Notes

Proving Discrimination Under the Age Discrimination in Employment Act

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Jacob Javits, one of this nation's senior congressmen has observed: "Youth is a state of mind. People are only as old as their doubts, their lack of confidence, their fears and despair."[1] Sentiments like these prompted the passage of the Age Discrimination in Employment Act [ADEA] in 1968.[2] The ADEA is Congress' response to the dilemma older workers face in their efforts to find and keep jobs, a dilemma caused by the assumed inability of the elderly to cope with employment.[3] Its statutory purpose is to promote "employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimi-

1. 113 CONG. REC. 2988 (1967).

2. 29 U.S.C. §§ 621-634 (1970), *as amended*, (Supp. III, 1973), 29 U.S.C.A. §§ 630(b), 634 (1975). *See generally* Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y.L.F. 309 (1973); Anderson, *Age Discrimination: Mandatory Retirement from the Bench*, 20 LOYOLA L. REV. 153 (1974); Bergman, *Age Discrimination in Employment: Air Carriers*, 36 J. AIR. L. 3 (1970); Halgren, *Age Discrimination in Employment Act of 1967*, 43 L.A.B. BULL. 361 (1968); I. Kovarsky & J. Kovarsky, *Economic, Medical, and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839 (1974); Note, *The Age Discrimination in Employment Act of 1967: A Practical Application*, 24 BAYLOR L. REV. 601 (1972); Note, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116 (1974); Comment, *Age Discrimination and the Over-Sixty-Five Worker*, 3 CUMBER.-SAM. L. REV. 333 (1972); Comment, *Class Actions Under the Age Discrimination in Employment Act: The Question is "Why Not"?*, 23 EMORY L.J. 831 (1974) [hereinafter cited as *Class Actions: "Why Not?"*]; Note, *Age Discrimination in Employment Under Federal Law*, 9 GA. S.B.J. 114 (1972); Note, *Age Discrimination in Employment: The Problem of the Worker Over Sixty-Five*, 5 RUTGERS CAMDEN L.J. 484 (1974); Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311 (1974); Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150 (1971); Note, *Discrimination Against the Elderly: A Prospectus of the Problem*, 7 SUFFOLK U.L. REV. 917 (1973).

3. 111 CONG. REC. 23035, 23038 (1965) (Labor Day speech by Secretary of Labor W. Willard Wirtz).

nation in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[4]

This Note will first provide a brief overview of the ADEA, emphasizing prohibited employment practices, litigation procedures, and remedial measures for violations of the Act. Second, problems typically faced in ADEA litigation will be explored. Particular attention will be devoted to the employee's burden of proof in establishing a prima facie case, and the statutory defenses available to employers will be reviewed. Because of the many similarities between the ADEA and Title VII of the Civil Rights Act of 1964,[5] Title VII precedent will be considered when appropriate.[6]

THE ADEA

Specifically, the ADEA, which applies to employment agencies[7] and labor organizations,[8] as well as to employers,[9] prohibits discharg-

4. 29 U.S.C. § 621(b) (1970).

5. 42 U.S.C. §§ 2000e to 2000e-17 (Supp. III, 1973), *amending* 42 U.S.C. §§ 2000e to 2000e-15 (1970).

6. Several ADEA courts have recognized the similarity between the two Acts. Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972); Blankenship v. Ralston Purina Co., 62 F.R.D. 35, 38 (N.D. Ga. 1973). *Compare* 29 U.S.C. § 623(c) (1970), *with* 42 U.S.C. § 2000e-2(a) (1970), *as amended*, (Supp. III, 1973); 29 U.S.C. § 623(b) (1970), *with* 42 U.S.C. § 2000e-2(b) (1970); 29 U.S.C. § 623(c) (1970), *with* 42 U.S.C. § 2000e-2(c) (1970), *as amended*, (Supp. III, 1973); 29 U.S.C. § 623(d) (1970), *with* 42 U.S.C. § 2000e-3(a) (1970), *as amended*, (Supp. III, 1973); 29 U.S.C. § 623(e) (1970), *with* 42 U.S.C. § 2000e-3(b) (1970), *as amended*, (Supp. III, 1973); 29 U.S.C. § 623 (f)(1) (1970), *with* 42 U.S.C. § 2000e-2(e)(1) (1970); 29 U.S.C. § 623(f)(2) (1970), *with* 42 U.S.C. § 2000e-2(h) (1970); 29 U.S.C. § 626(d) (1970), *with* 42 U.S.C. § 2000e-2(c) (1970), *as amended*, (Supp. III, 1973); 29 U.S.C. § 627 (1970), *with* 42 U.S.C. § 2000e-10(a) (1970); 29 U.S.C. § 633(b) (1970), *with* 42 U.S.C. § 2000e-5(d) (1970), *as amended*, (Supp. III, 1973).

The purpose of both Acts is to provide equal access to the job market, Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971); Hodgson v. First Federal Sav. & Loan Ass'n, 445 F.2d 818, 820 (5th Cir. 1972), and to remove barriers favoring a select group. United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 557 (W.D.N.C. 1971). Both Acts are remedial and humanitarian. Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 914 (N.D. Ga. 1973).

7. 29 U.S.C. § 630(c) (1970). Regularly procuring employees for at least one ADEA employer is enough to qualify the agency as an employment agency with respect to all of its activities. 29 C.F.R. § 860.35(b) (1974). The ADEA prohibitions apply regardless of the employment agency's size. 29 U.S.C. § 630(c) (1970). *See* Brennan v. C/M Mobile, Inc., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9532, at 5336 (S.D. Ala. Mar. 6, 1974); Brennan v. Paragon Employment Agency, Inc., 356 F. Supp. 286, 288 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 752 (2d Cir. 1974); 29 C.F.R. 860.36(c) (1974).

8. 29 U.S.C. § 630(d) (1970). For purposes of this section, a pension trust is not a labor organization. DeLoraine v. MEBA Pension Trust, 355 F. Supp. 89, 91 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 49 (2d Cir. 1974).

9. 29 U.S.C.A. § 630(b) (1975), *amending* 29 U.S.C. § 630(b) (1970). The 1974 Amendment changed the number of employees from 25 to 20 and redefined the term "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency." *Id.* Whether or not defendant was in fact an employer of plaintiff under the ADEA is a jury question. Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 916 (N.D. Ga. 1973). A parent corporation may be held liable under the ADEA for discriminatory practices by a subsidiary corporation if the subsidiary is the agent or instrumentality of the parent. *Id.*

ing[10] or failing to hire any individual between the ages of 40 and 65[11] because of age.[12] In addition, it prohibits age discrimination by an employer with respect to compensation,[13] terms, conditions, or privileges of employment[14] because of the employee's age.[15] Similarly, the employer is prohibited from limiting, segregating, or classifying an employee on the basis of age in a way which has an adverse effect on the individual's status as an employee or which deprives or tends to deprive the employee of employment opportunities.[16] It is also unlawful for the employer to reduce the wage rate of any employee in order to comply with the ADEA.[17] Thus, an employer may not reduce the wages of a 30-year old employee upon discovering that he is paying a 62-year old employee less.[18] Transferring either the younger or older worker to another job to avoid the wage-differential problem is equally unlawful.[19] The employer's only alternative is to raise the hourly wages of the older worker to the rate received by the younger worker.[20] Finally, the Act prohibits retaliatory discrimination occasioned by an individual's participation in any aspect of litigation concerning the enforcement of the ADEA.[21]

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10. *See* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 228 (D. Minn. 1971).

11. 29 U.S.C. § 631 (1970). "The lower age limit of 40 was picked because age discrimination most normally appears at this age. However, there is no magic in this figure." 113 CONG. REC. 2988 (1967) (remarks of Senator Javits). At the time of this writing, there is pending in the House of Representatives a bill which would amend the Act to forbid age discrimination against all workers over forty. H.R. 2588, 94th Cong., 1st Sess. (1975).

12. In this context, it is important to remember that the ADEA is not a means for employing the unqualified. As the Supreme Court stated regarding racial discrimination in Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971):

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate individiously to discriminate on the basis of racial or other impermissible classification.

13. "The term 'compensation' includes all types and methods of remuneration paid to or on behalf of, or received by an employee for his employment." 29 C.F.R. § 860.50 (b) (1974).

14. The phrase "terms, conditions, or privileges of employment" encompasses a wide and varied range of job-related factors, including, but not limited to: fringe benefits, promotion, demotion, or other disciplinary action, hours of work, including overtime, leave policies, career development programs, and seniority or merit systems which govern such conditions as transfer, assignment, job retention, layoff and recall. *Id.* § 860.50 (c).

