requirements of 5 U.S.C. 552a in §§ 1611.13, 1611.14, or 1611.15.

* * * * *

3. Section 1611.15 is added to read as follows:

§ 1611.15 Exemption—EEOC Personnel Security Files.

EEOC's system of records entitled EEOC Personnel Security Files contains records that document and support decisions regarding suitability, eligibility and fitness for service of applicants for EEOC employment and contract positions. The records include background investigation records. Pursuant to section (k)(5) of the Privacy Act, 5 U.S.C. 552a(k)(5), this system of records is exempt from the provisions of sections (c)(3) and (d)(1) of the Privacy Act, 5 U.S.C. 552a(c)(3) and (d)(1), but only to the extent that the accounting of disclosures or the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence.

[FR Doc. E8–6551 Filed 3–28–08; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625

RIN 3046–AA76

Disparate Impact 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 issues related to the United States Supreme Court's decision in *Smith* v. *City of Jackson*. The Court ruled that disparate impact claims are cognizable under the Age Discrimination in Employment Act (''ADEA'') but that liability is precluded when the impact is attributable to a reasonable factor other than age. Current EEOC regulations interpret the ADEA as prohibiting an employment practice that has a disparate impact on individuals within the protected age group unless it is justified as a business necessity.

DATES: Comments must be received on or before May 30, 2008. 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, 1801 L Street, NW., 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 May 30, 2008 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: In *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), the United States Supreme Court held that the ADEA authorizes recovery for disparate impact claims of discrimination. This holding validated the Commission's longstanding rule that disparate impact analysis applies in ADEA cases. The Court also held that the ''reasonable factors other than age'' (''RFOA'') test, rather than the business-necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals. This ruling differs from the EEOC's position that an employment practice that had a disparate impact on individuals within the protected age group could not be a reasonable factor other than age unless it was justified as a business necessity. The Commission proposes to amend its regulation to reflect the Supreme Court's decision.

Smith v. City of Jackson

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. 544 U.S. at 241–42.

The Fifth Circuit Court of Appeals dismissed the plaintiffs' disparate impact claim on the ground that such claims ''are categorically unavailable under the ADEA.'' *Id.* at 231. The Supreme Court disagreed and ruled that plaintiffs may challenge facially neutral employment practices under the ADEA. *Id.* at 233–40. The Court also ruled, however, 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.*[1] 544 U.S. at 240.

[1] 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

Continued

In holding that disparate impact claims are cognizable under the ADEA, the Supreme Court relied in large part on the parallel prohibitory language and the common purposes of the ADEA and Title VII. *Id.* at 233–40. *Accord McKennon* v. *Nashville Banner Pub. Co.,* 513 U.S. 352, 358 (1995) (statutes share ''common substantive features'' and ''common purpose: 'the elimination of discrimination in the workplace''') (quoting *Oscar Meyer & Co.* v. *Evans,* 441 U.S. 750, 756 (1979)). 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. 544 U.S. 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''). The Court observed that there is a ''remarkable similarity between the congressional goals'' of Title VII and ''those present in the Wirtz Report.'' 544 U.S. at 235 n.5.

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.'' [2] Id. at 240. Second, in reaction to the decision in *Wards Cove Packing Co.* v. *Atonio,*[3] which ''narrowly construed the employer's exposure to liability on a disparate-impact theory,'' Congress amended Title VII but not the ADEA. 544 U.S. at 240 (citing the Civil Rights Act of 1991, sec. 2, 105 Stat. 1071). Accordingly, ''*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.'' 544 U.S. at 240.[4]

Applying its analysis, the Court rejected the *Smith* plaintiffs' disparate impact claims on the merits. The Court 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.'' *Id.* at 241.

In addition, focusing on the plan's purpose, design, and implementation, the Court found that the City's pay plan was based on reasonable factors other than age. 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.'' *Id.* at 242.

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 Title VII's business necessity defense, which requires the employer to use the least discriminatory alternative, ''the reasonableness inquiry includes no such requirement.'' *Id.* at 243.

Revisions to Agency Regulations

The Commission proposes to revise current paragraph 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'' (RFOA). This revision reflects the Supreme Court's conclusion that disparate impact claims are cognizable under the ADEA and that the RFOA test, rather than the business-necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals.

The proposed revision also states 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. As the Supreme Court stressed in *Smith,* ''it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.' ''[5]

The Commission proposes to revise current paragraph 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. This section reiterates the Commission's longstanding position that the RFOA provision creates an affirmative defense that the employer must establish.[6]

Requiring the employer to bear the burden of proof is consistent with the language and structure of the ADEA. The RFOA provision is found in section 4(f)(1) of the ADEA, which states that ''[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited [by the ADEA] where age is a bona fide occupational qualification [''BFOQ''] reasonably

disparate impact on a group protected by Title VII, are ''fair in form but discriminatory in operation.'' *Id.* at 431.

[2] The Court found that the presence of the RFOA provision supported its conclusion that disparate impact claims are cognizable under the ADEA. 544 U.S. at 238–40. 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.' '' *Id.* at 239. 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,'' 29 U.S.C. 206(d)(1), the Court found it ''instructive'' that ''Congress provided that employers could use only *reasonable* factors in defending a suit under the ADEA.'' 544 U.S at 239 n.11 (emphasis in the original).

