the wheel from service within 15 CIS after the effective date of this AD.

(2) Thereafter, remove HPT stage 2 wheels, P/N 23084520, before exceeding the new, reduced engine cycle life limit (ECLL) of 23,000 CSN.

(k) For HPT stage 2 wheels, P/N 23075345 and 23074644, do the following:

(1) For wheels that have 19,985 CSN or more on the effective date of this AD, remove the wheel from service within 15 CIS after the effective date of this AD unless paragraph (k)(3) of this AD applies.

(2) Thereafter, remove HPT stage 2 wheels, P/N 23075345 and 23074644, before exceeding the new, reduced ECLL of 20,000 CSN.

(3) For HPT stage 2 wheels, P/N 23075345, that have a S/N listed in Table 5 of this AD and that have 22,985 CSN or more on the effective date of this AD, remove the wheel from service within 15 CIS after the effective date of this AD.

(4) Thereafter, for HPT stage 2 wheels, P/N 23075345, that have a S/N listed in Table 5 of this AD, remove the wheel from service before exceeding the new, reduced ECLL of 23,000 CSN.

TABLE 5—S/NS OF HPT STAGE 2 WHEEL, P/N 23075345, ELIGIBLE TO REMAIN IN SERVICE UNTIL 23,000 CSN

MM507646	MM508205	MM508251	MM508322
MM508144	MM508208	MM508264	MM508337
MM508153	MM508211	MM508305	MM508338
MM508176	MM508221	MM508311	MM508382
MM508186	MM508241	MM508319	MM508387
MM508188	MM508248	MM508320	

(l) For wheels, P/N 23069438, in engines that have not complied with RRC SB AE 3007A–72–176, Revision 5, dated September 2, 2008, or SB AE 3007A–72–215, Revision 2, dated September 28, 2009, remove the wheel before exceeding the new, reduced ECLL of 10,000 CSN.

(m) For wheels, P/N 23069438, in engines that have complied with RRC SB AE 3007A–72–176, Revision 5, dated September 2, 2008 or SB AE 3007A–72–215, Revision 2, dated September 28, 2009, do the following:

(1) For wheels that have 19,985 CSN or more on the effective date of this AD, remove the wheel from service within 15 CIS after the effective date of this AD.

(2) Thereafter, remove the wheel from service before exceeding the new, reduced ECLL of 20,000 CSN.

Alternative Methods of Compliance

(n) The Manager, Chicago Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Special Flight Permits

(o) Under 14 CFR 39.23, we are limiting the special flight permits for this AD by restricting the flight to essential flight crew only.

Related Information

(p) Contact Kyri Zaroyiannis, Aerospace Engineer, Chicago Aircraft Certification Office, Small Airplane Directorate, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; e-mail: *kyri.zaroyiannis@faa.gov*; telephone (847) 294–7836; fax (847) 294–7834, for more information about this AD.

Issued in Burlington, Massachusetts, on February 11, 2010.

Francis A. Favara,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–3145 Filed 2–17–10; 8:45 am]

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625

RIN 3046–AA87

Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission ("EEOC" or "Commission") is issuing this notice of proposed rulemaking ("NPRM") to address the meaning of "reasonable factors other than age" (RFOA) under the Age Discrimination in Employment Act ("ADEA").

DATES: Comments must be received on or before April 19, 2010. The Commission will consider any comments received on or before the closing date and thereafter adopt final regulations. Comments received after the closing date will be considered to the extent practicable.

ADDRESSES: You may submit comments by any of the following methods:

- By mail to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, U.S. Equal Employment Opportunity Commission, 131 "M" Street, NE., Washington, DC 20507.
- By facsimile ("FAX") machine to (202) 663–4114. (There is no toll free FAX number). Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTY). (These are not toll free numbers).
- By the Federal eRulemaking Portal: *http://www.regulations.gov.* After accessing this Web site, follow its instructions for submitting comments.

Instructions: All comment submissions must include the agency name and docket number or the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the above-listed formats, not all three. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information you provide. Copies of the received comments also will be available for inspection in the EEOC Library, FOIA Reading Room, by advanced appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays, from April 19, 2010 until the Commission publishes the rule in final form. Persons who schedule an appointment in the EEOC Library, FOIA Reading Room, and need assistance to view the comments will be provided with appropriate aids upon request, such as readers or print magnifiers. To schedule an appointment to inspect the comments at the EEOC Library, FOIA Reading Room, contact the EEOC Library by calling (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll free numbers).

FOR FURTHER INFORMATION CONTACT: Dianna B. Johnston, Assistant Legal Counsel, or Lyn J. McDermott, Senior Attorney-Advisor, at (202) 663–4638 (voice) or (202) 663–7026 (TTY). (These are not toll free numbers). This notice also is available in the following formats: Large print, Braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to the Publications Information Center at

1–800–669–3362 (voice) or 1–800–800–3302 (TTY).

