The Strengths and Weaknesses of the McDonnell Douglas Formula in Jury Actions under the ADEA

Mark I. Schickman
The Strengths and Weaknesses of the McDonnell Douglas Formula in Jury Actions under the ADEA

By Mark I. Schickman*

At common law, the employer-employee relationship usually was terminable at will.¹ Through the years, common law and statutory exemptions evolved and slowly eroded the original rule. With the enactment of Title VII of the Civil Rights Act of 1964,² federal law codified a number of factors, in particular race, on which an employer cannot rely in making employment decisions. Three years after the enactment of Title VII, President Johnson proposed in his “Older Americans Message” to Congress that employment discrimination legislation be extended to older Americans, as well as to those groups already protected by Title VII.³ The result of that address was the enactment of the Age Discrimination in Employment Act (ADEA) of 1967.⁴

The stated purpose of the ADEA is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”⁵ In expansive language, the ADEA makes it unlawful for an employer

to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; [or] to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any

5. Id. § 621(b).
individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . . 6

At the same time, the ADEA specifically permits an employer to take any action otherwise prohibited under . . . [the] ADEA 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 . . . and to discharge or otherwise discipline an individual for good cause.7

This Article discusses the nature and order of proof required to establish unlawful age discrimination under the ADEA. The Article first examines the present framework governing the allocation of burdens of production and persuasion in discrimination cases. The Article next discusses the development of these standards, focusing on their development in the context of race discrimination. The Article concludes that, because race discrimination involves issues that differ from those raised by age discrimination, the standards developed in Title VII litigation are inadequate for ADEA cases. The Article therefore suggests a paradigm for allocating the burden of proof in ADEA cases that is consistent with the policies underlying the Act.

Burden of Proof Under the ADEA

As in all civil litigation, the ADEA plaintiff has the burden of proving by a preponderance of the evidence that he or she was a victim of age discrimination.8 This burden can be met even if age is not the sole factor entering into an adverse employment decision, as long as age is a determining factor.9 The First Circuit recently defined the plaintiff's burden as requiring a showing that "but for" the employer's discriminatory motive, the job practice in question would not have taken place.10 Thus, the issue to be deter-

6. Id. § 623(a)(1)-(2).
7. Id. § 623(f).
10. Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979). An application of this standard is found in McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980). In McCorstin, there was extensive evidence of a termination "for cause," permitted under the ADEA. Therefore, following the presentation of plaintiff's case, the court directed a verdict for the defendant. On appeal, the Fifth Circuit acknowledged the evidence that indi-
mined in ADEA cases is whether, all other factors being equal, a younger employee would have received the same treatment as the plaintiff. If not, then the employee’s age was the determining factor in the adverse employment decision in the sense that “but for” his or her age, the disputed job practice would not have taken place.

The McDonnell Douglas Formula

Reasons for termination rarely can be proven by direct evidence. In McDonnell Douglas Corp. v. Green, the Supreme Court recognized the unavailability of direct evidence in most employment discrimination cases and established a test for proof of employment discrimination in Title VII actions in which there is a lack of direct evidence of discriminatory motive. The McDonnell Douglas formula was further refined by the Supreme Court in Furnco Construction Corp. v. Waters, and its applicability to ADEA actions is well settled.

The essence of the McDonnell Douglas test is a three-part exercise in logic, directed towards the presentation of circumstantial proof of discrimination. First, the plaintiff has the burden of establishing a prima facie case. “This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”

The word “may” is emphasized because the McDonnell Douglas formulation merely states the manner in which a plaintiff could demonstrate a prima facie case; it is not a rigid formula. The Court carefully noted: “The facts necessarily will vary in Title VII cases,

13. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Cova v. Coca Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978); Laugesen v. Anaconda Co., 410 F.2d 307 (6th Cir. 1975).
14. 411 U.S. 792, 802 (1973) (emphasis added) (footnote omitted).
and the specification above of the prima facie proof required [of the complainant] is not necessarily applicable in every respect to differing factual situations." Similarly, in Furnco, the Supreme Court made clear that "[t]he method suggested in McDonnell Douglas . . . was never intended to be rigid, mechanized, or ritualistic."

The First Circuit in Loeb v. Textron, Inc., noted that the proper adaptation of the McDonnell Douglas formula to an ADEA termination action would require proof that: (1) the plaintiff was in the protected age group; (2) the plaintiff was performing his or her job at a level that met the employer's legitimate expectations; and (3) the defendant sought someone to perform the same work after the plaintiff was fired.