[3] 490 U.S. 642 (1989).

[4] 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)).

[5] *Smith* v. *City of Jackson,* 544 U.S. 228, 241 (2005) (quoting *Wards Cove,* 490 U.S. at 656) (emphasis in *Smith*).

[6] Until recently, most courts treated RFOA as an affirmative defense. *See, e.g., Enlow* v. *Salem-Keizer Yellow Cab Co., Inc.* 389 F.3d 802, 807–08 (9th Cir. 2004) (in the context of a disparate treatment claim, characterizing the RFOA as an affirmative defense and holding that it was unavailable where the challenged practice is based on age), *cert. denied,* 544 U.S. 974 (2005); *E.E.O.C.* v. *Johnson & Higgins, Inc.,* 91 F.3d 1529, 1541 (2d Cir. 1996) (same), *cert. denied,* 522 U.S. 808 (1997). However, the Second and Tenth Circuits have recently concluded that defendants bear only the burden of production, not the burden of persuasion, on the issue. *Meacham* v. *Knolls Atomic Power Lab.,* 461 F.3d 134, 141–43 (2d Cir. 2006), *cert. granted,* 76 U.S.L.W. 3391 (U.S. Jan. 18, 2008) (No. 06–1505); *Pippin* v. *Burlington Res. Oil & Gas Co.,* 440 F.3d 1186, 1200 (10th Cir. 2006). *But see Meacham,* 461 F3d at 147–53 (Pooler, J., dissenting) (RFOA is an affirmative defense). The court in *EEOC* v. *Allstate Ins. Co.,* 458 F. Supp. 2d 980 (E.D. Mo. 2006), *certification for interlocutory appeal on other grounds granted,* 2007 WL 38675 (E.D. Mo. Jan. 4, 2007), did not analyze the issue but followed the lead of *Pippin* and *Meacham* to conclude that the defendant did not bear the burden of proof. For the reasons explained in the text and accompanying footnotes, the Commission disagrees with *Meacham* and *Pippin* and concludes that the RFOA burden of proof rests with the employer.

necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.'' 29 U.S.C. 623(f)(1). Since the employer indisputably bears the burden of proving BFOQ,[7] the most natural construction of section 4(f)(1) as a whole is that the employer similarly bears the burden of proving RFOA. In addition, when Congress enacted the Older Workers Benefit Protection Act (''OWBPA'') amendments to the ADEA in 1990, it specifically stated that the employer bears the burden of proof on the RFOA affirmative defense in section 4(f)(1). S. Rep. No. 101–263, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1535 (noting that Congress was incorporating into section 4(f)(2) ''the language of [section] 4(f)(1) that is commonly understood to signify an affirmative defense''). This approach also is consistent with the allocation of burdens under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), which precludes liability when the employer establishes that a pay differential is ''based on any other factor other than sex,'' 29 U.S.C. 206(d)(1)(iv).[8] The *Smith* Court did not need to discuss the burden of proof because the employer's actions were so eminently reasonable that it easily prevailed regardless of who bore the ultimate burden.

The Commission invites comments on these proposed changes from all interested parties. The Commission also invites comments on whether the regulations should address other matters concerning the application of the disparate impact theory of discrimination under the ADEA. In particular, the Commission would welcome comments on the following specific question:

1. Should the regulations provide more information on the meaning of ''reasonable factors other than age''? If so, what should the regulations say? For example, should the regulations refer to tort law standards such as negligence and reasonable standard of care when addressing the meaning of ''reasonable''? Should the regulations offer factors relevant to whether an employment practice is based on reasonable factors other than age? If so, what should those factors be?

[7] *See Smith,* 544 U.S. at 233 n.3 (2005) (referring to the BFOQ provision as ''an affirmative defense to liability'').

[8] *Corning Glass Works* v. *Brennan,* 417 U.S. 188, 196–97 (1974) (shifting the burden of proof to the employer ''is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof'').

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 a recent Supreme Court interpretation 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: March 25, 2008.

For the Commission.

Naomi C. Earp,

Chair.

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 paragraphs (d) and (e) of § 1625.7 to read as follows:

§ 1625.7 Differentiations based on reasonable factors other than age.

* * * * *

(d) Any employment practice that adversely affects 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.'' An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities.

(e) Whenever the exception of ''a reasonable factor other than age'' is raised, the employer bears the burden of proving that the ''reasonable factor other than age'' exists factually.

* * * * *

[FR Doc. E8–6517 Filed 3–28–08; 8:45 am]

BILLING CODE 6570–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0065]

RIN 1625–AA00

Safety Zone: Stars and Stripes Fourth of July Fireworks Event, Nansemond River, Suffolk, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishing a safety zone on the Nansemond River in the vicinity of Suffolk, VA in support of the Stars and Stripes Fourth of July Fireworks event. This action is intended to restrict vessel traffic movement on the Nansemond River to protect mariners from the hazards associated with fireworks displays.