SUPPLEMENTARY INFORMATION: On March 31, 2008, the EEOC published a Notice of Proposed Rulemaking ("NPRM") proposing to amend its regulations to reflect the Supreme Court's decision in *Smith* v. *City of Jackson*.[1] 73 FR 16807, Mar. 31, 2008. The NPRM proposed to revise 29 CFR 1625.7(d) to state that an employment practice that has an adverse impact on individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." The proposed revision also stated that the individual challenging the allegedly unlawful employment practice bears the burden of isolating and identifying the specific employment practice responsible for the adverse impact. The Commission also proposed to revise 29 CFR 1625.7(e) to state that, when the RFOA exception is raised, the employer has the burden of showing that a reasonable factor other than age exists factually.

In addition to requesting public comment on the proposed rule, the Commission asked whether regulations should provide more information on the meaning of "reasonable factors other than age" and, if so, what the regulations should say. Eight commenters supported efforts to provide more information on the issue, one commenter thought the EEOC should not provide additional information, and one commenter did not address the question. After consideration of the public comments, and in light of recent Supreme Court decisions, the Commission believes it appropriate to issue a new NPRM to address the scope of the RFOA defense. Accordingly, before finalizing its regulations concerning disparate impact under the ADEA, the Commission is publishing this new NPRM proposing to amend its regulations to define "reasonable factors other than age."

Recent Supreme Court Decisions

In *Smith* v. *City of Jackson,*[2] the United States Supreme Court held that the ADEA authorizes recovery for disparate impact claims of discrimination and that the "reasonable factors other than age" test, rather than the business-necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals.

The *Smith* plaintiffs, senior police and public safety officers, alleged that the defendant City's pay plan had a disparate impact on older workers because it gave proportionately larger pay increases to newer officers than to more senior officers. Older officers, who tended to hold senior positions, on average received raises that represented a smaller percentage of their salaries than did the raises given to younger officers. The City explained that, after a survey of salaries in comparable communities, it raised the junior officers' salaries to make them competitive with those for comparable positions in the region.[3]

The Supreme Court ruled that plaintiffs may challenge facially neutral employment practices under the ADEA but that the "scope of disparate-impact liability under the ADEA is narrower than under Title VII" of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[4] The Court relied in large part on the parallel prohibitory language and the common purposes of the ADEA and Title VII.[5] The Court noted that, in passing the ADEA, Congress was concerned that application of facially neutral employment standards, such as a high school diploma requirement, may "unfairly" limit the employment opportunities of older individuals.[6] The Court observed that there is a "remarkable similarity between the congressional goals" of Title VII and "those present in the Wirtz Report."[7]

At the same time, however, the Court identified two key textual differences that affect the relative scope of disparate impact liability under the two statutes. First, the ADEA contains the RFOA provision, which has no parallel in Title VII and precludes liability for actions "otherwise prohibited" by the statute "where the differentiation is based on reasonable factors other than age."[8] The RFOA provision "plays its principal role" in disparate impact cases, where it "preclud[es] liability if the adverse impact was attributable to a nonage factor that was 'reasonable'."[9] Comparing the RFOA provision with the Equal Pay Act provision that precludes recovery when a pay differential is based on "any other factor other than sex,"[10] the Court found it "instructive" that "Congress provided that employers could use only *reasonable* factors in defending a suit under the ADEA."[11]

Second, in reaction to the decision in *Wards Cove Packing Co.* v. *Atonio,*[12] which "narrowly construed the employer's exposure to liability on a disparate-impact theory," Congress amended Title VII but not the ADEA.[13] Accordingly, "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."[14]

Applying its analysis, the Court rejected the *Smith* plaintiffs' disparate impact claims on the merits. Focusing on the plan's purpose, design, and implementation, the Court found that the City's pay plan was based on

[1] 544 U.S. 228 (2005).

[2] 544 U.S. 228 (2005).

[3] *Id.* at 241–42.

[4] *Id.* at 233–40. Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. In *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the Supreme Court first recognized the disparate impact theory of discrimination under Title VII. The Court held that Title VII prohibits not only intentional discrimination but also employment practices that, because they have a disparate impact on a group protected by Title VII, are "fair in form but discriminatory in operation." 401 U.S. at 431.

[5] 544 U.S. at 233–40.

[6] *Id.* at 235 n.5 (quoting Report of the Sec'y of Labor, The Older American Worker: Age Discrimination in Employment 3 (1965), *reprinted in* U.S. EEOC, Leg. History of the ADEA 21 (1981) ("Wirtz Report")). Section 715 of the Civil Rights Act of 1964 directed the Secretary of Labor "to make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." 78 Stat. 265. Secretary W. Willard Wirtz presented his findings and recommendations in the Wirtz Report.

[7] 544 U.S. at 235 n.5.

