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Special points of interest

- U.S. Supreme Court places the burden of persuasion and production for using the “reasonable factor other than age” in defending against age discrimination claims on the employer.
- The U.S. Senate unanimously passed the ADA Amendments Act whereby the definitions of disabilities and impairments have been redefined making it easier for employees to establish claims under the ADA.

EMPLOYERS HAVE NEW BURDEN IN DEFENDING AGAINST AGE DISCRIMINATION CLAIMS

THE ADEA

In general, the Age Discrimination in Employment Act (ADEA), prohibits employment practices that have an unjustified disparate impact on older workers (those over the age of 40). However, the ADEA creates an exemption for employer actions that are otherwise prohibited by the ADEA, but are based on reasonable factors other than age. The U.S. Supreme Court recently addressed the question as to whether an employer, facing a disparate impact claim, and planning to defend on the basis of a “reasonable factor other than age” (RFOA) must not only produce evidence raising the defense but also persuade the fact finder of its merit. Previously, an employee was required to identify a specific policy which had a statistically significant impact on a protected group without alleging intent. If the employee made this showing, the employer was required to provide evidence (not prove) that the policy was supported by a legitimate business reason. However, the U.S. Supreme Court has now held that the employer has the additional burden of proving both.

THE CASE

In *Meacham v Knolls Atomic Power Laboratory*, the employer was required to reduce its workforce by approximately 31 jobs. In connection with the selection process for layoffs, the employer advised its managers to score employees in three areas: performance, flexibility and critical skills. These scores were summed, in addition to points for years of service, and the totals determined which employees would be laid off. Of the 31 salaried employees who were laid off, 30 were at least 40 years old (i.e. within the protected class under the ADEA). Twenty-eight of the 30 employees sued raising both disparate treatment (discriminatory intent) and disparate impact (discriminatory result) claims under the ADEA alleging the employer designed and implemented its workforce reduction process in order to eliminate older employees and regardless of their intent, the

process had a discriminatory impact on ADEA protected employees.

The jury found in favor of employees on the disparate impact claim but not on the disparate treatment claim. The case eventually came to the issue of which party bears the burden of persuasion on the RFOA defense.

THE U.S. SUPREME COURT DECISION

The U.S. Supreme Court concluded employers have the burden of proof in successfully defending against disparate impact claims of age discrimination when carrying out a reduction in force. This decision essentially eases the burden placed on employees bringing disparate impact claims under the ADEA. By a vote of 7 - 1, the U.S. Supreme Court ruled that when an employer engages in business practices that place a disproportionate burden on older workers, the employer must prove non-age factors were reasonable. The employer now has both the burden of production and the burden of persuasion for use of the RFOA defense in the decision to terminate employment. As such, it has become increasingly difficult for employers to obtain dismissal of disparate age discrimination claims on summary judgment. The U.S. Supreme Court addressed employers’ concerns by noting that an employee still must do more than merely allege a disparate impact resulting from the employers generalized policy.

CONCLUSION

When instituting a reduction in force, more than ever, it is necessary to develop a lay off plan that clearly identifies and articulates the selection criteria being used and be prepared to explain why the criteria was used and that it was reasonable.

ADA AMENDMENTS ACT PASSED BY SENATE ON SEPTEMBER 11, 2008

The Americans With Disabilities Act of 1990 (ADA) was intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Since 1999, the U.S. Supreme Court has narrowed the definition of a disability and it has been more difficult for employees to establish they are covered under the ADA. Since 2004, employees have lost 97% of ADA employment discrimination claims often due to the interpretation of the definition of a disability. On September 11, 2008, the U.S. Senate unanimously passed the ADA Amendments Act whereby the definitions of disabilities and impairments were redefined and a new standard for determining if an impairment substantially limits a major life activity was added. It is expected that the amendment will be signed by President Bush and become effective January 1, 2009.

Under the ADA, an individual is disabled if he or she: (1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded by the employer as having such an impairment. A qualified individual with a disability is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position the individual holds or desires."

The ADA Amendments Act reversed prior U.S. Supreme Court decisions which narrowed the definition of who is protected under the ADA and restored the original congressional intent of the ADA by: (1) clarifying the definition of disability including what it means to be substantially limited in major life activity; (2) prohibiting the consideration of measures that reduce or mitigate the impact of an impairment in determining whether an individual has a disability; (3) covering workers whose employers discriminate against them based on a perception that the worker is impaired regardless as to whether or not the worker actually has a disability; and (4) making it clear the ADA provides broad coverage to protect anyone who faces discrimination on the basis of disability.

This new language overturns three 1999 U.S. Supreme Court decisions that a person could not use the ADA to challenge discrimination if they were able to manage the symptoms associated with their disability through use of medication, prosthetics or other means of lessening their level of impairment. Under the new language, courts will evaluate whether a person qualifies as disabled under the ADA without considering these mitigating measures. As a result, people with conditions like epilepsy, diabetes, depression, bi-polar disorder, cancer and other conditions will have a much easier time establishing they are covered by the ADA.

Further, the new language clarifies that congress intended the ADA definition to be interpreted broadly in order to protect the full range of individuals who experience discrimination on the basis of a disability. The amendments clarify that "substantially limits" does not mean "prevents or severely restricts" but means "materially restricts" which is a new term defined as "more than moderate but less than severe."

Additionally, when evaluating a person with an episodic condition like epilepsy or depression and whether the individual is substantially limited or materially restricted, they are evaluated when their condition is presenting symptoms. Finally, the amendments includes a broad "regarded as" prong clarifying that if an individual experiences an adverse action based on a physical or mental impairment (whether real or perceived), he/she is covered regardless of whether that impairment actually substantially limits a major life activity.

In sum, the new amendments will essentially expand the ADA and provide broader protections to individuals and narrow the grounds for employers' defenses.

We are experienced, proactive and aggressive legal counsel providing superior service in all areas of employment law. If you would like further information regarding the issues raised in this newsletter or any other employment related issues, please contact Heather G. Ptasnik at (313) 259-8586 or John T. Below at (313) 259-8597. For more information about Kotz Sangster, please visit us at www.kotzsangster.com.

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