Age Discrimination in Employment and the Permissibility of Occupation Age Restrictions

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By Marc Rosenblum*

Prior to the passage of the Age Discrimination in Employment Act Amendments of 1978 (Amendments) a substantial number of age discrimination complaints were dismissed because of procedural deficiencies. The high dismissal rate, estimated at up to one half of all private suits, led several commentators to conclude that the narrow judicial interpretation of Age Discrimination in Employment Act (Act or ADEA) procedures was inconsistent with and contrary to the remedial nature of the Act.

The 1978 Amendments contain both procedural and substantive provisions. The substantive provisions alter the scope of the Act's coverage, modifying the age requirement and the types of employment covered by the Act. The procedural provisions affect

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5. The substantive amendments are as follows: (1) Involuntary retirement of persons below age 70 is prohibited under the terms of any seniority system or employee benefit plan. 29 U.S.C. §§ 623(f)(2), 631(a) (Supp. III 1979). A limited exception to this provision covered certain collective bargaining agreements in effect on September 1, 1977. This exception expired on January 1, 1980. (2) Statutory coverage is extended to persons between the ages of 40 and 70, rather than to persons below age 65. Id. § 631(a). Several exceptions to this change in age limits are included. Compulsory retirement of persons who, for the two-year
period immediately preceding retirement, held positions as key business executives or policymakers is permitted at age 65 where such persons are entitled to a pension of at least $27,000 per year. Id. § 631(c)(1). Tenured faculty at colleges and universities are not covered beyond age 65 until July 1, 1982. Id. § 631(d) (repealing provision set forth in Pub. L. No. 95-256, § 3(b)(3), 92 Stat. 189, 190 (1978)). (2) Federal government employees are covered at age 40 with no upper age limit. Id. §§ 631(b), 633a(a). Previously, such employees were subject to retirement at age 70. Id. § 633a(a) (1978). Thus, within the limits described above, § 4 of the ADEA, id. § 623(a)-(e), defines unlawful practices covering employers, employment agencies, labor organizations, retaliation against complaints by any or all of the aforementioned groups, and advertisements specifying preferences or limits based on age.

Section 4(f) also includes a provision defining the Act's exemptions: "It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section 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, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or (3) to discharge or otherwise discipline an individual for good cause." Id. § 623(f), as amended by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189.

Subsections 4(f)(1), (3) were left intact while subsection 4(f)(2) was amended, as noted under the first substantive provision listed above. Section 4(f)(1) was not amended, following an agreement by the Senate to drop its proposed change, which would have made it lawful to impose mandatory retirement on an employee at an age less than 65 where the employer demonstrates that age is a bona fide occupational qualification (BFOQ), when members of the House Conference Committee failed to approve such an amendment. The Conference Report states: "The conferees agree that the amendment neither added to nor worked any change upon present law." See H.R. REP. No. 950, 95th Cong., 2d Sess. 7 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 528-29.

Under the Senate proposal to amend § 4(f)(1), the subsection would have read as follows: "It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section, including the establishment of a mandatory retirement age less than the maximum age specified in section 12 of this Act, where age is a bona fide occupational qualification (BFOQ), when members of the House Conference Committee failed to approve such an amendment. The Conference Report states: "The conferees agree that the amendment neither added to nor worked any change upon present law." See H.R. REP. No. 950, 95th Cong., 2d Sess. 7 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 528-29.

In explaining the principal provisions of its version, the Senate Report, discussing § 4(f)(1), stated: "The committee intends to make clear that under this legislation an employer would not be required to retain anyone who is not qualified to perform a particular job. For example, in certain types of particularly arduous law enforcement activity, 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 employees' capacity or ability to continue to perform the jobs safely and efficiently. Accordingly, the committee adopted an amendment to make it clear that where these
ways: first, to the extent that experience influences peers, fewer older workers will regard as futile legal action against employment discrimination if they see others prevailing in such actions; second, more employers will be forced to consider the consequences of and the potential liability for their employment practices if complaints lead to substantive litigation.

Although the impact of the Amendments has been minimal in terms of increasing the percentage of older workers in the work force, extrinsic factors, such as voluntary retirement and withdrawal from the work force because of illness and disability, oper-

two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age. The committee also expressed its concern that litigation should not be the sole means of determining the validity of a bona fide occupational qualification. Although the Secretary is presently empowered to issue advisory opinions on the applicability of BFOQ exception. [sic] The committee recommended that the Secretary examine the feasibility of issuing guidelines to aid employers in determining the applicability of section 4(f)(1) to their particular situations." Id. at 10-11.