[8] *Id.* at 240. The Court found that the presence of the RFOA provision supported its conclusion that disparate impact claims are cognizable under the ADEA. *Id.* at 238–40.

[9] *Id.* at 239.

[10] 29 U.S.C. 206(d)(1).

[11] 544 U.S. at 239 n.11 (emphasis in the original).

[12] 490 U.S. 642 (1989). The *Wards Cove* Court ruled that, in a Title VII disparate-impact case, the plaintiff must isolate and identify the specific employment practice that has a disparate impact. Although the defendant had the burden of articulating a business justification for the challenged practice, the burden of persuasion remained at all times with the plaintiff. According to the Court, "at the justification stage, * * * the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. If the challenged practice was justified by business necessity, the plaintiff could still prevail by showing that the employer refused to adopt an equally effective, less discriminatory alternative. *Id.* at 660–61.

[13] 544 U.S. at 240 (citing the Civil Rights Act of 1991, sec. 2, 105 Stat. 1071).

[14] *Id.* at 240. The "identical" language is in section 703(a)(2) of Title VII (42 U.S.C. 2000e–2(a)(2)) and section 4(a)(2) of the ADEA (29 U.S.C. 623(a)(2)), which make it unlawful for employers "to limit, segregate, or classify" individuals in a manner that would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's [protected status]."

The language of the two statutes significantly differs, however, with regard to the applicable defense. Unlike the ADEA, which provides a defense when the practice is based on a reasonable factor other than age (29 U.S.C. 623(f)(1)), Title VII provides a defense only when the practice is job related and consistent with business necessity (42 U.S.C. 2000e–2(k)(1)(A)).

reasonable factors other than age.[15] The Court noted that the City grouped officers by seniority in five ranks and set wage ranges based on salaries in comparable communities. Most of the officers were in the three lowest ranks, where age did not affect officers' pay. In the two highest ranks, where all of the officers were over 40, raises were higher in terms of dollar amounts; they were lower only in terms of percentage of salary. The Court concluded that the plan, as designed and administered, "was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers."[16]

Finally, the Court noted that, although "there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable." "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."[17]

Smith did not specify which party bore the burden of persuasion on the RFOA defense, and most of the lower courts that addressed the issue after *Smith* held that the plaintiff bore the burden of proving that the employer's action was unreasonable.[18] Subsequently, in *Meacham* v. *Knolls Atomic Power Lab.,*[19] the Supreme Court held that an employer defending an ADEA disparate-impact claim bears both the burden of production and the burden of persuasion on the reasonable factors other than age defense.

Knolls Atomic Power Laboratories ("KAPL"), the employer in *Meacham,* instituted an involuntary reduction in force ("IRIF") in 1996 to reduce its workforce by 31 employees. To identify employees for the IRIF, KAPL asked managers to rate their employees on three factors—performance, flexibility, and the criticality of their skills—and to add points for years of service. Managers then ranked employees according to their scores and identified the lowest ranked employees for layoff. Thirty of the 31 employees selected for layoff were older than 40, even though only approximately 58% of the workforce was older than 40. The plaintiffs' statistical expert testified that the manner in which managers subjectively scored employees for flexibility and criticality accounted for the statistically significant disparities.[20]

Relying on the text and structure of the ADEA, the Supreme Court ruled that the RFOA provision creates an affirmative defense. The provision is in section 623(f)(1), which lists exemptions for employer practices "otherwise prohibited" by sections 623(a), (b), (c), or (e). As the court observed, it is a "longstanding convention" that the party claiming the benefits of an exemption bears the burden of proof.[21]

The Court noted that the bona fide occupational qualification provision, which also is in section 623(f)(1), creates an affirmative defense. The Court also noted that it has interpreted the Equal Pay Act exemption for pay differentials based on "any other factor other than sex" as an affirmative defense. In addition, in the Older Workers Benefit Protection Act, Congress added the phrase "otherwise prohibited" to section 623(f)(2) of the ADEA to clarify that the section establishes an affirmative defense. This confirms that the phrase "refers to an excuse or justification" and signals an affirmative defense on which the employer bears the burden of proof.[22]

The Court rejected KAPL's argument that, to prove that an adverse action occurred because of age, plaintiffs must show that the challenged employment practice was not based on a reasonable factor other than age.[23] The Court also rejected the Second Circuit's conclusion that plaintiffs have the RFOA burden of persuasion because plaintiffs bore the business necessity burden of persuasion under *Wards Cove* and the RFOA defense "replaces" the business necessity test. That "the business necessity test should have no place in ADEA disparate-impact cases" does not preclude a finding "that the RFOA exemption is an affirmative defense."[24]

Finally, the Court noted that, "the more plainly reasonable" the non-age factor, the smaller the difference between the burdens of production and persuasion. "It will be mainly in cases where the reasonableness of the non-age factor is obscure for some reason, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion."[25]

Revisions to Agency Regulations

The Commission proposes to revise current paragraph 1625.7(b) to clarify the scope of the RFOA defense. Consistent with *Smith* and *Meacham,* the proposed revision explains that whether a particular employment practice is based on reasonable factors other than age turns on the facts and circumstances of each particular situation and whether the employer acted prudently in light of those facts. This standard is lower than Title VII's business-necessity test[26] but higher than the Equal Pay Act's "any other factor" test.[27] It represents a balanced approach that preserves an employer's right to make reasonable business decisions while protecting older workers from facially neutral employment criteria that arbitrarily limit their employment opportunities.