Other factual scenarios that raise a similar affirmative inference of discrimination based on an employee's age come readily to mind: proof that an older employee was terminated while a younger employee was merely reprimanded for the same conduct; and proof that certain education requirements were preconditions for hiring an older employee, while the successful younger candidate did not possess the supposed prerequisite. Both of these situations describe conduct that, if unexplained, seems totally arbitrary—a showing that entitles the plaintiff "to an explanation from the defendant-employer for whatever action was taken." As the Furnco Court noted:

A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

The ease with which the McDonnell Douglas standard can be met is troubling at first. On the other hand, if direct evidence of discriminatory motive were required to avoid a directed verdict, few, if any ADEA cases would reach a jury. Furthermore, in fair-

15. Id. at 802 n.13.
16. 438 U.S. at 577.
17. 600 F.2d 1003 (1st Cir. 1979).
18. Id. at 1013-14.
19. Id. at 1014.
20. 438 U.S. at 577 (citation omitted).
ness, the ease with which a prima facie showing is made parallels the ease with which it is overcome.

The Court’s opinion in *McDonnell Douglas* with respect to the defendant’s burden was somewhat ambiguous. The majority stated that following the establishment of a prima facie case by the plaintiff,

[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection . . . . We think that [McDonnell Douglas’s explanation] suffices to discharge [its] burden of proof at this stage and to meet [the complainant’s] prima facie case of discrimination.\(^{21}\)

It was unclear from the facts and the holding in *McDonnell Douglas* what the ultimate impact of shifting the burden of proof to the defendant would be.\(^{22}\) Several early cases held that the burden of persuasion, as well as the burden of production, shifted to the defendant upon presentation of a prima facie case by the plaintiff.\(^{23}\) Other courts interpreted *McDonnell Douglas* as shifting only the burden of production to the defendant.\(^{24}\) The Supreme Court seemed to adopt the latter position in *Furnco*: “To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only ‘articulate’ some legitimate, nondiscriminatory reason for the employee’s rejection.”\(^{25}\)

In *Texas Department of Community Affairs v. Burdine*,\(^{26}\) the United States Supreme Court conclusively settled the issue. In *Burdine*, the Fifth Circuit had held that a defendant must prove by a preponderance of the evidence the existence of a legitimate nondiscriminatory reason for the plaintiff’s discharge.\(^{27}\) The Supreme Court reversed, holding that to dispel a prima facie case, the employer must merely carry a “burden of production,”\(^{28}\) qualified by a requirement that “the defendant’s explanation of its legitimate reasons must be clear and reasonably specific,”\(^{29}\) and must be

\(^{21}\) 411 U.S. at 802-03.
\(^{23}\) See, e.g., Holthaus v. Compton & Sons, Inc., 514 F.2d 651, 654 (8th Cir. 1975); Vulcan Soc’y v. Civil Serv. Comm’n of N.Y., 490 F.2d 387, 393 (2d Cir. 1973).
\(^{25}\) 438 U.S. at 578.
\(^{27}\) 608 F.2d 563, 567 (1979).
\(^{28}\) 49 U.S.L.W. at 4216.
\(^{29}\) Id. at 4217.
set forth "through the introduction of admissible evidence," rather than through incompetent evidence or argument of counsel.\textsuperscript{30} The Court stated that throughout the trial, "[t]he plaintiff retains the burden of persuasion."\textsuperscript{31} In response to concern that its holding would allow employers to fabricate explanations that could be articulated but not proven, the Court noted its confidence that pre-trial discovery and the availability of EEOC investigative files "permits the plaintiff meriting relief to demonstrate intentional discrimination."\textsuperscript{32} Accordingly, public policy requires that the explanation be articulated upon a prima facie showing. The Court, however, found no similarly compelling reason to shift the burden of proof to the defendant.

The Defendant's Burden of Articulation

The \textit{McDonnell Douglas} language inherently limits the nature of the articulation that must be proffered by the defendant. It must be an articulation of a "legitimate, nondiscriminatory reason" for the conduct.\textsuperscript{33} A legal secretary's prima facie case could not be successfully rebutted by an explanation that he or she made one typographical error in a five year period; the proffered reason would be a nonlegitimate expectation. Similarly, an employer could not successfully rebut a claim that older employees receive lower wages than their younger counterparts by the explanation that, for example, younger employees have families to support; that rationale would be discriminatory.

Thus, an ADEA plaintiff may attack the defendant’s proffered explanation as based upon nonlegitimate factors. An arbitrary, nonlegitimate explanation permits the same inference of hidden motive as the lack of any explanation. Similarly, no proof that the reason proffered by the defendant is a pretext for age discrimination is required to rebut an explanation based on a discriminatory rationale.

In \textit{EEOC v. Sandia Corp.},\textsuperscript{34} the plaintiff successfully attacked

\textsuperscript{30} Id. at 4216-17 n.9.
\textsuperscript{31} Id. at 4218.
\textsuperscript{32} Id. The Court also stated that "intentional discrimination" under the \textit{McDonnell Douglas} formula could be proven "indirectly by showing that the employer’s proffered explanation is unworthy of credence." \textit{Id.}
\textsuperscript{34} 23 F.E.P. Cas. 799 (10th Cir. 1980).
the defendant's justification for its employment decision as discriminatory in itself. In determining changes in the corporate hierarchy, Sandia grouped its employees on the basis of their experience, a characteristic in that case found to be linked to age. Within those groupings, Sandia employed a process known as "zero sum balancing," requiring one or more employees to move down in rank an equal number of steps as another employee moved up. Irrespective of whether this policy was an otherwise desirable business practice, the court found it violated the ADEA, ruling that "there is sufficient circumstantial evidence to indicate that age bias and age-based policies appear throughout the performance rating process to the detriment of the protected age group."

