



## ON THE LEGAL FRONT

### The Supreme Court Rules in *Meacham...and More*

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The Supreme Court issued two rulings on retaliation on May 27, 2008, one involving the Age Discrimination in Employment Act (ADEA; *Gomez-Perez v. Potter*) and the other involving Section 1981 (*CBOCS West v. Humphries*). The Supreme Court also issued two EEO rulings on June 19, 2008, one involving adverse impact in the ADEA (*Meacham v. Knolls Atomic Power Laboratory* [KAPL]) and the other involving pension and disability issues in the ADEA (*Kentucky Retirement System v. EEOC*). We will briefly summarize the two retaliation rulings and discuss in greater detail the *Kentucky* and *Meacham* rulings.

#### **The *Gomez-Perez* & *CBOCS West* Rulings**

The question in *Gomez-Perez v. Potter* was whether retaliation is a valid claim for *federal employees* under the ADEA. A 45-year-old female postal worker requested a transfer to work at a facility closer to her ailing mother, which was approved. However, her request for retransfer back to her old job was denied. She filed a union grievance on the failure to retransfer that was rejected and then filed ADEA charges claiming both age discrimination for failure to retransfer and retaliation for having filed the union grievance. The district court granted summary judgment for the defendant on both charges and the 1st Circuit affirmed. This ruling conflicted with the D.C. Circuit's ruling in *Forman v. Small* (2001), thereby motivating the Supreme Court review.

The question in *CBOCS West v. Humphries* was whether retaliation is a valid claim under Section 1981 of the Civil Rights Act of 1866 and 1871. A black employee was terminated after complaining about the termination of a black coworker. He claimed racial discrimination and retaliation under both Title VII and Section 1981. His Title VII charges were dismissed for failure to pay filing fees and *CBOCS West* won summary judgment on both Section 1981 charges. The 7th Circuit upheld the summary judgment on discrimination but reversed and remanded for trial on whether retaliation is a valid claim in Section 1981.

The Supreme Court ruled 6–3 that retaliation is a valid ADEA claim for federal employees and 7–2 that retaliation is a valid Section 1981 claim. Neither ruling was surprising. In *Gomez-Perez*, the dissenting justices (Roberts, Scalia,

and Thomas) acknowledged that retaliation was expressly incorporated into the ADEA when enacted to cover private entities in 1967. However, Justice Roberts opined that coverage of federal entities was not added until 1974, and there was no attachment of a retaliation provision. Speaking for the majority, Justice Alito cited precedents in Section 1982 (*Sullivan v. Little Hunting Park*, 1969) and Title IX (*Jackson v. Birmingham Board of Education*, 2005) in which there was language prohibiting discrimination but no specific language on retaliation. Nevertheless, the Supreme Court supported retaliation in both of these statutes. The *CBOCS West* ruling (Thomas and Scalia dissenting) was also based on *Sullivan v. Little Hunting Park* because Section 1981 and Section 1982 have been considered companion statutes in other Supreme Court rulings (e.g., *Johnson v. Railway*, 1975 & *Runyon v. McCrary*, 1976).

### ***Kentucky Retirement System v. EEOC***

At issue in *Kentucky v. EEOC* was a pension disability plan in which “hazardous position” workers (e.g., policemen) are eligible for normal retirement benefits after 20 years service or after working 5 years upon reaching age 55. Benefits are based on years of service, and years are added to the calculation for disabled workers to total either 20 years of service or the number of years of service needed to reach age 55. The only additional stipulation is that the number of years added is capped by the number of years worked. Thus, for example, a hazardous worker with 15 years of service who is disabled at age 40 receives 5 additional years, as does one with 5 years experience disabled at age 50. The plaintiff (Charles Lickteig) worked for the sheriff’s department when he was disabled at age 61 and retired. No years were added to his pension. The EEOC claimed that the plan failed to add years solely because the disability occurred after age 55. The State won a summary judgment in district court that was initially affirmed by a three-judge panel of the 6th Circuit before being reheard and overturned by an en banc panel. The Supreme Court overturned the en banc ruling in a 5–4 opinion with one of the most unusual groupings of justices in recent years. Justice Breyer delivered the majority opinion in which Roberts, Stevens, Souter, and Thomas joined, while Justice Kennedy delivered the dissenting opinion in which Alito, Ginsburg, and Scalia joined.