Proposed paragraph 1625.7(b) notes that whether a differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

Reasonable

In General

The statutory requirement that the non-age factor be reasonable is a key element of the RFOA defense.[28] In *Smith,* the Court found it "instructive" that the ADEA provides a defense only when the factor is reasonable, unlike the Equal Pay Act, which the Court said permits an employer to justify a pay differential by proving that it is based on any factor other than sex.[29] The test

[15] The Court also ruled that the plaintiffs failed to satisfy *Wards Cove*'s requirement that they identify a "specific test, requirement, or practice within the pay plan that has an adverse impact on older workers." 544 U.S. at 241.

[16] *Id.* at 242.

[17] *Id.* at 243.

[18] *See, e.g., Pippin* v. *Burlington Res. Oil & Gas Co.,* 440 F.3d 1186, 1200 (10th Cir. 2006); *Meacham* v. *Knolls Atomic Power Lab.,* 461 F.3d 134, 141–43 (2d Cir. 2006), *vacated and remanded,* 128 S. Ct. 2395 (2008).

[19] 128 S. Ct. 2395 (2008).

[20] *Id.* at 2398–99. The Second Circuit initially affirmed a jury verdict for the plaintiffs on their disparate impact claim. *Id.* at 2399 (citing *Meacham* v. *Knolls Atomic Power Lab.,* 381 F.3d 56, 74–47 (2d Cir. 2004)). Following the *Smith* decision, the Supreme Court vacated the judgment and remanded the case to the appellate court. On remand, a divided panel of the Second Circuit ruled that plaintiffs bear the burden of persuasion on the RFOA defense and held that the plaintiffs had not met that burden. *Id.* (citing *Meacham* v. *Knolls Atomic Power Lab.,* 461 F.3d 134, 140–41, 144 (2d Cir. 2006)).

[21] *Id.* at 2400.

[22] *Id.* at 2402.

[23] *Id.* at 2403.

[24] *Id.* at 2404.

[25] *Id.* at 2406.

[26] 42 U.S.C. 2000e–2(k)(1)(A)(i) (noting that a particular employment practice that has a disparate impact based on race, color, religion, sex, or national origin is unlawful unless the employer "demonstrate[s] that the challenged practice is job related for the position in question and consistent with business necessity").

[27] 29 U.S.C. 206(d)(1)(iv) (noting that a sex-based wage differential is not unlawful when payment is made pursuant to "a differential based on any other factor other than sex").

[28] *See Meacham,* 128 S. Ct. at 2403 ("The focus of the defense is that the factor relied upon was a 'reasonable' one for the employer to be using.").

[29] *Smith,* 544 U.S. at 239 n.11 (citing 29 U.S.C. 206(d)(1) (Equal Pay Act recovery barred where pay differential is "based on any other factor other than

for whether an age-based employment practice is lawful is not "rational basis"; instead, the statute requires that the practice be "reasonable." In defining what factors are reasonable, we look to tort law,[30] which contains the most extensive legal definition of reasonableness.

Proposed paragraph 1625.7(b)(1) explains that a reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances.[31] It is one that would be used in a like manner by a prudent [32] employer mindful of its responsibilities under the ADEA. In light of *Smith* and *Meacham,* a prudent employer knows or should know that the ADEA was designed in part to avoid the application of neutral employment standards that disproportionately affect the employment opportunities of older individuals.[33] Accordingly, a reasonable factor is one that an employer exercising reasonable care to avoid limiting the employment opportunities of older persons would use.[34]

Consistent with *Smith,* proposed paragraph 1625.7(b)(1) provides that the RFOA defense requires evidence that the challenged practice was reasonably designed to further or achieve a legitimate business purpose and was reasonably administered to achieve that purpose.[35] In *Smith,* for example, the method chosen by the employer to compete for new personnel was one used by most employers in like circumstances—raising the salaries of the least senior employees to attract new applicants. That an employer uses a common business practice is not dispositive of reasonableness, but it weighs in the employer's favor.[36]

In addition to the employment practice's design, the way in which it is administered affects its reasonableness. For example, for purposes of the RFOA defense, it may be reasonable to consider factors such as job performance and skill sets when deciding whom to discharge during a reduction in force.[37] It also may be reasonable to consider the extent to which an employee possesses a critical skill (*i.e.,* one that is key to the employer's operations), or is flexible (i.e., has skills that can be used in various assignments or has the ability to acquire new skills).[38] Use of such factors is reasonable under the ADEA if the employer has made reasonable efforts to administer its employment practice accurately and fairly and has assessed the age-based impact of the practice and taken steps to ameliorate unnecessary and avoidable harm. Steps such as training its managers to avoid age-based stereotyping, identifying specific knowledge or skills the employer wants to retain (*e.g.,* familiarity with the company's filing system or ability to integrate different computer networks), and providing guidance on how to measure flexibility (*e.g.,* whether an employee performs a variety of tasks or willingly accepts new assignments) are evidence of reasonableness.

