

April 19, 2010

Mr. Stephen Llewellyn
Executive Officer, Executive Secretariat,
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Sent via the Federal eRulemaking Portal: <http://www.regulations.gov>

Re: RIN 3046-AA87 (Proposed ADEA regulations on “reasonable factors other than age,” 75 *Fed Reg* 7212-7218, February 18, 2010)

Dear Mr. Llewellyn:

We are writing to you in response to the notice of proposed rules under the Age Discrimination in Employment Act (ADEA), published in the *Federal Register* on February 18, 2010, defining “reasonable factors other than age” (RFOA).

Vigilant (formerly TOC Management Services) is an employers’ association that assists approximately 500 employers in the Pacific Northwest. Vigilant provides labor and industrial relations services for member companies, including advice on human resources strategies, labor and employment law, management training, workplace safety, workers’ compensation and employee benefits. Many of the questions we receive from our members relate to issues surrounding employment decisions, employee relations, and nondiscrimination.

On behalf of Vigilant and its member companies, please accept the following comments:

§1625.7(b)(1) – Reasonable employer is not defined reasonably!

The proposed regulation describes a “reasonable employer” as “a prudent employer mindful of its responsibilities under the ADEA.” This is the wrong definition of what it means to be a reasonable employer. It seeks to impose on employers a mincing, tiptoed approach to business decisions that does not comport with reality. The thrust of the U.S. Supreme Court’s decision in *Smith v. City of Jackson* (544 U.S. 228 (2005)) was that an employer is entitled to pursue objectively reasonable business goals such as recruiting and retaining new employees.

The opposite of “reasonable” is “irrational” or “arbitrary.” For example, a manufacturing company that only hires people whose favorite color is blue would be acting in an irrational, arbitrary manner, with no legitimate business objective. Such a company would not be a reasonable employer. If this employer’s hiring policy had an adverse

impact on older workers, it also would not meet the standard of reasonableness in the RFOA defense.

The first sentence of paragraph (b)(1) should instead read (bold, underlined text to be inserted), “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~~ **an employer whose business decisions are calculated to achieve rational, lawful business objectives**) under like circumstances.” In other words, a reasonable employer is one who makes appropriate business decisions. Employers make such decisions constantly, and it is the rare, if not imaginary, employer who carefully keeps the ADEA in mind while carrying out the day-to-day tasks of running a business. The EEOC’s proposed expectation of such an approach is itself unreasonable.

§1625.7(b)(1) – List of factors to indicate reasonableness should be clarified

We appreciate having a non-exclusive list of considerations to indicate whether the factors an employer takes into account are reasonable. However, the proposed rule indicates that the six factors listed are automatically relevant. Depending on the circumstances, not all of the factors in this list may actually be relevant. We recommend inserting the word “may” into the last sentence of this paragraph, so that it reads as follows (bold, underlined text to be inserted): “Factors relevant to determining whether an employment practice is reasonable **may** include but are not limited to, the following....”

Furthermore, we object to the inclusion of the fourth and fifth factors in the list (assessing adverse impact on older workers and evaluating the severity of the harm and the extent of minimizing such harm). The reasonableness of a business decision does not turn on whether the decision adversely affects older workers. Rather, it turns on typical business goals such as improving efficiency, reducing expenses, maximizing profits, expanding territory, serving customers, recruiting talent, and retaining top performers. As long as the factors used by the employer to make a decision are reasonable, and not based on age, the ADEA allows the employer to apply those factors, despite adverse impact on older workers. It doesn’t make sense to further analyze adverse impact in the middle of the RFOA defense. The adverse impact has already been established. Now the question before the decisionmaker is whether the decision was based on reasonable factors other than age.

§1625.7(b)(2) – Criteria for whether a factor is “other than age” should be revised

The third sentence of this paragraph should be deleted, as it states the EEOC’s apparent assumption that supervisors’ discretionary decisions are based on “conscious or unconscious age-based stereotypes.” It is inappropriate for the EEOC to embody this

assumption in a regulation that is intended to be neutral and guide both employers and employees.

Furthermore, the list of factors to indicate whether a factor is “other than age” appears to make further assumptions about appropriate business decisions that are outside the agency’s purview.

The first factor that the EEOC proposes to weigh is “[t]he extent to which the employer gives supervisors unchecked discretion to assess employees subjectively.” From the context, it is clear that the agency dislikes the idea of supervisors making decisions on their own, and dislikes the idea of subjective assessments. However, it is the employer’s prerogative to allocate decision-making as it sees fit in its management structure. In large companies, it is common for a higher-level manager or human resources person to review significant supervisory decisions. By no means is such a process mandated by law, however, and this ideal process may be impractical depending on the size of the employer and the nature of the work. The mere fact that the employer delegates a decision to a supervisor should have no bearing on the analysis as to whether a decision is based on age.

Similarly, the subjective nature of an employee assessment should *not* be seen as an inherent indicator that the assessment is based on age. We recognize that objective criteria are easier to analyze and compare. However, subjective criteria in employment decisions are perfectly legal, so long as they do not stray into impermissible territory (e.g., age discrimination under the ADEA). For example, a customer service representative legitimately may be rated on “friendliness” – a subjective, but very important, quality in such a position. The fact that this criteria is subjective has absolutely nothing to do with whether the criteria is age-based. Subjectivity is therefore irrelevant to the question as to whether a decision is based on age.

Most disturbing is the agency’s proposal to evaluate “[t]he extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes.” The agency’s commentary elaborates on this proposal by stating that employers “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.” Certainly we agree that to the extent such terms are used as a code for age discrimination, such conduct would be prohibited. But to say that employers risk discrimination if they take into account legitimate job-related qualities such as flexibility, willingness to learn, or technological skills, is mind-boggling. Depending on the position, such qualities in fact are extremely relevant in the modern workplace. A stubborn, inflexible young person is just as much of an obstacle to progress in the workplace as is a stubborn, inflexible older worker. Similarly, a lack of technological skills can be a major stumbling block to success, regardless of age. An employer’s search for employees who exhibit the behaviors that are essential to success in the workplace is legitimate, and should not be viewed by the EEOC as evidence of age discrimination.

Conclusion

Thank you for your time and consideration of these comments on behalf of Vigilant's members. It is important that these ADEA regulations reflect the text of the statute and the Supreme Court's interpretation that employers are allowed to make legitimate business decisions, even if they have an adverse impact on older workers, as long as the decisions are based on reasonable factors other than age.

Sincerely,

/Karen E. Davis/

Karen E. Davis

Senior Employment Attorney

Vigilant