15. 29 U.S.C. § 623(a)(1) (1970).

16. *Id.* § 623(a)(2). A union office is an employment opportunity for purposes of the ADEA. Hart v. United Steelworkers, 350 F. Supp. 294, 296 (W.D. Pa. 1972).

17. 29 U.S.C. § 623(a)(3) (1970).

18. *See* 29 C.F.R. § 860.75 (1974).

19. *Id.*

20. *Id.*

21. 29 U.S.C. § 623(d) (1970). The protection afforded by statute, making it unlawful to discharge or discriminate against an employee because he has filed a complaint

The ADEA provides that "any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ."[22] This general rule is subject to several limitations. A person cannot commence a civil action to enforce any provision of the ADEA until 60 days after he has given the Secretary of Labor[23] notice[24] of his intent to file the action.[25] The notice must be filed with the Secretary within 180 days after the alleged unlawful practice occurs,[26] except when the practice occurs in a state having a law which prohibits age discrimination in employment. In states having age discrimination statutes, notice must be filed within 300 days after the alleged unlawful practice occurs or within 30 days after the individual receives notice of termination of proceedings instituted under state law, whichever is earlier.[27] Although the ADEA does not require the aggrieved person to exhaust state

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or caused a proceeding to be instituted, may be enforced by an employee in a civil action, even though there is no explicit statutory remedy. Fagot v. Flintkote Co., 305 F. Supp. 407, 412-13 (E.D. La. 1969).

22. 29 U.S.C. § 626(c) (1970). It should be noted that under the applicable statute of limitations, a civil action must commence within 2 years after the occurrence of the alleged unlawful practice. *Id.* § 626(e) (incorporating *id.* § 255(a). However, the statute extends to 3 years in the case of a willful violation. *Id.* The 3-year statute of limitations for willful violations has been held applicable where promises for future compliance have not been kept, Hodgson v. Cactus Craft, 481 F.2d 464, 467 (9th Cir. 1973), where the employer knew his action was unlawful, Thomas v. Louisiana, 348 F. Supp. 792 (W.D. La. 1972), and where there has been definite knowledge of the ADEA's applicability and bad faith evasion of the Act. Bishop v. Jelleff Ass'n, 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7049 (D.D.C. Mar. 11, 1974).

23. Authority is vested in the Secretary of Labor to make investigations and require employees, employment agencies, and labor organizations to keep all records necessary or appropriate to demonstrate compliance with the administration of the Act. 29 U.S.C. § 626(a) (1970).

24. Written notice is desirable, but not necessary. Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 914 (N.D. Ga. 1973).

25. 29 U.S.C. § 626(d)(1) (1970). *See* Balc v. United Steelworkers, 6 CCH EMPLOYMENT PRAC. DEC. ¶ 8948, at 6039 (W.D. Pa. Oct. 19, 1973). An intent to file suit is implied in a complaint to the Secretary of Labor alleging age discrimination in employment. Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 915 (N.D. Ga. 1973). *Contra*, Powell v. Southwestern Bell Tel. Co., 494 F.2d 485, 489 (5th Cir. 1974); Grossfield v. Saunders Co., 1 FAIR EMPLOYMENT PRAC. CAS. 624, 625 (S.D.N.Y. 1968). The notice of intent must contain basic facts which will enable the Secretary to perform his functions, including an identification of the parties involved and a general description of the discriminatory action alleged. Burgett v. Cudahy Co., 361 F. Supp. 617, 621 (D. Kan. 1973).

The ADEA requires the employer to post "in conspicuous places on the premises" a notice containing material explaining the purpose of the Act. 29 U.S.C. § 627 (1970). If the employee fails to comply with the notice provision and the defendant-employer has failed to notify the employee of the provision, the suit will not be dismissed. Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7049 (D.D.C. Mar. 11, 1974); *see* Gebhard v. G.A.F. Corp., 59 F.R.D. 504 (D.D.C. 1973). *Contra*, Hiscott v. General Electric Co., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9735, at 6069 (N.D. Ohio, Aug. 28, 1974).

26. 29 U.S.C. § 626(d)(1) (1970); *see* Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 913 (N.D. Ga. 1973). Compliance with the 180-day notice provision is a jurisdictional prerequisite to suit under the Act. Powell v. Southwestern Bell Tel. Co., 494 F.2d 485, 487 (5th Cir. 1974); Burgett v. Cudahy Co., 361 F. Supp. 617, 621-22 (D. Kan. 1973); Gebhard v. G.A.F. Corp., 59 F.R.D. 504, 507 (D.D.C. 1973).

27. 29 U.S.C. § 626(d)(2) (1970).

remedies before commencing an action in federal court, appropriate state agencies must be given the initial opportunity to consider the complaint.[28]

The notice provision is intended to afford the Secretary of Labor an opportunity to utilize informal methods to resolve the conflict.[29] Additionally, it allows the Secretary to consider whether the case is sufficiently important to warrant the use of Labor Department attorneys.[30] If the Secretary decides against pursuing the case, or if he takes longer than 60 days to make a determination, the plaintiff may commence a civil action.[31] If the Secretary decides to institute proceedings, however, the right of the individual to file his own action is terminated.[32]

The strategic advantages of the Secretary of Labor pursuing the litigation are numerous. First, the Secretary has extensive legal resources at his disposal, and the Department has experience in this type of litigation. Second, the Secretary is empowered to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment . . . and [he] may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate"[33] to aid in the enforcement of the ADEA.[34]

Class actions may be brought under the ADEA.[35] Any employee

28. 29 U.S.C. § 633(b) (1970). The state, however, must "be given a threshold period of sixty days in which it may attempt to resolve the controversy . . . ." Goger v. H.K. Porter Co., 492 F.2d 13, 15 (3d Cir. 1974); *accord*, McGarvey v. Merck & Co., 359 F. Supp. 525, 528 (D.N.J. 1973), *cert. denied*, 419 U.S. 836 (1974). Suit may be commenced in federal court 60 days after proceedings have been commenced under the state law, unless such proceedings were earlier terminated. 29 U.S.C. § 633(b) (1970). Unless the plaintiff has justifiably and detrimentally relied on official advice in neglecting to pursue state remedies, his failure to do so is fatal. Vaughn v. Chrysler Corp., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9680, at 5854 (E.D. Mich. Apr. 30, 1974).

29. 29 U.S.C. § 626(d) (1970); *see, e.g.*, Vaughn v. Chrysler Corp., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9680, at 5854 (E.D. Mich. Apr. 30, 1974); Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7049 (D.D.C. Mar. 11, 1974); Burgett v. Cudahy Co., 361 F. Supp. 617, 621 (D. Kan. 1973).

To satisfy the law, conciliation, conference, and persuasion must constitute strong, affirmative attempts by the Secretary of Labor. This includes explanation to the employer of the Secretary's desires and the requirements of the Act. Brennan v. Ace Hardware Corp., 495 F.2d 368, 375 (8th Cir. 1974). Failure by the Secretary initially to utilize these conciliatory methods may bar the suit. *Id.* at 369. Where, however, it is found that requisite efforts at voluntary compliance were not made, the court has discretion to stay the proceedings to allow such effort. *Id.* at 376.

30. *See* Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7049 (D.D.C. Mar. 11, 1974).

31. 29 U.S.C. § 626(c) (1970).

32. *Id.*

33. *Id.* § 211(a).

34. *Id.* § 626(a) (incorporating *id.* § 211). In order to compel the employer to produce such material, the Secretary of Labor has subpoena power. *Id.* § 209 (incorporated into the ADEA under *id.* § 626(a)).

35. 29 U.S.C.A. § 216(b) (Supp. 1975) (incorporated into the ADEA under 29

may bring suit on behalf of himself and other employees similarly situated, but no employee may be a party plaintiff unless he has consented in writing.[36] In addition to requiring written consent, several courts have held that each member of the class must give the Secretary notice of his participation in the action within 180 days after the alleged violation.[37] In other words, every member of the class must individually comply with the notice requirements of the ADEA.[38] Less restrictive notice requirements have been imposed by some courts; according to these more lenient decisions, plaintiffs may join in the action, regardless of their individual compliance with the Act's notice provision, so long as the original plaintiff has given proper notice.[39] This seems the more reasonable view since the original party plaintiff, by complying with the ADEA's notice requirements, has put both the Secretary of Labor and the prospective defendant on timely notice of the complaint.[40] Further, requiring individual notice to the Secretary in class actions may prove wasteful of administrative resources. As stated in a Title VII action:

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful. The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated. . . .[41]

Of course, due process and fairness would require that the defendant be put on notice of all the plaintiffs' names within a reasonable time.