The determination of reasonableness also requires consideration of what the employer knew or should have known about the practice's impact when it took the challenged action.[39] If the employer had no reason to know that its actions would have an age-based adverse impact, then it cannot be expected to take any action to ameliorate such impact. An employer, however, cannot hide behind lack of knowledge. A reasonable employer implementing practices that harm significant numbers of employees will evaluate the process to determine whether its practice has a disproportionate impact based on age. If the practice has a substantial adverse age-based impact, the employer's failure to have measured the impact will not protect it from a finding that it should have known of the impact.

Relevant Factors

To aid in assessing whether an employment practice is based on a reasonable factor other than age, proposed paragraph 1625.7(b)(1) sets forth a nonexhaustive list of factors that may be relevant to the RFOA defense. As noted above, relevant considerations include whether the practice and its implementation are common business practices and the extent to which the employer took steps to assess and ameliorate the adverse impact on older workers. The extent to which the factor is related to the employer's stated business goals also is relevant to whether it is a reasonable one. For example, in *Smith,* the city's "decision to grant a larger raise to lower echelon

sex")); *compare id. with* 29 U.S.C. 623(f)(1) (ADEA's RFOA provision, which bars recovery only when based on a reasonable factor other than age). *Cf. Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642, 660 (1989) ("A mere insubstantial justification * * * will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.").

[30] *See* W. Page Keeton et al., "Prosser and Keeton on Torts" 1, at 4–6 (5th ed. 1984) (torts "consist of the breach of duties fixed * * * by law," provide "compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests," and impose liability "upon conduct which is socially unreasonable").

The Supreme Court has turned to tort law for useful guidance in resolving employment discrimination cases. *See, e.g., Kolstad* v. *American Dental Assn.,* 527 U.S. 526, 538 (1999) (employer's state of mind relevant to award of punitive damages); *Faragher* v. *City of Boca Raton,* 524 U.S. 775, 799–802 (1998) (because lower courts have applied a negligence standard to coworker harassment, it is not appropriate to treat supervisory harassment as being within the scope of employment; however, agency principles weighed in favor of holding an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority). So, too, have lower courts. *See Baskerville* v. *Culligan International Company,* 50 F.3d 428, 432 (7th Cir. 1995) (Posner, J.) (in determining when an employer has taken reasonable steps to discover and rectify acts of sexual harassment of its employees, the court observed that "what is reasonable depends on the gravity of the harassment[; j]ust as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, [citing, inter alia]; W. Page Keeton et al., "Prosser and Keeton on the Law of Torts" 34, at 208 (5th ed. 1984)"); *Shager* v. *Upjohn Co.,* 913 F.2d 398, 405 (7th Cir. 1990) (noting that age discrimination constitutes a tort and therefore doctrine of respondeat superior applies).

[31] *Cf.* Restatement (Second) of Torts 283 (1965) (standard of conduct to avoid liability for negligence "is that of a reasonable man under like circumstances").

[32] *Cf.* Restatement (Second) of Torts 283 cmt. c (1965) ("reasonable man" standard refers to a person of "ordinary prudence").

[33] *See Smith,* 544 U.S. at 235, n.5 (quoting Wirtz Report).

[34] *Cf. Faragher* v. *City of Boca Raton,* 524 U.S. 775, 808–09 (1998) (rejecting employer's argument that it should not be held liable for negligently failing to promulgate anti-harassment policy where EEOC regulations advised employers to take all steps necessary to prevent harassment and holding as a matter of law that employer did not exercise reasonable care to prevent sexual harassment).

[35] *See Smith,* 544 U.S. at 235 n.5 (quoting Wirtz Report's discussion of employment standards that unfairly limit employment opportunities of older individuals).

[36] *See id.* at 241 ("it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group").

[37] *See Pippin* v. *Burlington Res. Oil & Gas Co.,* 440 F.3d 1186, 1200–01 (10th Cir. 2006) (finding that reliance on performance ratings and employee skill sets when choosing workers for layoff was reasonable as a matter of law but placing RFOA burden of persuasion on plaintiff).