Another employment practice that may be unlawful under the ADEA might occur in circumstances in which a management expert advises a company that all management becomes stale after a certain number of years and should be replaced without regard to individual performance, as a matter of course, on the theory that the constant turnover of management supplying new ideas is as important to business as crop rotation, with its constant influx of different minerals, is to farmers. Even if the employer had a good faith belief in that philosophy and it were proven to be a desirable business practice, this practice may be unlawful, however, for the court in Laugesen v. Anaconda Co. stated that if "length of service itself, a factor inevitably related to age, [is] the basis for discharge regardless of performance, [it] would show discrimination."

Occasionally, it is difficult to distinguish a discriminatory rationale from a proper one. The subtlety of the distinction is made apparent by the Department of Labor regulations on the issue.

---

35. Id. at 810.
36. 510 F.2d 307 (6th Cir. 1975).
37. Id. at 313.
38. 29 C.F.R. § 860.103(c), (d), (f)(2), and (h). The regulations promulgated pursuant to the statute provide at § 860.103: "(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual. (d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit."

Section (f)(2) further provides that "Evaluation factors such as quantity or quality of
which represent one serious attempt to address the problem. The regulations are premised upon the concept that group classification of older workers, as opposed to individual case by case determinations, is a practice "plainly contrary to the terms of the Act and the purpose of Congress in enacting it." 

The problem with this approach is evidenced in Donnelly v. Exxon Research & Engineering Co. In Donnelly, the district court approved the termination of personnel whose sales did not exceed seventy-five percent of their base salary. Donnelly argued that the procedure was discriminatory and violative of the ADEA because it perpetuated a situation where, however inadvertently, part of the equation depended upon the length of service of the employee; that is to say, it is the plaintiff's position that since a portion of the salary of the employee was computed on the basis of his seniority with the company and since it was his salary level which was the touchstone of whether or not he was to be retained or let go, the operation of this procedure, however inadvertently, unlawfully discriminated against the older employees since they would be the ones who would be making more and more likely to fall within that group who were earning more than they were producing.

Donnelly's position, then, was that the company's policy effectively was an individual formula that de facto operated detrimentally to older employees.

In approving Exxon's practice, the court focused upon the production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age."

Subsection (h) of these regulations states: "It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed."

39. The Department of Labor regulations are not binding on the courts, but are especially persuasive. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

40. 29 C.F.R. § 860.103(h) (1979). If age is raised as a bona fide occupational qualification, different standards apply. See text accompanying notes 62-74 infra.


42. Id. at 7638.
formula’s equal application to older and younger workers. But the court’s reasoning is incongruous with its holding:

It would be unlawful and worse if an employer were to fire an older worker doing satisfactory work who, because of his seniority, received a certain salary because the employer wished to replace him with someone else who would do no better work but who, as a younger man with less seniority, would do the work for less.

That, as the Court has indicated, would be unlawful under the statute. There is nothing unlawful under the statute, however, in a formulation which says that any worker, whatever his age, whose productivity measured in dollars is 75 per cent less than his salary measured in dollars is to be terminated. That discriminates against no one.

There is no evidence in this record that this plaintiff was terminated by the employer for the purpose of replacing him in any function with a younger man who would do the same work at less cost. 43

The court’s decision permits precisely the result that it describes as “unlawful and worse”—the replacement of an older worker with a younger, less expensive counterpart whose performance is no better. A $21,000 per year employee whose sales reach $15,000 is to be terminated; a $19,000 per year replacement whose sales are identical is to be retained. The Donnelly court approved that practice, with language indicating that such a result violated the ADEA.

The courts have never clearly defined the legality of practices that make nondiscriminatory economic sense on an individual level, but that operate to the disadvantage of older workers as a group. Seniority is expected to bring higher wages for reasons of loyalty, fidelity, morality, and morale—factors that are incapable of objective transformation into dollar equivalents. Whether the ADEA intended to create a new social contract in consideration of those factors is uncertain.

It is clear that the issue is resolved each time the courts accept an employer’s articulation of nondiscriminatory conduct. When the articulation is not accepted, a judgment for the plaintiff should be entered. No further proof of pretext is required when the employer’s stated rationale is itself found to be discriminatory.