The ADEA provides the plaintiff with several possible remedies. Perhaps the most useful of these is injunctive relief.[42] In *Hodgson v.*

USC § 626(a) (1970)). For a recent discussion concerning the maintenance of a class action suit under the ADEA, see *Class Actions: "Why Not?," supra* note 2.

36. 29 U.S.C.A. § 216(b) (Supp. 1975). The majority of courts have held that the term "party plaintiff" implies that each member of the class must file written consents. Burgett v. Cudahy Co., 361 F. Supp. 617, 622 (D. Kan. 1973); Hull v. Continental Oil Co., 58 F.R.D. 636, 637 (S.D. Tex. 1973); Bishop v. Jelleff Associates, Inc., 5 CCH EMPLOYMENT PRAC. DEC. ¶ 7995, at 6659 (D.D.C. Aug. 1, 1972); Price v. Maryland Cas. Co., 62 F.R.D. 614 (S.D. Miss. 1972). *But see* Blankenship v. Ralston Purina Co., 62 F.R.D. 35, 41 (N.D. Ga. 1973). Each member of the class does not have to give notice if the defendant affirmatively waives this condition. Price v. Maryland Cas. Co., 62 F.R.D. 614 (S.D. Miss. 1972).

37. *See* Gebhard v. G.A.F. Corp., 59 F.R.D. 504 (D.D.C. 1973).

38. *See, e.g., id.*; Price v. Maryland Cas. Co., 62 F.R.D. 614 (S.D. Miss. 1972).

39. Burgett v. Cudahy Co., 361 F. Supp. 617, 623 (D. Kan. 1973); Blankenship v. Ralston Purina Co., 62 F.R.D. 35, 38 (N.D. Ga. 1973); Bishop v. Jelleff Associates, Inc., 5 CCH EMPLOYMENT PRAC. DEC. ¶ 7995, at 6659 (D.D.C. Aug. 1, 1972).

40. Bishop v. Jelleff Associates, Inc., 5 CCH EMPLOYMENT PRAC. DEC. ¶ 7995, at 6659 (D.D.C. Aug. 1, 1972).

41. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968).

42. 29 U.S.C. § 217 (1970) (incorporated in the ADEA under *id.* § 626(b)).

First Federal Savings & Loan Association,[43] the Fifth Circuit sanctioned broad injunctive relief under the Act. Rejecting more limited relief, the court stated: "Were the injunction in the instant case to be limited to the hiring of tellers the government would have to maintain its surveillance over defendant in order to insure that violations of the Act in job categories other than teller did not occur."[44] Thus, although the function of the ADEA injunction is not punitive,[45] the injunction may be of general applicability, and it must be sufficiently broad to prevent future violations of the Act.[46] Courts also have jurisdiction to grant other equitable or legal relief to effectuate the purposes of the Act, including decrees compelling employment, reinstatement, or promotion.[47]

The ADEA provides that successful plaintiffs are to receive an amount equal to the wages and benefits previously lost due to the employer's discriminatory discharge, less the value of plaintiff's total benefits and earnings at other jobs from the date of discharge until the date of trial.[48] An equal amount may also be imposed as liquidated or punitive damages in the case of willful violations.[49] A willful violation will be found only when there has been actual knowledge of the Act's applicability and bad faith evasion of the Act.[50] Damages are measured

43. 455 F.2d 818 (5th Cir. 1972).
44. *Id.* at 826.
45. *Id.*
46. *Id.*
47. 29 U.S.C. § 626(b) (1970) provides:
> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section.

Section 216(b) of the Fair Labor Standards Act [FLSA], 29 U.S.C. §§ 201-217 (1970), *as amended*, 29 U.S.C.A. §§ 202-204, 206-208, 210, 212-216 (Supp. 1975), states:
> Any employer who violates the provisions of section 206 [minimum wage regulation] or section 207 [maximum hour regulation] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

48. 29 U.S.C.A. § 216(b) (Supp. 1975) (incorporated in the ADEA under 29 U.S.C. § 626(b) (1970)); Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9313, at 7438 (D.D.C. Apr. 16, 1974); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971).

Although the ADEA does not itself provide for attorney's fees, section 216 of the FLSA, incorporated into the ADEA, provides for recovery by plaintiff of attorney's fees and costs. Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1217 (N.D. Ga. 1973); Monroe v. Penn-Dixie Cement Corp., *supra* at 235.

49. 29 U.S.C. § 626(b) (1970).

50. In Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974), the court held that it had discretion, after finding a willful violation, as to whether or not to award liquidated damages. The court cited 29 U.S.C. § 260 (1970) as authority for its conclusion. That statute provides:
> if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor

only to the date of trial.[51] For this reason, if the employee waives court ordered reinstatement of his old job, he is entitled to no future damages stemming from his employer's discrimination.[52] Similarly, if the plaintiff does not request reinstatement, the parties stand in the same position as if the court had reinstated plaintiff and he had instantaneously quit the job for a reason having nothing to do with discrimination.[53] Accordingly, the employer also would not be liable for wages subsequent to a refusal of reinstatement. An employer cannot reduce the damages by showing the advantages which might accrue to his former employee in his new employment at some later time, the calculation being too speculative.[54] The measure of damages is not clear where the employer's business terminates between the date the employee was discharged and the date of the trial. Clearly the employer is still liable for damages up to the time his business was terminated. Arguably, however, unless the employee can show that because of his discharge he was placed in a less favorable position from the time the business was terminated than employees who were not discharged, the employer should not be liable for damages after termination of his business.

It may be questionable whether an employment agency which refuses to refer a person within the protected age group to a certain employer, due to that employer's request for young employees, would itself be liable to the applicant for damages. Arguably, the statute seems to address itself to the employment agency only as an employer, not as an agent of an employer seeking employees. Nevertheless, in *Brennan v. Hughes Personnel, Inc.*,[55] the court held that an employment agency may be liable for the minimum wages the plaintiff would have received from the prospective employer.[56] Since the ADEA is applicable to employment

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Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

The *Chilton* court reasoned that since section 216 of the FLSA is applicable to the ADEA, and since section 260 amends section 216 to allow discretion by the court in awarding liquidated damages, this same discretion is allowed in ADEA awards. 370 F. Supp. at 666. Section 260, however, only speaks of the situation where the employer has shown lack of willfulness, and thus would not control where willfulness is shown. The better view under the ADEA is that if the plaintiff can show willful disregard of the Act he is entitled to double damages.

51. *See* Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9313, at 7437 (D.D.C. Apr. 16, 1974); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971).

52. Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971). The *Monroe* court stated that damages beyond this period "would be highly speculative (especially in cases where the plaintiff was in his forties and, thus, had many years ahead in which he might or might not get raises, reductions, fired, or incapacitated all of which could greatly affect his future earnings) . . . ." *Id.* at 235.

53. *Id.* Additionally, of course, the damages accruing beyond the trial date would be impossible to calculate in many instances. *Id.*

54. Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971).

55. 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9571 (W.D. Ky. May 22, 1974).

56. The court felt it more equitable and realistic in this case, however, to award

agencies and labor organizations, they too should bear the burden of damages if they have participated in a violation of the ADEA. In some cases, it may be tactically preferable to sue an employment agency rather than an employer. The proper allocation of liability between employment agency and employer is open to question. Where the agency is cooperating with the employer, joint and several liability would be appropriate. Where, however, the decision to refer only younger job candidates is the agency's decision, only the agency should be held liable.

PROOF OF DISCRIMINATION

The Problem of Intent

An examination of problems of proof under the ADEA must first focus on whether intent is required for a violation of the Act. Although there is some conflict in authority, the better view is that no discriminatory intent is required. In Title VII litigation, it is well settled that the plaintiff need not prove discriminatory intent to obtain relief.[57] As was noted by the Supreme Court in *Griggs v. Duke Power Co.*,[58] "The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[59] Similarly, in *Williams v. General Foods Corp.*,[60] the Seventh Circuit stated that the standard of liability under Title VII is simply the defendant's engaging in unlawful employment practices. Thus, it was only necessary for the plaintiff to establish that the corporation actually engaged in employment practices proscribed by Title VII; the corporation's intent was not pertinent.[61]

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damages equal to only the profits which the defendant-employment agency secured from placing two other applicants in the job for which the plaintiff had applied. *Id.* at 5476. The court rationalized that the defendant's profits from these two placements should properly equal damages to the plaintiff. *Id.* Under the terms of the statute, however, the plaintiff could have received an amount equal to her lost wages. The court based its discretionary power to reduce damages on the phrase "to grant such legal or equitable relief as is appropriate to effectuate the purposes of this chapter." *Id.* at 5477. However, in light of the purposes of the ADEA, it seems likely that Congress meant this phrase to prevent reduction of damages rather than to authorize a reduction.

57. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Williams v. General Foods Corp., 492 F.2d 399, 403-04 (7th Cir. 1974); Sims v. Sheet Metal Workers Int'l Ass'n, 353 F. Supp. 22, 25 (N.D. Ohio 1972), *modified*, 489 F.2d 1023 (6th Cir. 1974).

58. 401 U.S. 424 (1971).

59. *Id.* at 432.

60. 492 F.2d 399 (7th Cir. 1974).

61. *Id.* at 403-04. Under Title VII, the granting of injunctive relief and back pay is conditioned on a finding that the employer "intentionally engaged" in an unlawful employment practice. 42 U.S.C. § 2000e-5(g), *as amended*, (Supp. III, 1973). To show intent, however, the plaintiff need only show that the employment practice was deliberate rather than accidental. Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971) (expressly rejecting willfulness as a necessary element).

In Title VII suits, as well as in ADEA suits, a requirement of intent would allow countless built-in discriminatory mechanisms to perpetuate themselves unchecked. Thus, in *Marquez v. Omaha District Sales Office*,[62] a suit under the Civil Rights Act of 1964, the court stated:

> It is true that the Civil Rights Act of 1964 is not violated where an employer's *present system of promotion* excludes consideration of an employee because he is deemed not qualified solely by reason of lack of ability or experience. However, where an employer's present advancement policy serves to perpetuate the effects of past discrimination, although neutral on its face, it rejuvenates the past discrimination in both fact and law regardless of present good faith.[63]

Because the purposes of Title VII and the ADEA are analogous, the ADEA should be interpreted consistently with Title VII to require no discriminatory intent in order to obtain relief. Analysis of the Act mandates a similar conclusion. Congress went to great lengths to specify the employer's defenses, and yet, chose not to include the absence of discriminatory intent as one of these defenses.[64] Furthermore, Congress specifically provided for liquidated or punitive damages in the case of willful violations.[65] Presumably, intentional discrimination was recognized as worthy of more severe punishment than innocent violation of the Act.

There does exist language in a recent ADEA case which may be interpreted as suggesting that a "specific intent to discriminate" must be shown in order to establish a violation of the Act.[66] This requirement would impose such a burden on the plaintiff's establishment of a prima facie case that the ADEA would lose much of its effectiveness. In this case and in others,[67] however, specific intent was inferred from the plaintiff's prima facie case. Thus, as a practical matter, proof of intent, even if required, may not be an insuperable burden.

The Prima Facie Case

The complainant in an ADEA action has the initial burden of establishing a prima facie case of age discrimination.[68] Because informa-

62. 440 F.2d 1157 (8th Cir. 1971).
63. *Id.* at 1159-60.
64. *See* 29 U.S.C. § 623(f) (1970).
65. *Id.* § 626(b). In addition, the 3-year statute of limitations has been held applicable for willful violations rather than the 2-year statute of limitations. See 29 U.S.C. § 255(a) (1970) (incorporated in the ADEA under *id.* § 626(e)). This is further evidence that specific intent is not required.
66. Wilson v. Sealtest Foods, 501 F.2d 84, 86 (5th Cir. 1974).
67. *See id.*; Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972); Hodgson v. Sugar Cane Growers Coop., 5 CCH EMPLOYMENT PRAC. DEC. ¶ 8618 (S.D. Fla. Apr. 4, 1973).
68. Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 822 (5th Cir. 1972);

tion that would exonerate the employer is within the employer's knowledge,[69] the burden then shifts to him to legitimize his rejection of the applicant or discharge of the employee; that is, the employer must rebut the prima facie case.[70] Although the courts have consistently required that plaintiff establish a prima facie case, its ingredients, as defined by lower courts, have varied. Recently the Supreme Court, in *McDonnell Douglas Corp. v. Green*,[71] standardized a test for finding a prima facie case of discrimination. The court stated that the complainant in a Title VII action satisfies the burden of establishing a prima facie case of racial discrimination by showing: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications.[72] Although the case can be interpreted narrowly, as applying only to *applicants* for employment, the Fifth Circuit has applied the *McDonnell* standards to the discharge of an existing employee.[73] The court found that an age discrimination suit had been improperly dismissed where the claimant had shown he was within a protected age class, was doing satisfactory work, was asked to take early involuntary retirement, and was replaced by a younger person. The court stated that "a minimal showing of these analogous *McDonnell* factors justifies some explanation on the part of the employer."[74]

Utilization of the *McDonnell* test in ADEA cases will often involve an additional burden on the plaintiff. For example, it will be essential for the discharged or rejected employee to establish that he has satisfied the performance and qualification criteria established by the employer. For example, in *Hodgson v. Sugar Cane Growers Cooperative*,[75] plaintiff demonstrated that he had been discharged even though he possessed all the skills and qualifications required for his position. The court found the evidence uncontroverted that the plaintiff's health was good, that he had no physical disabilities, that he maintained a pleasant working relationship, and that he was described by his fellow workers as a good first class mechanic. The court then found that the plaintiff had established a prima facie case.[76] Since the plaintiff had established that

Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7049 D.D.C. Mar. 11, 1974); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1213 (N.D. Ga. 1973).

69. Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 822 (5th Cir. 1972).
70. *Id.*; Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1213 (N.D. Ga. 1973).
71. 411 U.S. 792 (1973).
72. *Id.* at 802.
73. Wilson v. Sealtest Foods, 501 F.2d 84 (5th Cir. 1974).
74. *Id.* at 86.
75. 5 CCH EMPLOYMENT PRAC. DEC. ¶ 8618 (S.D. Fla. Apr. 4, 1973).
76. *Id.* at 7613.

he was within the protected group, had performed as well as his fellow workers, and was terminated in a position that would subsequently be filled, he had satisfied the *McDonnell* test.[77]

Marshalling evidence concerning age and qualifications is one way to fashion a prima facie case. The plaintiff may also establish his case by alerting the court to overt discriminatory practices on the part of the defendant-employer. One such practice is advertising in a manner which indicates a preference on the basis of age.[78] Advertising by an employer, labor organization, or employment agency which tends to discriminate against the older worker is expressly forbidden by the ADEA.[79] Interpretive discrimination rules established by the Department of Labor indicate that help-wanted advertisements and notices are prohibited if they include terms or phrases such as "age 25," "young," "boy," "girl," "college student," or "recent college graduate."[80] In addition, the Secretary of Labor has declared that even though many or most individuals above a certain age may not qualify for positions which require burdensome work, an employer violates the ADEA by using help-wanted advertisements which specify age limitations for such positions.[81]

This administrative ruling has met with opposition from at least one court. In *Brennan v. Paragon Employment Agency, Inc.*,[82] the court found that advertising a preference for an employee of a certain age

77. *Id.* at 7613-14. Although the *Sugar Cane* court did not specifically apply the *McDonnell* test, it considered the same factors and, if applied, the *McDonnell* test would have been satisfied.

78. *See, e.g.*, Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 826 (5th Cir. 1972); Hodgson v. Western Textile Co., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9383, at 7721 (N.D. Ill. Apr. 26, 1974); Hodgson v. Great Am. Discount & Credit Co., 336 F. Supp. 1355, 1360 (M.D. Ala. 1972). The opinions of expert witnesses have been used to determine whether a word indicates a preference for younger workers. *See* Hodgson v. Career Counselors Int'l, Inc., 5 CCH EMPLOYMENT PRAC. DEC. ¶ 7983, at 6626 (N.D. Ill. Sept. 28, 1972).

79. 29 U.S.C. § 623(e) (1970).

80. 29 C.F.R. § 860.92(b) (1974). Advertisements which denote a certain educational level, such as "college graduate," however, are not in violation of the Act. 29 C.F.R. § 860.92(c) (1974). In addition, the statute is not violated by advertisements which specify a minimum age less than 40, such as "not under 18," or "not under 21." *Id.*

The phrase "looking for a bright young girl" has been found to be a violation of the ADEA. Hodgson v. Western Textile Co., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9383, at 7721 (N.D. Ill. Apr. 26, 1974). Use of terms and phrases such as "sharp recent grads," "recent high school grads," and "recent math grads," are not in violation of the ADEA "when simply appealing generally to all such persons to avail themselves of defendant's services (employment agency) . . . ." Brennan v. Approved Personnel Service, Inc., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9810, at 6393 (M.D.N.C. Sept. 20, 1974), *rev'd on other grounds*, 44 U.S.L.W. 2208 (4th Cir. Oct. 28, 1975). However, such terms and phrases are discriminatory when used to advertise openings for a specific job. *Id.* "Career girl" and "junior" are not discriminatory. *Id.* at 6394. The phrase "corporate attorney 1-2 years out of college" is discriminatory. *Id.* "Excellent first job!" is not discriminatory. *Id.*

81. 29 C.F.R. § 860.103(f)(1)(iii) (1974).