[38] *See, e.g., Meacham* v. *Knolls Atomic Power Lab.,* 461 F.3d 134, 144 (2d Cir. 2006) (noting that employer's expert testified that " 'criticality' and 'flexibility' were ubiquitous components of 'systems for making personnel decisions' "), *vacated and remanded,* 128 S. Ct. 2395 (2008). However, selecting employees for retention based on their work schedule "flexibility" might expose an employer to allegations of disparate treatment or failure to accommodate under Title VII or the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* For example, ranking employees according to their ability to work flexible schedules might affect an employee who has been assigned to a regular, set schedule as a reasonable accommodation.

[39] *Cf. Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742, 759 (1998) (applying agency principles, the Court noted that an employer may be liable for a supervisor's sexual harassment when the employer's "own negligence is a cause of the harassment" and that "[a]n employer is negligent if it knew or should have known about the conduct and failed to stop it").

employees for the purpose of bringing salaries in line with that of surrounding police forces * * * responded to the City's legitimate goal of retaining police officers."[40]

The extent to which the employer took steps to define the factor accurately also is relevant to reasonableness. For example, an employee's flexibility may be assessed through concrete examples of behavior such as accepting or resisting new assignments, seeking or refusing training, and being open or opposed to new ways of doing things. Similarly, the steps the employer took to apply the factor fairly and accurately affect the determination of whether the factor was reasonable. For example, the extent to which the employer provided decision makers with training or other guidance on how to implement the practice may be relevant to whether the practice was administered in a reasonable way.

In addition, the list includes the severity of the practice's impact on individuals within the protected age group. Severity is measured both in terms of the degree of injury to affected employees and the scope of the impact, i.e., the number of persons harmed.[41] *Smith* is perhaps the quintessential example of negligible impact because the impact was slight in both degree and scope. Although the raises given to older workers were smaller in percentage terms, they were higher in actual dollar terms. Thus, to the extent that any older workers suffered any harm, it was minor.[42] In addition, to the extent workers could be said to have been disadvantaged, the numbers of those so affected were small.

The other end of the severity spectrum is one in which the harm to affected individuals is significant and falls primarily on older individuals. The more severe the harm, the greater the care that ought to be exercised.[43] This end of the spectrum is exemplified by the facts in *Meacham,* where the affected employees lost their jobs and the age-based effect was "startlingly skewed."[44] This is not to say that a reasonable employer must entirely eliminate the impact but, rather, that a reasonable employer would investigate the reason for the result and attempt to reduce the impact to the extent appropriate to the given facts.

The extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps, also is relevant to the issue of reasonableness. As noted in the Restatement, the reasonableness of the employer's actions also includes consideration of the relationship between the severity of the harm and the availability of measures that would reduce or eliminate the risk of harm.[45] If, as in *Smith,* the harm is negligible both in terms of the numbers affected and the degree of harm to those affected, it is not necessary to consider whether there are measures that would further reduce or eliminate the harm.

On the other hand, if the harm is severe, the determination of reasonableness includes consideration of whether the employer knew or should have known of measures that would reduce or eliminate the harm and the extent of the burden that implementing such measures would place on the employer.[46] For example, a reduction-in-force designed to cut costs by terminating sales people with the highest salaries might severely affect older workers. The employer could mitigate the harm by also considering the sales revenues that the affected individuals generated. By considering revenue as well as salary, the process would reasonably achieve the employer's important goal of cutting costs without unfairly limiting the employment opportunities of older individuals.

Finally, the determination of reasonableness includes consideration of whether other options were available and the reasons the employer selected the option it did. As the proposed regulation notes, this does not require an employer to adopt a practice that has the least impact on members of the protected group. Unlike Title VII's business necessity defense, which requires an employer to use the least discriminatory alternative,[47] "the reasonableness inquiry includes no such requirement."[48] Thus, the availability of a less discriminatory practice does not by itself make a challenged practice unreasonable.

That the reasonableness inquiry does not require an employer to use the least discriminatory alternative, however, does not mean that the existence of alternatives is irrelevant. An employer's knowledge of and failure to use equally effective, but less discriminatory, alternatives is relevant to whether the employer's chosen practice is reasonable. This is especially true if the chosen practice significantly affects the employment opportunities of older individuals but only marginally advances a minor goal of the employer. "If the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable."[49]

On the other hand, the dearth of equally effective options also is relevant to whether the employer's chosen practice is reasonable. The fewer options available, the more reasonable the employer's action appears. Thus, for example, a practice that appears unreasonable in the abstract because it severely affected a high percentage of older workers might in fact be reasonable because there were no other options or the available options were more burdensome than the one chosen.

Factors Other Than Age

Proposed paragraph 1625.7(b)(2) makes clear that, for the RFOA defense to apply, the challenged practice must be based on a non-age factor.[50] As the proposed paragraph notes, disparate impact challenges typically involve

[40] *Smith,* 544 U.S. at 242.

