

11.11 Age Discrimination—Defenses—Reasonable Factor Other Than Age

The defendant [name] contends that its [test] [requirement] [practice] [selection criterion] is based on a reasonable factor other than the plaintiff [name]'s age. The defendant [name] has the burden of proving the following elements by a preponderance of the evidence:

First, the [test] [requirement] [practice] [selection criterion] is based on a factor other than the age of [the plaintiff [name]] [those similarly situated];

Second, [insert justification for factor] is a legitimate interest of the defendant [name]'s business; and

Third, the [test] [requirement] [practice] [selection criterion] is reasonably related to achieving [insert justification for factor].

If you find that the plaintiff [name] has proved [his] [her] [other pronoun] claim[s] in accordance with Instruction[s] [insert cross reference to the pertinent instruction[s] on the plaintiff's theory of liability], your verdict should be for the plaintiff [name], unless you find that the defendant [name] has proved this defense, in which event your verdict should be for the defendant [name].

Comment

Distinctions “based on reasonable factors other than age” (RFOA) are not unlawful under the ADEA. 29 U.S.C. § 623(f)(1). Thus, in a disparate impact case, the defendant is entitled to an instruction on this defense if the evidence can support a finding that the defendant’s test, requirement, or practice is based on a factor other than age. *See generally Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (“It is . . . in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was ‘reasonable.’”); *see also Meacham v. Knolls Atomic Power Lab’y.*, 554 U.S. 84, 96 (2008) (noting that the factor relied on by the employer must be a reasonable one, which may lean more heavily on older workers, as against younger ones).

In a disparate treatment case, instruction on RFOA as an affirmative defense will be unnecessary because the plaintiff already bears the burden of proving that the employer’s decision was, in fact, based on age. *See Smith*, 544 U.S. at 238 (“In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under [the ADEA] in the first place.”). Instructing the jury on RFOA in a disparate treatment case may cause confusion regarding the allocation of the burden of proof.

Unlike the “business necessity” defense applicable to disparate impact cases under Title VII, RFOA requires only that the factor have a reasonable relationship to a legitimate business purpose. The employer is not required to tailor the factor narrowly to minimize its

disparate impact on older workers. *See Smith*, 544 U.S. at 243. Thus, the instruction requires the defendant to show: (1) a factor other than age; (2) a legitimate business purpose; and (3) a reasonable relationship between the two. *See id.* at 242 (non-age consideration disparately impacting older workers is a “reasonable factor other than age” when it “respond[s] to the [employer’s] legitimate goal”).

The Supreme Court clarified that federal employees are not required to meet the “but-for” causation standard to establish age discrimination. *Babb v. Wilkie*, 589 U.S. 399, 411-12 (2020) (analyzing 29 U.S. § 633a(a)). Rather, a federal employee is entitled to relief upon a showing of being “subjected to unequal consideration.” *Id.* However, that showing will support only “injunctive or other forward-looking relief.” *Id.* at 413. To “obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision,” a federal employee must satisfy the “but-for” causation standard. *Id.*

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