43. Id. at 7639.
Proof of Pretext

With few exceptions, it is not difficult to rebut a prima facie case. The most common explanations—the employee was not performing well; the employee’s position was eliminated; the applicant did not possess the qualifications for the job; a personality conflict existed—will suffice. Once an acceptable explanation is made, the burden of producing evidence returns to the plaintiff who must then prove that the stated reason is a pretext or a coverup for some other motive. This comprises the third and final part of the McDonnell Douglas formulation. Even without direct proof of age bias or age motivation, proof that the articulated reason was a pretext creates an inference that the adverse action was “based on the consideration of impermissible factors.”

Although attacking the objective correctness of the employer’s decision is not a sufficient rebuttal of the defendant’s explanation that there was a legitimate, nondiscriminatory reason for plaintiff’s discharge, evidence that the employer was wrong in its stated reasons for discharge raises the inference of an unlawfully motivated practice. For example, an employee whose position was eliminated cannot obtain a verdict by proving that the employer was wrong in believing that he or she was unproductive; nor can an employee fired for poor performance reach the jury by showing that the employer wrongly evaluated his or her performance. The courts are not willing to act as a “super board of directors,” second-guessing bona fide management decisions. However, it would be probative for the employee whose position was allegedly eliminated to show that, immediately after termination, a new job title was created and that the person filling that position performed identical tasks. Such evidence does not address the objective correctness of the good faith business decisions, but instead raises the inference of an unlawfully motivated practice.

The importance of this distinction was underscored by the Fifth Circuit in Houser v. Sears, Roebuck & Co. After Houser, a

44. 438 U.S. at 577.
45. Unlike Title VII, which allows only “equitable relief,” the ADEA permits both legal and equitable relief and, thus, a jury trial. Compare 29 U.S.C. § 626(b) (1976) with 42 U.S.C. § 2000e-5(g). The right to a jury trial in ADEA actions was determined by the Supreme Court in Lorillard v. Pons, 434 U.S. 575 (1978), and later was codified at 29 U.S.C. § 626(c)(2) (Supp. III 1979).
47. 627 F.2d 756 (5th Cir. 1980).
credit department manager, established his prima facie case, Sears explained that he was fired for applying the early credit payment of one customer to the nearly delinquent account of another, thereby violating Sears's internal procedures. In rebuttal, Houser presented evidence that such "misapplication of funds" was justified and well-intentioned because it actually saved money for Sears. A motion for judgment notwithstanding the verdict was granted to Sears, the district court finding no substantial evidence or inference to permit a finding that the reason proffered by Sears was a pretext for age discrimination. Although the Fifth Circuit noted Houser to be "an extremely able, diligent and hard-working manager" who did save money for Sears by violating its credit manual, it was "unable to find that [plaintiff's] testimony created evidence permitting a reasonable jury inference that the firing of Houser because of his misapplication of funds (however well intentioned) was merely a pretext for his firing." In Kerwood v. Mortgage Bankers Association, the plaintiff, a long-term employee who had been consistently recognized as a brilliant performer in his field had engaged in a dispute with his employer over a change in the employer's business philosophy. The defendant argued that Kerwood's discharge resulted from that conflict. Finding for the employer, the court stated:

The law fully recognizes the employer's business necessity to make its employee judgments free from restraint "especially when a management level job is involved"... provided only that its actions, however couched and shielded, are non-discriminatory... Once the court is satisfied, as here, that the explanation advanced by an employer to justify an employee's dismissal was made in good faith, was not merely put forth as a pretext to shield unlawful age discrimination, and did not violate any statutory stricture, the court cannot substitute its judgment for that of the employer.

Once the defendant has articulated a legitimate nondiscriminatory reason for the employment practice in question, any other proof presented by the plaintiff in support of his or her claim must, of necessity, attempt to demonstrate that the defendant's stated reasons for its action are a mere pretext for unlawful age

48. Id. at 7590.
49. Id.
51. Id. at 1309 (emphasis added in part) (citations omitted).
discrimination. At this stage, the only relevant evidence is that which tends to establish that the explanation being offered for the defendant's actions is a sham. Absent such evidence, appellate courts have affirmed judgments despite evidence that the employer, considering the plaintiff's replacement, stated "we want a younger man this time," or testimony that the defendant's officers stated that "the division's future lay in its young Ph.D.'s."

In determining the truth or pretext of the employer's explanation, statistical evidence is probative. While an employee whose termination is justified on the basis of a "personality conflict" could not prove pretext by testifying, with friends and family, that he or she has an amiable personality, that testimony, coupled with proof that ninety percent of the employees terminated for "personality conflict" were over sixty would be probative rebuttal.

Statistics, however, do not hold the same importance in ADEA cases as they do in a Title VII action. As the court in Laugesen v. Anaconda Co. explained:

The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex, and national origin. Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.