[41] Restatement (Second) of Torts 293 (1965) (in determining the magnitude of the risk for the purpose of determining whether the actor is negligent, factors that must be considered include the extent of the likely harm and the number of persons whose interests are likely to be harmed).

[42] The city's pay plan divided five police ranks into a series of steps and set the wages for the ranks based on a survey of wages in surrounding communities. Most of the officers were in the three lowest ranks, where age did not affect compensation. Compensation was affected only in the two highest ranks, police lieutenant and deputy police chief, where all of the officers were over 40. Although the raises given to the more senior older workers were smaller in percentage terms than the raises given to the less senior younger workers, they were larger in dollar terms. Overall, approximately 66% of the officers under 40 received raises of more than 10% while approximately 45% of those over 40 did. *Smith,* 544 U.S. at 241–42.

[43] *Cf.* Restatement (Second) of Torts 298 cmt. b (1965) ("The greater the danger, the greater the care which must be exercised.").

[44] *Meacham* v. *Knolls Atomic Power Lab.,* 461 F.3d 134, 145 (2d Cir. 2006), *vacated,* 128 S. Ct. 2395 (2008).

[45] *Cf.* Restatement (Second) of Torts 292 cmt. c (1965) ("if the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable.").

[46] *Id.*

[47] Title VII requires an employer to adopt the least discriminatory alternative. *See* 42 U.S.C. 2000e–2(k)(1)(A). In contrast, factors listed in the proposed paragraph refer to what the employer "knew or should have known" at the time of the challenged action. These factors recognize that the RFOA test is less stringent than the business necessity test and that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith,* 544 U.S. at 240.

[48] *Smith,* 544 U.S. at 243.

[49] Restatement (Second) of Torts 292, cmt. c (1965).

[50] *See* 29 CFR 1625.7(c) ("When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable."); *Smith,* 544 U.S. at 239 (RFOA "preclud[es] liability if the adverse impact was attributable to a nonage factor that was 'reasonable.' ").

practices that are based on objective, non-age factors.[51] Objectively measurable factors such as salary and seniority are non-age factors. Although they may sometimes correlate with age, they are analytically and factually distinct from age.[52]

On the other hand, the unchecked use of subjective criteria that are subject to age-based stereotypes may not be distinct from age.[53] The Supreme Court has recognized that the problem of discrimination by lower-level managers given unchecked discretion to engage in subjective decision making needs to be addressed and that disparate impact analysis is sometimes the only way to do so.[54] Like Title VII, the ADEA was directed at "the *consequences* of employment practices, not simply the motivation" and "good faith 'does not redeem employment procedures * * * that operate as 'built-in headwinds' for [protected] groups and are unrelated to measuring job capability.' "[55]

For example, an employer that is downsizing may want to retain individuals with the ability to learn new computer skills. If the employer makes no effort to assess that ability objectively but instead gives managers unchecked discretion to determine whom to retain, the decision makers may act on the basis of stereotypes about older workers' willingness or ability to learn computer skills. As a consequence, the downsizing may result in a significantly younger but not necessarily more technologically capable workforce. In that situation, where age-based stereotypes infected an undisciplined decision-making process, the employer did not rely on a factor other than age.

An employer that gives unchecked discretion to supervisors to engage in subjective decision making should know that doing so may well cause an age-based disparate impact. Thus, employers that give their supervisors unchecked discretion to make subjective decisions expose themselves to liability on this basis. They should particularly avoid giving such discretion to rate employees on criteria known to be susceptible to age-based stereotyping, such as flexibility, willingness to learn, or technological skills. Instead, evaluation criteria should be objectified to the extent feasible. For example, instead of asking supervisors in the abstract to rate employees' willingness to take on new tasks, employers should instruct supervisors to identify times that an employee was asked to perform new tasks and to describe the employee's reaction to such assignments. In addition, supervisors should be trained to become aware of and avoid age-based stereotyping. If the employer does give supervisors unchecked discretion to engage in subjective decision making, it should determine whether doing so had a disparate impact and, if so, should take reasonable steps to determine whether that impact might be attributable to supervisors' conscious or unconscious age bias and to mitigate the problem.[56]

To aid in assessing whether an employment practice is based on a non-age factor, proposed paragraph 1625.7(b)(2) sets forth a nonexhaustive list of factors that are relevant to the RFOA defense. Relevant factors include the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively, the extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes, and the extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

The Commission invites comments on the proposed changes from all interested parties.

[51] *See Meacham,* 128 S. Ct. at 2403 ("in the typical disparate-impact case, the employer's practice is 'without respect to age' and its adverse impact (though 'because of age') is 'attributable to a nonage factor' * * *").

[52] *See Hazen Paper Co.* v. *Biggins,* 507 U.S. 604, 611 (1993) ("Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.' "); *Anderson* v. *Baxter Healthcare Corp.,* 13 F.3d 1120, 1125–26 (7th Cir. 1994) (age and compensation levels are analytically distinct).