In essence, this was the battle of two Supreme Court precedents; *Hazen v. Biggins* (1993) and *Ohio v. Betts* (1989). The majority ruled that *Hazen* was the appropriate precedent. In *Hazen*, Walter Biggins was fired at age 62 just a few weeks short of pension eligibility. A jury found for Hazen on disparate treatment, but the Supreme Court overturned, ruling that the jury was unduly influenced in its disparate treatment ruling by a factor *correlated* with age (years of service). *Hazen* was a unanimous decision in which the Supreme Court ruled that years of service and age are “analytically distinct,” meaning years of service cannot serve as a proxy for age. Based on *Hazen*, the majority ruled there was no evidence that Kentucky’s plan was motivated by age and, in fact, cited an example in which the older of two employees both over

age 40 can receive a greater benefit from such a plan (e.g., a 40-year old with 15 years experience accrues 5 additional years, whereas a 45-year-old with 10 years experience accrues 10 additional years).

In *Ohio v. Betts*, a woman (June Betts) who was disabled after age 60 faced a Hobson's choice between unpaid medical leave and retirement benefits paying \$158.50 per month. She chose retirement benefits. Had she been under 60, she would have received \$355 a month in disability benefits. In a controversial 5–4 ruling delivered by Justice Kennedy, the Supreme Court ruled that Betts could prevail only by proving that the Ohio plan was “subterfuge” to evade the purposes of the ADEA (i.e., a scheme to discriminate against older workers). Congress then overturned the *Betts* ruling in Title I of the Older Workers Benefit Protection Act of 1990 (OWBPA) and defined the statutory Bona Fide Benefits Plan (BFBP) defense as follows:

- (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is not less than that made or incurred on behalf of a younger worker, as permissible under section 1625...or
- (ii) that is a voluntary early retirement incentive plan consistent with the relevant purposes of this Act.

In short, benefits must be the same for older and younger workers unless (a) they cost more to provide for older workers, or (b) the plan is part of a legitimate voluntary early retirement package.

According to Justice Kennedy, who wrote the *Betts* ruling and the dissenting opinion in the present case, the *Betts* ruling, as overturned in the OWBPA, should control the present case. The principle objection to the *Betts* ruling by Congress was that it placed a burden of persuasion on the plaintiff in the face of a plan that was *facially discriminatory* based on age. Viewing it in this way, Kennedy opined that the Kentucky plan was as *facially discriminatory* as the Ohio plan, and that rather than force the plaintiff to prove that the plan was motivated by age, the defendant should bare a burden of persuasion to prove there is a cost basis for not accruing years beyond age 55.

### ***Meacham v. KAPL***

*Meacham* addressed a residual issue from *Smith v. City of Jackson* (2005), a ruling discussed in the July 2005 issue of **On The Legal Front**. Prior to the Supreme Court's ruling in *Hazen v. Biggens* (1993), it was common for lower courts to treat age-based adverse impact claims with Title VII rules. However, after *Hazen*, most circuit courts ruled that adverse impact was an invalid claim in the ADEA as a matter of law.

The facts in *Smith* were that the city of Jackson, Mississippi authorized higher percentage raises to officers and dispatchers with less than 5 years experience because they feared competition for these positions from neighboring communities. Dispatchers and officers with more than 5 years experience were significantly older than those with less than 5 years experience. The district court

ruled that adverse impact is unavailable in the ADEA as a matter of law, a common ruling after *Hazen*, and the 5th Circuit agreed. The Supreme Court, in a 5–4 ruling, endorsed adverse impact as a valid claim in the ADEA. Nevertheless, the plaintiffs lost on grounds that they (a) failed to identify a cause of adverse impact and that the city had (b) a Reasonable Factor Other Than Age (RFOA) for authorizing the pay raises. A key part of this ruling was the belief on the part of the majority that the Civil Rights Act of 1991 (CRA-91) overturned *Wards Cove v. Atonio* (1989) as regards adverse impact in Title VII, but not in the ADEA.