The Laugesen court did not discuss the factor of bias in work force age statistics which limits the probative value of statistics in ADEA cases. In a static work force of 1,000 people, absent any terminations or new hires, the cumulative age of the work force will

52. Simmons v. McGuffey Nursing Home, 619 F.2d 369, 371 (5th Cir. 1980).
53. Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980).
55. 510 F.2d 307 (6th Cir. 1975).
56. Id. at 312-13 n.4.
grow 1,000 years every year. Even if several sixty year old employees were terminated and replaced with twenty year olds, the average age of the work force would grow from one year to the next. Because of its potentially misleading use, statistical evidence is not as reliable in age discrimination cases as it is in cases alleging discrimination based upon immutable characteristics such as race, sex, and national origin.57

Policy considerations also support the greater reliance on statistical evidence in Title VII cases than in ADEA actions. The effects of past bigotry against the classes protected by Title VII are most effectively remedied by providing class relief, and statistical evidence is particularly appropriate in class actions. In contrast, the ADEA is concerned with the protection of the present individual rights of the older employee, rather than providing a remedy for past discrimination. The unique nature of age discrimination was recognized during the congressional debates on the ADEA:

Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in nonemployment because of feelings about a person entirely unrelated to his abilities to do a job. This is hardly a problem for the older job seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.58

The ADEA attempts to counter these assumptions that are made about the effects of age on performance by promoting the employment of older persons59 and by prohibiting the segregation or classification of employees on the basis of age in any detrimental way. The regulations promulgated pursuant to the Act thus limit the available defenses to considerations based upon individual merit rather than group stereotype.60

Employment practices that discriminate on the basis of age are frequently motivated by reasons other than the assumptions that are made about the effect of age on performance, for example, the widespread belief that older workers are more expensive than

younger workers. Indeed, the ADEA's legislative history notes that in apparent recognition of the extra expense to private industry that the ADEA would bring, Congress considered, although it eventually rejected, the idea of presenting tax incentives to employers who hired and retained older employees.

It may well be true that, in some industries, the efficiency of an older, experienced worker does not match his or her expected annual salary raise. In some situations it may be economically advantageous to have a constant influx of young, untrained, inexpensive personnel. Further, pension program costs typically rise faster on a year to year basis for older employees, thus making younger workers potentially more economical. As Congress noted in its initial findings and declarations, however, "certain otherwise desirable practices may work to the disadvantage of older persons." The context of the language implies that although such practices may be otherwise desirable, if they work to the disadvantage of older persons as a class, they are prohibited by the Act despite their economic desirability. Just as Title VII prohibits the alleged "economically desirable" practice of hiring only young female flight attendants on airlines, so, too, the ADEA might prohibit economically justifiable practices that work to the disadvantage of older persons.

**The Bona Fide Occupational Qualification Affirmative Defense**

Age itself can be a bona fide occupational qualification (BFOQ) under the ADEA. As an affirmative defense, the burden

---

64. The Second Circuit discussed this issue in Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980). The plaintiff in Geller argued that the school board's policy of limiting new hires to teachers with five years experience or less, who therefore would be below the sixth step of the salary schedule, had a discriminatory impact on individuals within the class protected by the ADEA. The trial court found that 62% of the teachers younger than 40 were precluded from being hired by that policy, while 93% of those in the protected age group were adversely affected. Id. at 1030. The Second Circuit agreed with the trial court that the "sixth step" policy was discriminatory and violative of the ADEA, despite the stated cost-cutting purpose of the hiring policy. Id. at 1033.
of proving a BFOQ rests on the defendant. In order to meet its burden of proof, the defendant must satisfy a stringent two-pronged test. First, the employer must show that the age related criterion is not only desirable, but is "reasonably necessary" to the essence of the business operation. Second, the employer must demonstrate that it had a factual basis for believing that all or substantially all persons over age forty lack the requisite qualifications or that it is impractical or impossible to determine individually the qualifications of persons over age forty.

In Usery v. Tamiami Trail Tours, Inc. and in Hodgson v. Greyhound Lines, Inc. two bus companies relied upon stated concerns regarding passenger safety and successfully argued that, as a group, older bus drivers were not as safe as younger drivers, especially on out of town routes (where, incidentally, the pay was higher). Presumably, the National Aeronautics and Space Administration could similarly justify the general proposition that all or substantially all persons over age forty lack the stated physical requirements for the position of astronaut trainee. Determining whether age is a BFOQ by inquiring whether all or substantially all persons over age forty lack the requisite qualifications is consistent with the ADEA's purpose in that the qualifications of individual workers over forty are taken into account. Allowing an employer to meet the second prong of the test by proving that it is impractical or impossible to determine individually the qualifications of persons over forty, however, ignores the express purpose of the ADEA: that older workers ought to be evaluated on an individual basis. When there is a mechanism for individual testing, such as physical exams, there seems to be no valid rationale for depriving the older worker of the individual consideration preferred by the ADEA. The preference for individual testing is not eliminated merely because such testing is expensive or time consuming. If it is possible and practical to determine whether a worker possesses the requi-