[53] *See Durante* v. *Qualcomm,* 144 Fed. Appx. 603, 606 (9th Cir. 2005) (unpublished) (although "'[p]laintiffs generally cannot attack an overall decisionmaking process in the disparate impact context, [and] must instead identify the particular element or practice within the process that causes an adverse impact[,]' * * * an overall decision-making process may be subject to a disparate impact challenge if the employer utilizes an 'undisciplined system of subjective decision-making' ") (quoting *Stout* v. *Potter,* 276 F.3d 118, 1124 (9th Cir. 2002) and *Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977, 990 (1988)).

[54] *Watson* v. *Fort Worth Bank and Trust,* 487 U.S. 977, 990 (1988).

[55] *Smith,* 544 U.S. 228, 234–35 (emphasis in original) (citing *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971)).

[56] An employer that gives supervisors unchecked discretion to engage in subject decisionmaking should also determine whether doing so resulted in age-based disparate treatment. Cases challenging subjective decisionmaking may involve allegations of disparate treatment as well as disparate impact. *See, e.g., Meacham,* 128 S. Ct. at 2398 (noting that plaintiffs raised both disparate-treatment and disparate-impact claims).

Regulatory Procedures

Executive Order 12866

Pursuant to Executive Order 12866, EEOC has coordinated this proposed rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

Paperwork Reduction Act

This proposal contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it imposes no economic or reporting burdens on such firms and makes no change to employers' compliance obligations under the Act. Instead, the proposed rule brings the Commission's regulations into compliance with recent Supreme Court interpretations of the Act. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 29 CFR Part 1625

Advertising, Age, Employee benefit plans, Equal employment opportunity, Retirement.

Dated: February 12, 2010.

For the Commission.

Stuart J. Ishimaru,

Acting Chairman.

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to

amend 29 CFR chapter XIV part 1625 as follows:

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

Authority: 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary's Order No. 10–68; Secretary's Order No. 11–68; Sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 12, 29 U.S.C. 631, Pub. L. 99–592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

Subpart A—Interpretations

2. Revise paragraph (b) of § 1625.7 to read as follows:

§ 1625.7 Differentiations based on reasonable factors other than age.

* * * * *

(b) Whether a differentiation is based on reasonable factors other than age ("RFOA") must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(1) *Reasonable.* A reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer (i.e., a prudent employer mindful of its responsibilities under the ADEA) under like circumstances. To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer. Factors relevant to determining whether an employment practice is reasonable include but are not limited to, the following:

(i) Whether the employment practice and the manner of its implementation are common business practices;

(ii) The extent to which the factor is related to the employer's stated business goal;

(iii) The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (*e.g.,* training, guidance, instruction of managers);

(iv) The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;

(v) The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and

(vi) Whether other options were available and the reasons the employer selected the option it did.[1]

(2) *Factors Other Than Age.* When an employment practice has a significant disparate impact on older individuals, the RFOA defense applies only if the practice is not based on age. In the typical disparate impact case, the practice is based on an objective non-age factor and the only question is whether the practice is reasonable. When disparate impact results from giving supervisors unchecked discretion to engage in subjective decision making, however, the impact may, in fact, be based on age because the supervisors to whom decision making was delegated may have acted on the bases of conscious or unconscious age-based stereotypes. Factors relevant to determining whether a factor is "other than age" include, but are not limited to, the following:

(i) The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;

(ii) The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and

(iii) The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

* * * * *

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[1] This does not mean that an employer must adopt an employment practice that has the least severe impact on members of the protected age group. "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Smith* v. *City of Jackson,* 544 U.S. 228, 243 (2005). Instead, this simply means that the availability of other options is one of the factors relevant to whether the practice was a reasonable one. "If the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable." Restatement (Second) of Torts 292, cmt. c (1965).

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AN37

Payment for Inpatient and Outpatient Health Care Professional Services at Non-Departmental Facilities and Other Medical Charges Associated With Non-VA Outpatient Care

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to update the Department of Veterans Affairs (VA) medical regulations concerning the payment methodology used to calculate VA payments for inpatient and outpatient health care professional services and other medical services associated with non-VA outpatient care.

DATES: Comments must be received on or before April 19, 2010.

ADDRESSES: Written comments may be submitted by email through *http://www.regulations.gov*; by mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "RIN 2900–AN37—Payment for Inpatient and Outpatient Health Care Professional Services at Non-Departmental Facilities and Other Medical Charges Associated with Non-VA Outpatient Care." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joseph C. Enderle, Jr., National Fee Program Manager, Department of Veterans Affairs, P.O. Box 469066, Denver, CO 80246–9066, telephone (303) 370–5088. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Under 38 U.S.C. 1703(a), "[w]hen [VA] facilities are not capable of furnishing economical hospital care or medical services because of geographical inaccessibility or are not capable of furnishing the care or services required, the Secretary, as authorized in [38