82. 356 F. Supp. 286 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 752 (2d Cir. 1974).

was not a violation of the ADEA.[83] On a motion to dismiss for failure to state a claim, the court held that the interpretative bulletin concerning advertisement of age preferences was unreasonable because it was not consistent with the purpose of the Act. The court concluded that the purpose of the ADEA was to prevent those persons aged 40 to 65 from having their careers ended by unreasonable prejudice, not to prevent their children and grandchildren from obtaining employment. The court stated that there was nothing in the Act that authorized the Secretary of Labor to prohibit employers from encouraging young persons, whether or not in college, to turn from idleness to useful endeavor.[84] This encouragement was found to be in the public interest and therefore based on reasonable factors other than age.[85]

Contrary to the *Paragon* decision, the ADEA specifically makes every such advertisement unlawful.[86] The Act prohibits advertisement of this type because of its adverse effect on older workers searching for employment. Thus, the precedential value of *Paragon* may be slight. One court has expressly rejected the *Paragon* decision,[87] and others, confronted with facts similar to those of *Paragon*, have held contrary to it.[88]

A third means of making a prima facie case of age discrimination is statistical evidence. As is true with advertising,[89] statistics are not conclusive proof of an employer's discriminatory intent.[90] In Title VII actions, however, courts have consistently held that discrimination in employment procedures may be established by statistical data.[91] For instance, the Eighth Circuit, in *Parham v. Southwestern Bell Telephone Co.*,[92] held, as a matter of law, that "statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, establishes a violation of Title VII . . . ."[93]

83. The court said that the relief sought, an injunction enjoining the agency from running the ads, would not be appropriate to effectuate the purposes of the Act. *Id.* at 288-89.

84. *Id.* at 289.

85. *Id.*

86. *See* 29 U.S.C. § 623(e) (1970); Hodgson v. First Fed. Sav. & Loan Ass'n, 445 F.2d 818, 826 (5th Cir. 1972).

87. Brennan v. Hughes Personnel, Inc., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9571, at 5475 (W.D. Ky. May 22, 1974).

88. *See* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 826 (5th Cir. 1972); Hodgson v. Western Textile Co., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9383 (N.D. Ill. Apr. 26, 1974); Hodgson v. Great Am. Discount & Credit Co., 336 F. Supp. 1355 (M.D. Ala. 1972).

89. Brennan v. Hughes Personnel, Inc., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9571, at 5475 (W.D. Ky. May 22, 1974).

90. Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1213 (N.D. Ga. 1973).

91. United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Wood, Wire & Metal Lathers Int'l Union, 471 F.2d 408 (2d Cir. 1973); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

92. 433 F.2d 421 (8th Cir. 1970).

93. *Id.* at 426.

Similarly, in *Vulcan Society v. Civil Service Commission*,[94] the court held that the difference between minority representation in a department, 5 percent, and in the general population of New York City, 32 percent, was statistically sufficient to demonstrate discrimination.[95] One court[96] has noted that since discrimination cases involve imponderables concerning which it is difficult to make factual proof, the plaintiff need only demonstrate a statistically significant imbalance between the percentage employed from one group in the general population and the percentage employed from another. Once the plaintiff has established this, a presumption arises that the imbalance is the result of discriminatory practices.[97]

ADEA decisions have followed Title VII cases, holding that discriminatory practices may be inferred from statistical data.[98] In *Hodgson v. First Federal Savings & Loan Association*,[99] the court held that "statistics by themselves would perhaps support a finding that defendant had violated the Act."[100] Exactly what will be considered a marked disparity, however, has not been resolved in either ADEA or Title VII litigation. The *First Federal* court noted that more than one year after the effective date of the ADEA, not a single person within the protected age group had been hired by the defendant for the job position of teller.[101] The court stated that this was sufficient to support a finding that the defendant had violated the Act.[102]

Statistical evidence is also admissible to demonstrate that the average age of workers in an organization has declined.[103] From this, an inference of impermissible age discrimination may be drawn. Finally, statistical data showing that a greater percentage of persons under 40 than those over 40 received promotions could be found significant in establishing a prima facie case.[104]

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94. 360 F. Supp. 1265 (S.D.N.Y. 1973), *modified*, 490 F.2d 387 (2d Cir. 1974). The case was brought under the civil rights provisions of 42 U.S.C. §§ 1981, 1983 (1970).
95. 360 F. Supp. at 1269.
96. Afro American Patrolmen's League v. Duck, 366 F. Supp. 1095 (N.D. Ohio 1973), *modified*, 503 F.2d 294 (6th Cir. 1974).
97. *Id.* at 1100.
98. *E.g.*, Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 823 (5th Cir. 1972); Hodgson v. Ideal Corrugated Box Co., 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9805, at 6371 (N.D.W. Va. Jan. 31, 1974); Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972).
99. 455 F.2d 818 (5th Cir. 1972).
100. *Id.* at 823.
101. *Id.*
102. *Id.*
103. Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1213 (N.D. Ga. 1973).
104. *Cf.* Marquez v. Omaha Dist. Sales Office, 440 F.2d 1157, 1160-61 (8th Cir. 1971).

DEFENSES

The Bona Fide Occupational Qualification Defense

Once the plaintiff has established a prima facie case, the burden shifts to the defendant to legitimize his actions.[105] The defenses available to the defendant-employer, which are to be construed narrowly against the employer seeking to assert them,[106] are provided by statute as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> 1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> 2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or
>
> 3) to discharge or otherwise discipline an individual for good cause.[107]

Thus far, one of the most litigated defenses has been the bona fide occupational qualification [BFOQ].[108] Since Title VII also contains the BFOQ defense,[109] the issue can also be a subject of litigation in suits alleging discrimination due to sex,[110] religion,[111] and national origin.[112] Two recent sex discrimination cases illustrate the conflict caused by the

105. Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 822 (5th Cir. 1972); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1213 (N.D. Ga. 1973); Hodgson v. Tamiami Trail Tours, Inc., 4 CCH EMPLOYMENT PRAC. DEC. ¶ 7795, at 6050 (S.D. Fla. Mar. 31, 1972).

106. Hodgson v. Tamiami Trail Tours, Inc., 4 CCH EMPLOYMENT PRAC. DEC. ¶ 7795, at 6049 (S.D. Fla. Mar. 31, 1972).

107. 29 U.S.C. § 623(f) (1970).

108. *Id.* § 623(f)(1).

109. 42 U.S.C. § 2000e-2(e)(1) (1970).

110. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *See generally* Note, *Title VII: A Remedy for Discrimination Against Women Prisoners*, 16 ARIZ. L. REV. 974, 989-91 (1975); Comment, *Sex Discrimination in Employment: What Has Title VII Accomplished for the Female?*, 9 U. RICHMOND L. REV. 149 (1974). The EEOC has expressed the view that the BFOQ defense in the Civil Rights Act of 1964 must be narrowly interpreted as applied to sex discrimination in employment. 29 C.F.R. § 1604(2)(a) (1974). *See generally* Note, *Sex Discrimination in Employment*, 24 N.Y.U. CONF. LAB. 313 (1971); Note, *Sexual Discrimination in Employment*, 17 WAYNE L. REV. 242 (1971).

111. *See generally* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975); Comment, *Religious Observance and Discrimination in Employment*, 22 SYRACUSE L. REV. 1019 (1971).