67. Id. at 236. Instances of disqualifications common to "all or substantially all" persons over 40 are hard to imagine. A possible example, however, would be a Broadway producer casting a child's role. The producer could, of course, lawfully exclude from consideration all job applicants over age 40.
68. 531 F.2d 224 (5th Cir. 1976).
69. 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975).
site qualifications, the BFOQ defense should not permit reliance upon assumptions true for most, but not all, older workers.\textsuperscript{72}

That result was realized in \textit{Houghton v. McDonnell Douglas Corp.},\textsuperscript{73} despite the clearly “safety related” aspects of the job involved—test pilot. The \textit{Houghton} court noted the defendant’s testimony dealing with general age statistics and Houghton’s proof of his own excellent health. The Eighth Circuit found the trial court’s approval of a BFOQ based on such generalities “clearly erroneous” in light of the plaintiff’s specific qualifications, because “medical technology can predict a disabling physical condition in a test pilot with virtually foolproof accuracy.”\textsuperscript{73} In this situation, individual testing rather than reliance upon a per se age limit was required to effectuate the purposes of the ADEA. More precisely, if the qualification \textit{can} be practically determined on an individual basis, there is no bona fide reason to resort to assumptions about older workers unless the assumption is universally true.

The BFOQ issue, like the balance of the ADEA, must be interpreted in light of the Act’s basic purpose of promoting individual consideration over assumptions about older workers as a group. The courts have consistently relied upon the underlying purposes of the ADEA in construing its procedural and entitlement provisions, tailoring them to the ADEA’s stated purpose of conciliation, rather than litigation, of disputes.\textsuperscript{74}

\textsuperscript{71} The legislative history of the 1978 amendments to the ADEA supports the argument that the second prong of the BFOQ test requires a showing of \textit{both} elements. The Senate Report noted that “there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employee’s capacity or ability to perform the jobs safely and efficiently.” S. Rep. No. 55-493, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 504, 513-14 (emphasis added). A specified age, the Senate Committee noted, could be a lawful reason for mandatory retirement “where these two conditions are satisfied” in connection with a BFOQ. The Senate Bill contained language to clarify that point, but it was deleted in committee: “The [House and Senate] conferees agree that the amendment neither added to nor worked any change upon present law.” \textit{Id.} at 529. Both conditions, therefore, must be met to establish the BFOQ affirmative defense.

\textsuperscript{72} 553 F.2d 661 (8th Cir. 1977).

\textsuperscript{73} \textit{Id.} at 664.

\textsuperscript{74} \textit{See, e.g.}, Slatin v. Stanford Research Ins., 590 F.2d 1292 (4th Cir. 1979) (discussing the nonavailability of pain and suffering damages under § 626(b)); Reich v. Dow Badische Co., 575 F.2d 363, 368 (2d Cir. 1978) (interpreting the ADEA’s notice requirements). Both \textit{Slatin} and \textit{Reich} followed the cases that relied on congressional intent to interpret these provisions to promote conciliation efforts.
Tailoring the McDonnell Douglas Formula to ADEA Actions

The ADEA is aimed at eliminating arbitrary classification of older workers and attempts to ensure that the individual abilities of older workers and applicants are considered in employment decisions. It recognizes the social problem of a growing number of older workers unable to keep jobs or to find new jobs and seeks to eliminate certain otherwise desirable practices that work to the disadvantage of older persons.

At the same time, "Congress did not intend that every employer who discharges a person in the protected age group should automatically find himself at the other end of an age discrimination charge." If action is taken for good cause or on the basis of a reasonable factor other than age, applied equally to employees of all ages, without any characterization or segregation coming into play, the ADEA is not violated. But if the discrimination addressed by the ADEA is less vehement than that prohibited by Title VII, it is also more subtle. Only thirteen years have elapsed since the ADEA was enacted and stereotypes surrounding the performance of the older worker are far from eradicated. Nor is it unheard of for management to believe that "young labor works cheap" and that "cheap labor is good."

Age discrimination thus may prove more difficult to eradicate than racial or religious discrimination. Once racial bigotry is recognized, its arbitrary nature becomes readily apparent; no one will argue credibly that one race is inherently more capable than another. On the other hand, age discrimination is based upon assumptions about the capabilities of older workers that are more conducive to rational argument. These assumptions, born of a lifetime of social training, are much harder to alter.

For this reason, the issues of ADEA proof are more complex. Racial bigotry exists wholly apart from the question of job related qualifications; employers discriminate against blacks because of feelings about blacks as people, not as workers. In contrast, employers discriminate against older workers on the basis of presumptions about age as it relates to performance. As a consequence of this distinction, the McDonnell Douglas formula needs to be modified when applied to ADEA cases.