As depicted in Table 1, the *Smith* ruling dictates that there is commonality between Title VII and the ADEA in the prima facie phase (Phase 1), as plaintiffs in both statutes must identify a specific employment practice (or group of practices) that disproportionately excludes or falls more harshly on one group than another. The statutes then diverge. The defense to adverse impact (Phase 2) in Title VII is proof that the challenged practice is job related and consistent with business necessity, forcing the plaintiff to prove (Phase 3) there are equally valid alternative practices with less or no adverse impact. In the ADEA, defendants may invoke the RFOA statutory defense (Phase 2), forcing the plaintiff to prove that the factor(s) offered is not reasonable (Phase 3). The key piece of residue left over from the *Smith* ruling was the level of proof required from defendants that invoke the RFOA defense.

Table 1  
*Commonality Between Title VII and the ADEA*

Title VII	
Phase 1	Statistical evidence of an identified employment practice that disproportionately excludes protected group members
Phase 2	Proof that the challenged practice is job-related and consistent with business necessity
Phase 3	Proof there is an equally valid, job-related practice with less or no adverse impact
ADEA	
Phase 1	Statistical evidence of an identified employment practice that disproportionately excludes protected group members
Phase 2	Statutory defense—Reasonable Factor Other Than Age (RFOA)
Phase 3	Proof that the factor cited is unreasonable, or not the true reason for the employment practice

The 2nd Circuit had long entertained adverse impact as a valid ADEA claim, both before and after *Hazen v. Biggens* (1993). However, after CRA-91 overturned *Wards Cove* insofar as Title VII is concerned, this 2nd Circuit continued to use the *Wards Cove* interpretation for ADEA cases.

The facts in *Meacham* were as follows. The defendant, KAPL, instituted an involuntary reduction in force (IRIF) in conjunction with a voluntary separation plan (VSP) for employees with 20 or more years of service. There was no difficulty in identifying an employment practice (i.e., the layoff) that

caused adverse impact; 30 out of 31 (98%) of the laid off employees were over age 40. The 2nd Circuit reviewed this case twice. Under *Wards Cove* rules, which mimic *McDonnell-Burdine* disparate treatment rules in the defense phase, KAPL articulated that the laid off employees were rated lowest in criticality of skills and flexibility for retraining. However, in the pretext phase, the plaintiffs proved to the satisfaction of a jury that there were suitable alternatives with less adverse impact, including a hiring freeze and extension of the VSP to employees with less than 20 years of service. The 2nd Circuit agreed with the jury, and the plaintiffs were victorious in *Meacham I* (2004).

*Meacham I* was vacated and remanded for reconsideration in light of *Smith*, and the plaintiffs lost in *Meacham II* (2006). Based on *Smith*, a divided panel of the 2nd Circuit ruled that the defense's articulation in *Meacham I* was sufficient to satisfy the RFOA defense and that the plaintiffs now had the burden to prove that the reasons offered by KAPL were unreasonable. The two majority judges ruled that based on the Supreme Court's reference to *Wards Cove* in *Smith*, the RFOA defense is productive (as in *McDonnell-Burdine*). The dissenting judge argued that the burden in RFOA is persuasive and, therefore, that KAPL would have to affirmatively prove, rather than merely articulate, its reasons for using the IRIF criteria. For its part, the Supreme Court unanimously agreed with the dissenting judge, listing numerous reasons why statutory defenses such as RFOA (e.g., Bona Fide Occupational Qualification (BFOQ), Bona Fide Benefit Plan (BFBP), Bona Fide Seniority System (BFSS), etc.) are affirmative defenses. The Court ruled 7-1 that the employer must meet the burden of persuasion.<sup>1</sup>