112. The BFOQ defense has not been litigated in connection with national origin to date. For discussion of the problem of national origin employment discrimination generally, see Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973); Note, *Civil Rights-Employment-National Origin Discrimination and Aliens*, 51 TEXAS L. REV. 128 (1972).

term "bona fide". In *Bowe v. Colgate-Palmolive Co.*,[113] the court was faced with a restriction of certain employment opportunities to males due to the requirement of lifting heavy weights as a routine occupational duty. The defendant contended that the BFOQ defense was applicable, excusing the employer from the prohibitions of the Act. Agreeing with this position, the district court stated that "[g]eneric classification between the sexes must be permitted on the basis of general and generally recognized and basic differences in the physical characteristics, abilities, capacities, restrictions, and limitations of the respective sexes."[114]

The court of appeals squarely rejected the district court's position, holding that while Colgate should be permitted to retain its 35 pound weight lifting limit as a general guideline for *all* of its employees, workers must be notified that they will be afforded a reasonable opportunity to demonstrate their ability to meet the lifting requirement.[115] Thus, within the context of one factual situation, the two courts demonstrated widely differing interpretations of the term "bona fide" as applied in sex discrimination cases. A third interpretation of the term was offered by the Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*[116] Realizing that the broad construction applied by the district court in *Bowe* would cause the Title VII equal employment rules to be engulfed by the BFOQ exception, the *Weeks* court held that the employer must show from a factual basis that "all or substantially all" of the persons in the protected group would be unable to perform the duties efficiently.[117]

Only two ADEA decisions have addressed the applicability of the BFOQ defense.[118] In *Hodgson v. Greyhound Lines, Inc.*,[119] the defendant, a bus company, refused to consider applications for the position of driver from persons between 40 and 65 years of age. Although persons remained with the company after age 40, it was alleged that in all such cases the individuals were hired before reaching that age.[120] Defendant

113. 272 F. Supp. 332 (S.D. Ind. 1967), *reversed in part*, 416 F.2d 711 (7th Cir. 1969).
114. *Id.* at 365.
115. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969).
116. 408 F.2d 228 (5th Cir. 1969).
117. *Id.* at 235.
118. Federal statutory and regulatory requirements, providing age limitations for hiring or compulsory retirement without reference to the individual's actual physical condition at retirement age, are not affected by the ADEA when such conditions are clearly imposed for the safety and convenience of the public. This is true, for instance, of airline pilots subject to the regulations of the Federal Aviation Administration [FAA]. The FAA does not permit pilots to engage in carrier operations after they reach the age of 60. 29 C.F.R. 860.102(d) (1974).
119. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).
120. The trial court, however, had found that the defendant-employer did hire "schoolteacher drivers" up to the age of 50. Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230, 238 (N.D. Ill. 1973), *rev'd*, 499 F.2d 859 (7th Cir. 1974).

contended that it was required by law to exercise the highest degree of care, and that the only practical means of complying with this standard was to hire younger persons. In addition, defendant contended that because a new driver, regardless of age or prior experience, was assigned irregular and more strenuous routes,[121] a person between the ages of 40 and 65 could not physically and mentally endure the work.

Faced with defining the BFOQ defense, the court examined two recent discrimination cases. The *Weeks* "all or substantially all" test, which had been relied upon by the *Hodgson* trial court,[122] was distinguished by the court of appeals: "Unlike *Weeks*, our concern goes beyond that of the welfare of the job applicant and must include consideration of the well-being and safety of bus passengers and other highway motorists."[123] The court, adopting the test set forth in *Diaz v. Pan American World Airways, Inc.*,[124] found that the BFOQ is a valid defense when the defendant can prove that the age limitation goes to the *essence* of the defendant's business operation. Thus, the court held:

> [T]o the extent that the elimination of Greyhound's hiring practice may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.[125]

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121. New drivers were subject to extra-board work.

> While on extra-board the driver is on call twenty-four hours a day seven days a week with as little as two hours notice, to take runs that the more senior regular run drivers do not operate. Often these operations involve odd and irregular hours and, frequently, long charter trips outside the territory served by the regular routes of Greyhound, that may last up to thirty days.

499 F.2d at 864.

122. The trial court held that the principle of nondiscrimination requires that an employer establish that all or substantially all older persons would be unable to perform safely and efficiently the duties of the employment before he may rely on the BFOQ defense. In other words, the court found that only factually based, reasonable cause to believe that age is a BFOQ reasonably necessary to the operation of that particular business would bring the employer within the BFOQ defense. 354 F. Supp. at 236, *rev'd*, 499 F.2d 859 (7th Cir. 1974). In addition, the trial court concluded, on the basis of expert testimony, that functional capacity rather than chronological age should be the most important factor in determining whether or not an individual can perform safely. Observing that there was no way to predict how one individual will be affected by the aging process, the court held that assessment of functional capacity must be made repeatedly throughout the employee's employment experience. The court concluded that the defendant had failed to factually demonstrate reasonable cause to believe that age was a BFOQ in hiring bus drivers. *Id.* at 239.

123. 499 F.2d at 861.

124. 442 F.2d 385 (5th Cir. 1971).

125. 499 F.2d at 863.

Applying this test, the *Hodgson* court found that Greyhound had presented a rational basis in fact for believing that initial hiring of older drivers would decrease safety. According to the court, Greyhound had shown that the rigors of irregular scheduling upon a class of persons exhibiting physical and sensory degeneration would increase the risk of harm to its passengers. Additionally, the court was impressed by

> statistical evidence reflecting, among other things, that Greyhound's safest driver is one who has sixteen to twenty years of driving experience with Greyhound and is between fifty and fifty-five years of age, an optimum blend of age and experience with Greyhound which could never be attained in hiring an applicant forty years of age or over.[126]

Combining this evidence, the court held that Greyhound had "amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others,"[127] and "that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale."[128]

In *Hodgson v. Tamiami Trail Tours, Inc.*,[129] the defendant had refused to hire or consider any applications of persons over the age of 40. The defendant bus company defended an age discrimination complaint on the same grounds as those used by the Greyhound Company. The court held that the defendant need only prove that age is the best available tool for screening applicants.[130] Functional characteristics generally associated with age were found to be the most practical device available to screen applicants. For this reason, the defendant was not required to consider individually the abilities of applicants over 40 years old.

The courts in *Greyhound* and *Tamiami*, applying the same tests to identical fact situations, reached complimentary conclusions. Both courts, agreeing that the defendant must make a factual demonstration that age was a BFOQ, were reluctant to impose too stringent a test on an employer entrusted with the safety of others. Similar to *Greyhound*'s "rational basis in fact" standard, the *Tamiami* court stated that the employer need only establish a "direct and reasonably limited connection between age, job performance, and defendant's normal operations and hiring practices."[131] Agreeing that evidence of unique disabilities affecting safety were found in all persons over 40, both courts found age

126. *Id.*
127. *Id.* at 865.
128. *Id.*
129. 4 CCH EMPLOYMENT PRAC. DEC. ¶ 7795 (S.D. Fla. Mar. 31, 1972).
130. *Id.* at 6050.
131. *Id.* at 6052.

an accurate measure of predicting job performance. Thus, the courts found the defendants within the protection of the BFOQ exception.

Arguably, the general theory proposed by the *Greyhound* and *Tamiami* courts undercuts the true meaning of the BFOQ exception. To utilize factors associated with growing old, as both *Greyhound* and *Tamiami* did, will always discriminate against the older person, even though he can perform as efficiently as a younger person. One could contend that the exception should only apply to situations in which age itself is a job qualification. For example, if an employer wanted to hire 3-year old children for advertising portraits, clearly a person 45 years old would be ineligible for the employment. Similarly, if the employer wished to hire persons aged to 35 to test that age group's hearing ability, the employer could rely on the BFOQ defense. This is the stringent interpretation which the Equal Employment Opportunity Commission has adopted concerning the use of the BFOQ exception in cases involving sex discrimination. Only "[w]here it is necessary for the purpose of authenticity or genuineness . . . will [the Commission] consider sex to be a bona fide occupational qualification . . . ."[132] According to the Commission, an employer is prohibited from denying employment to females simply because the job requires lifting heavy weights. Even where such restrictions are authorized by state laws, the Commission, "has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and therefore, discriminate on the basis of sex. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational exception."[133] Under this ruling, assuming that the lifting requirement is job-related, the only alternative for the employer is to include the lifting requirement as a job qualification. The female who can lift the weight will be considered individually and will not be discriminated against because the majority of her gender cannot perform the task.

The Commission's standard for the BFOQ, the most stringent yet advanced, was adopted by the Ninth Circuit in *Rosenfeld v. Southern Pacific Co.*[134] In that case, the position of agent-telegrapher was denied to women applicants because of lifting requirements, long hours, and restrictive state laws. The court stated: "Based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ

132. 29 C.F.R. § 1604.2(a)(2) (1974).
133. *Id.* § 1604.2(b)(1).
134. 444 F.2d 1219 (9th Cir. 1971).

exception."[135] Thus, the court held that sex itself is the determining issue, rather than factors generally associated with sex.

Pursuing the rationale of the *Rosenfeld* case, it may be argued that to allow the BFOQ exception to operate in ADEA cases simply because persons of a certain age generally cannot perform successfully or efficiently at a particular job defeats the purpose of the Act. Thus, measuring performance by individual capabilities should always be the rule. When courts begin accepting factors generally attributable to age, rather than the factor of age, they greatly expand the boundaries of the BFOQ defense.