When an employer discriminates because of dislike for blacks, Jews, or Asians, the employer generally must fabricate an independent rationale for the adverse job action. In that context, the issue of pretext is appropriately the paramount issue of proof. In contrast, an employer's subjective impression that an older worker is not innovative, aggressive, or learning fast enough may well be a good faith, nonpretextual, honest opinion. Nonetheless, it may be grounded upon the employer's subconscious stereotypes regarding older workers, rather than upon objective considerations. Under the McDonnell Douglas formula, judgment in favor of the employer would be required. Such a result, however, ignores the congressional finding that erroneous assumptions about older workers—good faith notwithstanding—are the fundamental cause of age discrimination. The focus that the McDonnell Douglas Court placed upon pretext in a Title VII action fails to address the very problem identified by Congress in enacting the ADEA.

More importantly, the courts must resolve the tension created by the Act between the incremental economic advantage to the employer and the job security of the older worker. There are several traditional, facially neutral management practices that discriminate against older workers. Furthermore, the termination of older workers generally is of economic benefit to the employer. Either the courts or Congress must clarify whether the ADEA is meant to protect older workers from the results of these factors.  

76. One common employer rationale, which has a sound basis in good faith management philosophy, is the desire to maintain a continuity in its work force, avoiding the prospect of all key employees in a particular area of responsibility retiring simultaneously. In order to justify such a practice, factual support for the proposition that such a practice does serve to maintain continuity in the work force must be presented by the employer. To argue that a 50 year old employee (who would reach mandatory retirement age in 20 years) is a less qualified candidate for management training than a younger counterpart with a longer working life ignores the factors of employee mobility and turnover. It may well be the case that the 50 year old employee has a better statistical probability of staying with the same company than does a 35 year old counterpart.

Further, the 1978 amendments to the ADEA recognized this problem and severely limited its applicability in the added § 631(c)(1). While raising coverage of the protected class from 65 years to 70 years, the Senate Committee recognized concerns over the impact of that change "on the ability of employers to assure promotional opportunities for younger workers." S. Rsp. No. 95-493, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 504, 510. Although the concern was phrased in terms of the benefits it provides for younger workers, the employer's rationale is obvious: continuity of operation requires the promotion of younger workers into key positions.

The exemption authorized in recognition of that concern is strictly limited to mandatory retirement of employees between 65 and 70 years of age, who have been in bona
For example, one facially neutral evaluation practice involves ranking an entire work force according to performance relative to the length of time in a position. Under such a system, if three equally skilled employees have five, ten, and twenty years experience respectively, the twenty year incumbent, most likely the oldest and highest paid of the three, will be ranked lowest. Thus, in a termination situation, that person would lose his or her position as a result of what appears to be an objective practice. As yet, the issue of whether the ADEA's policy affords a valid basis for terminating the older worker in a situation of this type has not been judicially resolved. The question raised by this inquiry is whether Congress intended to prohibit discrimination against older workers even though such discrimination served the employer's objective, business-related economic interests. In the "customer preference" cases brought under Title VII, the court favored the social purpose of the Act over the economic gain of the employer. The ADEA's purpose arguably requires the same result. The McDonnell Douglas formulation provides no guidance for the jury on that issue.

The McDonnell Douglas formula further does not assist in drawing the fine line between BFOQ cases, in which the employer bears the burden of proving the affirmative defense, from those cases in which age-based policies are denied by the defendant. When, for example, an employer denies that a categorization discriminates on the basis of age, and alternatively argues that the categorization is reasonably necessary to its business operation, even if discriminatory, the defendant would bear the burden of proving the affirmative defense. No jury can be expected to distinguish those issues without explicit direction from the courts.

fide executive or high policymaking positions for the preceding two years, and whose immediate, nonforfeitable annual compensation (from any combination of defined compensation, pension or profit sharing) is at least $27,000, adjusted for inflation. 29 U.S.C. § 631(c)(1) (Supp. III. 1979). The precision with which that exemption was drafted indicates that the termination of an employee who does not meet all three requirements cannot be justified by management's desire to maintain a continual flow of younger workers into its business. S. Rep. No. 95-493, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 504, 530.

Congress plainly was balancing the needs of employers and older employees, and made the policy judgment that only in specific, high-ranking positions is continuity essential. Assumptions about prospective retirement cannot be part of the decisionmaking process until an employee is at least 65 years old, and unless an employee is assured a certain annual salary for life, his or her employment needs outweigh the needs of the employer.

One final limitation, as several cases have noted, is that the *McDonnell Douglas* formulation was created for the judge-tried proceeding provided by Title VII. Most of the formula is irrelevant or, worse, confusing to a jury. It can distract a jury in the usual case in which the proof of discrimination with which the jury must be concerned is tangential to the *McDonnell Douglas* debate, which is directed at lawyers and judges. Indeed, the *McDonnell Douglas* test is not a three step “judicial minuet” observable by the jury. Yet the extensive *McDonnell Douglas* instruction focuses the jury’s attention upon prima facie elements, articulations, and proof of pretext, which loom in importance while the judge speaks. As a result, the basic question of age as a “but for” factor may be forgotten.