## Conclusions

The Supreme Court has delivered a number of employee-friendly retaliation rulings in recent years, as well as a number of interesting ADEA rulings. The recent retaliation rulings support that EEO law (and civil rights law in general) prohibits retaliation regardless of whether the word retaliation is explicitly found in the statute. This support was expected, partially to ensure that statutes could be enforced as they were likely intended. Note that the Supreme Court used precedents across various statutes to come to their retaliation rulings. In other words, rulings related to Title IX, which focused on educational opportunities, and to Section 1982, which focused on property rights, were used to determine Section 1981 and ADEA coverage. In each of these cases, there was no written retaliation provision, yet the Supreme Court ruled that each statute was intended to prohibit retaliation. These rulings suggest that similar statutes have similar implications, regardless of the fact that they may have been written at different times and under very different conditions.

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<sup>1</sup> Justice Breyer did not take part in this ruling. Justice Scalia wrote his own concurring opinion and essentially deferred to the EEOC in the matter. Justice Thomas wrote a split opinion, reiterating that he does not support disparate impact claims under the ADA (and dissented in the *Smith* ruling).

With regard to the ADEA, disparate impact theory appears alive and well. The heavier employer burden endorsed in *Meacham* makes it more difficult for employers to defend an adverse impact claim under the ADEA, and in combination with the *Smith* ruling, should have employers paying attention to employment practices and their relation to the ADEA. However, note that the employer burden under the ADEA is still substantially lighter than the Title VII burden. *Kentucky v. EEOC* was a more employer-friendly ruling, although more relevant to disparate treatment claims under the ADEA than to disparate impact claims. The ruling essentially supported that reasonable factors used to determine pension status were not proxies for age. However, this case should be followed to see if Congress reacts to it as it did to *Ohio v. Betts* in 1990.

Note that many recent ADEA cases have focused on less traditional employment decisions like disability benefits, pension plans, rehire policies, and so on. These types of employment decisions may not be on the HR radar relative to more traditional employment decisions like hiring and promotion, yet these actions can be challenged under treatment and/or impact claims. Of course, *Meacham* was essentially a termination case stemming from a performance measurement system. With the recent economic hardship in the United States and many organizations implementing reduction in force initiatives, it will be interesting to see if there is a meaningful increase in ADEA claims in 2008 related to reduction in force outcomes.

So what implications do these rulings have for I-O psychologists? With regard to retaliation, I-O psychologists could be more involved in the development and implementation of internal grievance policies, procedures, and documentation. Perhaps the most intuitive way to minimize retaliation is to ensure that employees and supervisors are aware of the discrimination claiming process, what retaliation is, and strategies for handling claims and future interactions with claimants. With regard to the ADEA, I-O psychologists should be involved in the development of reduction in force initiatives. Intuitively, termination decisions should be reasonable and ideally related to job performance. Perhaps I-O psychologists could also be more involved in compliance work that considers the legal defensibility of nontraditional employment decisions like disability benefits, pension plans, rehire policies, and so on. Of course, conducting relevant adverse impact analyses by age for traditional and nontraditional employment decisions is a worthwhile exercise in the post *Smith/Meacham* era.

### Cases Cited

- CBOCS West v. Humphries (2008) 128 S.Ct. 1951.
- Forman v. Small (CA DC 2001) 271 F.3d. 285.
- Gomez-Perez v. Potter (2008) 128 S.Ct. 1931.
- Hazen v. Biggins (1993) 507 US 604.
- Jackson v. Birmingham Board of Education (2005) 544 US 167.
- Johnson v. Railway Express Agency (1975) 421 US 454.
- Kentucky Retirement System v. EEOC (2008) 128 S.Ct. 2361.
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Runyon v. McCrary (1976) 427 US 160.  
Smith v. City of Jackson (2005) 544 US 228.  
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Wards Cove Packing Company v. Atonio (1989) 490 US 642.

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