Measuring performance according to individual capabilities was required on constitutional grounds in *Cleveland Board of Education v. La Fleur*.[136] In *La Fleur*, pregnant school teachers brought a civil rights action[137] challenging the constitutionality of mandatory maternity leave rules. Although the Supreme Court's main concern was the right " 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'," [138] the Court also examined the validity under the fourteenth amendment of generalizations as to the efficiency of a specific group—pregnant school teachers.[139] In determining that the mandatory leave rules were too broad, the Court held that the school board could not conclusively presume that every pregnant school teacher who reaches the fifth or sixth month of pregnancy was physically incapable of continuing work, unless the board could show universal inability to teach past that period.[140] Absent this proof, the Court held that such a presumption violates due process since it is neither "necessarily nor universally true."[141] *La Fleur* is of particular interest because states and their political subdivisions have recently become subject to the ADEA.[142]

Thus, applied in other contexts, the holdings in *Greyhound* and *Tamiami* may be susceptible to challenge on the ground that they are

135. *Id.* at 1225.
136. 414 U.S. 632 (1974).
137. Pursuant to 42 U.S.C. § 1983 (1970).
138. 414 U.S. at 640, *quoting* Eisenstadt v. Baird, 405 U.S. 438, 453 (1971).
139. 414 U.S. at 644-47.
140. *Id.* at 645-46.
141. *Id.*
142. 29 U.S.C.A. § 630(b) (1975), *amending* 29 U.S.C. § 630(b) (1970). Courts have generally held that age is not a suspect category and have upheld the rational use of age in public hiring and firing decisions. *See* Cookson v. Lewistown School Dist. No. I, 351 F. Supp. 983 (D. Mont. 1972); Lewis v. Tucson School Dist. No. 1, 23 Ariz. App. 154, 531 P.2d 199 (1975). Only when the administrative decision has no rational relationship to a legitimate state purpose will the age-related decision be set aside. Murgra v. Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974), *prob. juris. noted*, 44 U.S.L.W. 3010 (U.S. July 22, 1975) (No. 74-1044). Thus, the inclusion of states within the ambit of ADEA protection will be of great importance to older state employees.

based on an irrebuttable presumption which is unsupported by sufficient proof.

The Reasonable Factor Defense

While the BFOQ defense emphasizes age as a legitimate consideration, the employer may defend his actions by asserting that age was not considered at all; he may simply contend that employment decisions are based on reasonable factors other than age.[143] To maintain a successful reasonable factor defense, the employer must demonstrate that reasonable factors other than age, such as a policy against hiring relatives of present employees,[144] caused the alleged discrimination. Where wage differentiations between old and young workers are involved, the Secretary of Labor has approved of evaluation factors such as quantity or quality of production, educational level,[145] schedule of hours,[146] and validly related physical fitness requirements.[147] Such factors, however, must have been uniformly applied to all applications for a particular job category, regardless of age.[148] Uniform application is the key to successful use of this defense.

The reasonable factor defense is often involved in suits based on employment aptitude tests. Although testing may be a reasonable means of screening applicants, the procedure may also disguise employment discrimination. In order for the testing procedure to be based on reasonable factors other than age, it must be specifically related to the requirements of the job.[149] In addition, the test must be fair and reasonable, administered in good faith and without discrimination on the basis of age, and properly evaluated.[150]

In *Griggs v. Duke Power Co.*,[151] a Title VII case, the Supreme Court found that certain testing procedures had been formulated so as to disadvantage particular groups. The Court held that employment oppor-

143. *See* 29 U.S.C. § 623(f)(1) (1970). The Secretary of Labor has stated that the reasonable factor defense will be evaluated on a case-by-case basis, rather than on the basis of general considerations. 29 C.F.R. § 860.103(d) (1974). Thus, unusual working conditions will be given weight according to their individual merit. *Id.*

144. 29 C.F.R. § 860.104(c) (1974).

145. *Id.* § 860.103(f)(2).

146. *Id.* § 860.104(a)(2).

147. *Id.* § 860.103(f)(1)(i).

148. *Id.* § 860.103(f)(2). The regulations state that hiring only individuals receiving Social Security is discriminatory. *Id.* § 860.104(a). Asserting that average costs of employing older workers is higher than hiring younger persons is also no defense. *Id.* § 860.103(h).

149. *Id.* § 860.104(b).

150. *Id.* Since younger persons may have more recent experience in test taking, their "test sophistication" or "test wiseness" may give them an advantage over older persons who are further removed from schooling. *Id.* The problem is further complicated by the fact that the younger person, having recently finished school, possesses knowledge of new skills and techniques.

151. 401 U.S. 424 (1971).

tunity provisions of the Civil Rights Act[152] prohibit an employer from requiring a high school education or a standardized general intelligence test as a condition of employment where neither standard was shown to be significantly related to successful job performance.[153] The decision did not interpret the Civil Rights Act to deny an employer the right to determine the qualities and abilities that he may require of his employees. Rather, the Court stated:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[154]

Although the ADEA contains no provisions specifically concerning the validity of testing procedures, it may be persuasively argued that the *Griggs* test should be used to supplement the ADEA standards. Once a court is satisfied that a test fails to measure the ability of an individual to perform a particular job, the burden should shift to the defendant. If the skills measured by the test are not required for performance of the job, then the test should be presumed invalid.

Nevertheless, such a presumption could not be conclusive since the ADEA does not limit an employer's business judgment in deciding what qualifications his employees should possess. It restricts only the utilization of *age* as a factor in the selection process. As one court noted: "In construing the Act, the Court concludes that when the burden shifts to the defendant, such burden is discharged by the employer showing that its conduct was not motivated by age bias and was 'reasonable' or rational."[155] If a job requirement excludes older workers from employment, the employer must merely convince the court that this requirement was not activated by the desire to turn away older persons. In other words, it is sufficient that the employer's selection criteria were not "a subterfuge to evade the purposes of the Act."[156] Thus, the reasonable

152. 42 U.S.C. § 2000e-2(h) (1970).
153. 401 U.S. at 436.
154. *Id.*
155. Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7049 (D.D.C. Mar. 11, 1974).
156. *See* 29 U.S.C. § 623(f)(2) (1970).

factor defense provides the employer great latitude in developing testing procedures and implementing personnel policies.

Although courts will not question the reasonableness of criteria ostensibly used to select employees[157]—for example, reasonable weight limitations—deviation from these criteria may establish a prima facie case of discrimination. An example of this discriminatory deviation is illustrated by *Hodgson v. First Federal Savings & Loan Association*,[158] where the defendant bank claimed the plaintiff had not been hired because she was overweight. The court found the evidence undisputed that for a period of more than 1 year after the effective date of the ADEA not a single person within the protected age group—40-65—had been hired by the savings and loan association for the position of teller.[159] The plaintiff had shown that during this period 35 trainees had been employed, the job order on file with a personnel consultant had called for teller trainees between the ages of 21 and 24, and the association's representative had written "too old for teller" in his interview notes on the aggrieved plaintiff's application. After finding the plaintiff as qualified as, if not more qualified than, present employees of the defendant bank, the court turned to the claim of differentiation based on weight factors. The court said that "little or no credence" could be given to the personnel officer's rationalization that he meant to write "too heavy" rather than "too old" on the application.[160] Finding that the plaintiff was otherwise qualified for employment and that other tellers were heavier than the plaintiff, the court concluded that the weight standard had been applied in a discriminatory manner.[161]

The Good Cause Defense

While the reasonable factor defense is usually applicable to the initial hiring and subsequent employment of an individual, the separate defense of good cause is available to justify discharges.[162] Good cause has been broadly interpreted, justifying discharges due to adverse business conditions or where an executive's business views or abilities were considered faulty by management.[163] In *Stringfellow v. Monsanto*

157. It should be noted, however, that even facially neutral job selection criteria can be subject to judicial scrutiny under Title VII if such criteria have a disparate effect on a protected class. *See* Albermarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* Note, *Title VII: A Remedy for Discrimination Against Women Prisoners, supra* note 110, at 991-92; Comment, *Title VII: Discriminatory Results and the Scope of Business Necessity*, 35 LA. L. REV. 146 (1974).

158. 455 F.2d 818 (5th Cir. 1972).

159. See text accompanying notes 101-02 *supra*.

160. 455 F.2d at 824.

161. Id.

162. 29 U.S.C. § 623(f)(3) (1970).

163. Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7050 (D.D.C. Mar. 11, 1974).