To prevent these problems, the jury instructions should include the following questions:

Has the plaintiff presented any affirmative evidence to show the job practice that harmed him or her was arbitrary and lacking in any legitimate business reason, or openly based upon age?

Was the defendant’s explanation of its conduct based upon a legitimate business-related reason?

Has the plaintiff proven that reason to be based upon stereotypes or categorizations that discriminate against older workers or has the plaintiff proven that the stated reason is a pretext, or coverup, for another reason?

When dealing with a *McDonnell Douglas* formula instruction, the court should refrain from referring to the prima facie case and shifting burdens between the parties. Once a case is submitted to the jury, the prima facie showing has no significance; it has served its purpose in avoiding a Rule 41(b) dismissal and is now sub-

---

78. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003 at 1016 (1st Cir. 1979); Laugesen v. Anaconda Co., 510 F.2d 307 at 312 (6th Cir. 1975).

79. Sime v. Board of Trustees, 526 F.2d 1112, 1114 (9th Cir. 1975). Sime’s prima facie showing included testimony of defendant’s officials, who explained during Sime’s case in chief the reasons for the discharge. When she rested without presenting proof of pretext, her case was dismissed. The Ninth Circuit rejected Sime’s claim that she was entitled to an opportunity to reopen her case for rebuttal by the terms of the *McDonnell Douglas* formula, noting that where the defendant presents its articulation during plaintiff’s case, it must be met before resting. Id. Thus, as demonstrated in *Sime*, the “shifting” burden is not a formal step observable to a jury.

80. These questions are not intended to supplant, but rather to supplement, the pattern instructions dealing with subjects such as proximate causation and credibility of witnesses, or the most important, basic instruction dealing with the ultimate burden upon the plaintiff—proof that age was a determining, “but for” factor in the job practice at issue.

81. Fed. R. Civ. P. 41(b) provides in part: “After the plaintiff, in an action tried by
sumed within a larger question—was age the "but for" factor in the adverse job action. Similarly, the burden of articulation that shifts to the employer will have been met by the time the issue reaches the jury. Thus, there is no reason to instruct the jury regarding any shifting burden.

Several modifications are appropriate, then, to convert the McDonnell Douglas formulation into an ADEA jury charge. The instruction should retain the concept that any affirmative inference of arbitrary employer action requires an explanation by the employer, and that a plaintiff's proof that the explanation is a pretext can support a jury inference of age-motivated action. But the instructions should better focus the inquiry into employment practices that are facially neutral, nonpretextual, and business-related, yet statistically detrimental to older workers including the plaintiff. Whether economic advantage short of "business necessity" is a permissible rationale for employee categorization affecting older workers should be determined and included in the instructions. Finally, courts must delete references to the technical, procedural aspects of McDonnell Douglas in their jury instructions, allowing proper emphasis upon the question of age as a determinative factor in the adverse job action.

One overriding caveat, recognized by most ADEA trial practitioners, is important to note. Despite clear instructions that the ADEA is concerned only with age discrimination, and not with any other conduct, however arbitrary, unfair or capricious the conduct may be, juries show a sympathy to ADEA plaintiffs that is not as likely to be present in Title VII cases tried to the court. Thus, the feeling that long-term employees deserve more favorable treatment than others or that employers are required to provide due process protections to employees prior to termination, concepts having no basis in the Act, becomes a pragmatic jury truth.

In this vein, a California appellate court recently concluded that seniority creates an expectation of continued employment that outweighs the common law doctrine of "termination at will."82

---

To the extent that decision is followed, it affords protection far beyond the ADEA's limits, providing a concept as novel as Title VII itself. Should that policy be adopted, it would relegate the common law "termination at will" doctrine to the realm of an exception, rather than a rule.

Conclusion

The *McDonnell Douglas* formula is a useful tool for the purposes for which it was designed: affording the plaintiff his or her day in court despite the unavailability of direct proof of discrimination or other circumstantial evidence. The analytical framework is useful to the court and counsel during the course of trial, and its logical concepts are a useful guide to the jury.

The formula becomes counterproductive only when it is forced to cover a case wholly outside of its intended area of application, or when proof of its elements is mistranslated into the inflexible equivalent of proof of age discrimination. Moreover, it does not address the most contested issue in age discrimination litigation: an employer's explanation of a job-related cause that is an honest, good faith, nonpretextual one, but is based upon a subjective age stereotype, or job practices whose impact discriminates against long-term employees. To create a satisfactory paradigm of ADEA proof directed to the jury rather than the court, and addressed to erroneous assumptions about the impact of age on performance, a refinement of the *McDonnell Douglas* test in ADEA actions is required.

---

Though the "termination at will" doctrine of Cal. Lab. Code § 2922 (West 1971) was discussed, the *Cleary* court held that 18 years of service created an implied in law covenant that made the statute inapplicable. *Id.* at 455, 168 Cal. Rptr. at 729.