Co.,[164] economic considerations causing a substantial reduction in a chemical plant's activity resulted in the defendant terminating numerous employees. The litigation arose under the ADEA because only three of the 47 employees who were terminated were under 40 years of age. Nevertheless, the court held that the reduction plan was lawful since it was based on considerations other than age.[165] In arriving at this conclusion, the court accepted the defendant's contention that economic conditions constituted sufficient good cause to justify the terminations.[166]

As with the reasonable factor defense, courts do not evaluate the considerations underlying a good cause dismissal.[167] Once the defendant has shown that a discharge was due to reasonable factors other than age, the court may not investigate those factors. As stated in *Brennan v. Reynolds & Co.*,[168]

> Section 621 is concerned about age discrimination. Its purpose is not to solve other problems about employment. In approving "discharge for *good cause*" as a defense to an action under 621, it is not my purpose to label as a "for good cause discharge" any kind of discharge other than one based "merely upon the age factor." Section 621 does not cast upon the court the duty of determining that a discharge was, for reasons other than age, a justifiable discharge.[169]

Nevertheless, in order to determine that layoffs allegedly for good cause were not motivated by age discrimination, the courts must scrutinize the employer's justification for the discharge. As is true in the reasonable factor defense, decisions which are not rational from a business stand-

164. 320 F. Supp. 1175 (W.D. Ark. 1970).
165. *Id.* at 1182.
166. The court found that the terminations were the result of an evaluation utilizing 18 criteria measuring an individual's degree of job performance. The supervisors were first to review the evaluations. Subsequently, the evaluations were analyzed, correlated, compiled, and summarized by the superintendent of manufacturing. On this basis, the court found the discharges supported by reasonable factors. *Id.* at 1181-82.

Similarly, in Gill v. Union Carbide Corp., 368 F. Supp. 364 (E.D. Tenn. 1973), several persons over 40 years of age were discharged due to curtailment of funds. In making discharges, management evaluated each employee, taking into account effectiveness, value to programs, versatility, uniqueness, and personal problems. *Id.* at 368. The company considered age and long service as a credit to the individual. The court found that the terminations were based on reasonable factors other than age, concluding that the reason there were many more terminations of persons over 40 years of age was that the company had a relatively high number of such employees. *Id.* at 369. The court also held that the *Stringfellow* procedures, see text accompanying notes 163-65 *supra*, whereby the aggrieved party could consult with his superior about his job performance and consult with other persons in decisionmaking positions, "are not the *sine qua non* in order for defendant here to show that reasonable factors other than age were used in reaching its ultimate decision to terminate plaintiff." *Id.* at 369.
167. Bishop v. Jelleff Associates, Inc., 7 CCH EMPLOYMENT PRAC. DEC. ¶ 9214, at 7050 (D.D.C. Mar. 11, 1974).
168. 367 F. Supp. 440 (N.D. Ill. 1973).
169. *Id.* at 444.

point may require proof that the defendant's actions were not discriminatory. Thus, the court must make an initial determination that the business considerations were valid.[170] In questionable cases, the court may make a thorough examination of the defendant's recent employment practices in order to establish the absence of discriminatory employment practices.[171]

Defenses to Allegations of Premature Retirement

Retirement pursuant to a valid retirement program is another defense available to the defendant. However, premature retirement is a business practice prohibited by the ADEA. The Act provides that "observing the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the Act," is an acceptable defense "except that no such employee benefit plan shall excuse the failure to hire any individual.[172] The plan must be fairly administered,[173] and in so doing, the employer must proportionately weigh certain factors.[174] According to the Department of Labor, the most important factor in distributing available employment opportunities between younger and older workers should be length of service.[175] Since seniority systems normally afford greater rights to those who have had longer service,[176] any seniority system which gives lesser rights to those with longer service, and results in discharge or less favored treatment of those individuals protected by the ADEA, may be considered a subterfuge to evade the express purposes of the Act.[177] This is equally true of a seniority system existing prior to the effective date of the Act which perpetuates discrimination on the basis of age.[178]

Considering that length of service is a credit to an employee, a

170. Billingsley v. Service Technology Corp., 6 CCH EMPLOYMENT PRAC. DEC. ¶ 8874 (S.D. Tex. Apr. 5 & Apr. 24, 1973).

171. *See* Gill v. Union Carbide Corp., 368 F. Supp. 364 (E.D. Tenn. 1973); Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970).

172. 29 U.S.C. § 623(f)(2) (1970). It may be contended that "no plan shall excuse the failure to hire" means that if an individual was retired pursuant to a plan before reaching the age of 65, the employer could not refuse to rehire that individual on the basis of the bona fide retirement exception. It would seem that the individual is still under the umbrella of the Act. *But see* Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974). In that case, the court noted that defendant was under no obligation to rehire an employee after he had been properly retired under the plan. *Id.* at 218.

173. Systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin in violation of Title VII of the Civil Rights Act will not be regarded as bona fide for purposes of the ADEA. 29 C.F.R. § 860.105(d) (1974).

174. *Id.* § 860.105(a).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

model retirement system should be sufficiently flexible to defer retirement of older employees who have demonstrated competent performance. Such a plan would reflect a desire by an employer not to discriminate on the basis of age. In *Steiner v. National League of Professional Baseball Clubs*,[179] the plaintiff contended that defendant's retirement plan, requiring umpires to retire at age 55, was a subterfuge to evade the ADEA. After finding that defendant had deferred retirement of umpires in several earlier instances and had allowed deferment of plaintiff's own retirement on the basis of performance, the court found the system "a legitimate and nondiscriminatory method of engagement of the services of umpires."[180] The court agreed with the defendant that the " 'fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the normal retirement program does not, in and of itself, render an otherwise bona fide plan invalid. . . .' "[181]

Since the terms of any employee benefit plan must be recorded and preserved,[182] the courts will have at their disposal evidence with which to assess the plan. From this, the courts should be able to decide whether or not there exists any unlawful differentiation between workers of different ages. If there does exist such a differentiation, the plan will be unlawful under the Act as a discriminatory device.[183]

If the employee is not eligible for the plan or chooses not to participate in the plan, then applying the plan to the employee in order to require retirement before age 65 would clearly be prohibited by the Act, even if employees covered by the plan had to retire before age 65.[184] In *Hodgson v. American Hardware Mutual Insurance Co.*,[185] an employee who had chosen not to participate in a retirement plan which required compulsory retirement of female workers at age 62 was discharged at that age. The court stated: "Obviously premature discharge due to compulsory retirement rules is as relevant to the concern expressed above as the reluctance to hire older workers . . . . If fewer older workers are arbitrarily retired before age sixty-five, fewer will be compelled to seek jobs."[186] While the court found that the plan was a bona fide seniority system, plaintiff had chosen not to participate in the plan, and therefore the court held that the defendant had violated the

179. 8 CCH EMPLOYMENT PRAC. DEC. ¶ 9800 (C.D. Cal. June 19, 1974).
180. *Id.* at 6351.
181. *Id.* at 6352, *citing* 29 C.F.R. § 860.110 (1973).
182. 29 C.F.R. § 850.3(b)(2) (1974).
183. A plan would be unlawful if it were not bona fide as required by 29 U.S.C. § 623(f)(2) (1970).
184. *See* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971).
185. *Id.*
186. *Id.* at 228.

ADEA by discharging her.[187] The Secretary of Labor, in agreement with the *American Hardware* case, has stated that the bona fide seniority system exception does not apply to the involuntary retirement of employees under the age of 65 who have chosen not to participate in the employer's retirement or pension program.[188]

As well as forbidding unseasonable retirement, the ADEA forbids an employer denying a job application because of the applicant's ineligibility under the employer's retirement plan.[189] For example, an applicant who is above the maximum starting age provided for by the plan cannot be refused employment solely for that reason.[190] The employer, however, may refuse to allow the employee to enroll in the plan if he is above the maximum age set for enrollment when hired.[191]

CONCLUSION

The drafters of the ADEA provided a fairly effective device for eliminating discrimination against older workers. The Act's exceptions must be narrowly construed, however. Otherwise, employers could utilize these channels to perpetuate a discriminatory pattern against older workers. Once the plaintiff has established a prima facie case, the court should carefully scrutinize the employer's use of any defenses under the Act. Eliminating discrimination under the ADEA is the first step toward the goal of increasing employment opportunities for the elderly.

187. *Id.*
188. 29 C.F.R. § 860.110(b) (1974).
189. 29 U.S.C. § 623(f)(2) (1970). It is also essential that the terms and conditions of an alleged seniority system be communicated to those affected by the system in order to be classified as bona fide. 29 C.F.R. § 860.105(c) (1974). *See* Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).
190. Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 229 (D. Minn. 1971).
191. *Id.*