Commenting on the Senate's proposed amendment of § 4(f)(1), Senator Javits indicated that the "clarifying language was approved which permits the establishment of a designated retirement age less than age 70 where age has been shown to be an important indicator of job performance." Id. at 32.

Although the Senate's proposed amendment to § 4(f)(1) was deleted by the Conference Committee, it is nonetheless pertinent because a determination of which employer practices are specifically permitted under § 4(f)(1) is fundamental to current and future interpretation of the statute.

The scope of § 4(f)(1) has not yet been fully clarified by the federal courts of appeals. Unfortunately, the Supreme Court has declined to review the BFOQ question when it was raised by litigating parties. See, e.g., Houghton v. McDonnell Douglas Corp., 553 F.2d 581 (8th Cir.), cert. denied, 434 U.S. 966 (1977); Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975).

6. The Amendments changed the Act's procedural provisions in a number of areas: (1) a jury trial is now authorized on any issue of fact, 29 U.S.C. § 626(c) (Supp. III 1979); (2) a complainant, rather than filing a notice to sue, now files a charge alleging unlawful discrimination with the Equal Employment Opportunity Commission (EEOC), 29 U.S.C. § 626(d) (Supp. III 1978) (enforcement of this section of the ADEA was transferred from the Secretary of Labor to the EEOC effective Jan. 1, 1979. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978 Compilation), reprinted in 5 U.S.C. app., at 354 (Supp. III 1979) and in 92 Stat. 3781 (1978)); (3) the statute of limitations is now tolled for up to one year while the EEOC attempts conciliation. 29 U.S.C. § 626(e) (Supp. III 1979). Previously, the lawsuit had to be initiated within two years of the alleged discriminatory act.

7. The Act's overall present impact, and the extent to which age discrimination in employment has lessened as a result, is beyond the scope of this Article. Such a review would require a comparison of all persons whose employment experience under statutory protection differed from what it otherwise would have been, and the development of some means of distinguishing such an impact on a section by section basis.

ate to make such a measurement an unreliable indication of the impact of the Amendments. The influence on the decisionmaking processes of ADEA-protected workers and ADEA-covered employers resulting from the Amendments suggests that the Amendments have had at least some impact on the job status of incumbent older workers.

This Article reviews the problem of age discrimination in employment, particularly the effectiveness of the ADEA in reducing the incidence of age discrimination. The Article first analyzes the major statutory exceptions to the ADEA, emphasizing judicial interpretation of the bona fide occupational qualification with reference to police, firefighters, and airline pilots. The Article next discusses the standard of review for age discrimination claims brought under the federal constitution that, in conjunction with the ADEA, provide the framework of permissible employment practices affecting older workers on the basis of age. The Article concludes that the dual statutory and constitutional protection afforded to individuals claiming age discrimination is largely illusory because of the scope of the exemptions under the ADEA and the lenient standard of judicial review accorded to age-based classifications under equal protection analysis.

Statutory Exemptions under Section 4(f)

Section 4(f) of the Act sets forth exemptions to the provisions

9. This is true particularly among those 65 years and older, whose labor force participation declined from 16.0% in 1975 to 15.2% in 1979. The Department of Labor projects the acceleration of this trend, reflecting declines in absolute numbers as well as in the proportion of workers age 65 and older in the labor force, to 10.3% in 1985 and 9.3% in 1990 in an intermediate growth scenario, and to 7.9% and 6.4%, respectively, in a low growth scenario. U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT, Tables E-1, E-2 (1980); 28 U.S. DEP'T OF LABOR, BUREAU OF STATISTICS, EMPLOYMENT & EARNINGS, Table 3 (Jan., 1981).

10. This impact, however, will not be of equal benefit to all ADEA-protected workers. The emphasis of the Amendments is on the retention and delayed retirement of currently employed workers. Older workers seeking employment gain little substantive protection from the Amendments.

It is difficult to measure the effect of changed retirement age limits apart from other factors, especially prospective sources and levels of retirement income, that influence voluntary retirement decisions. Nonetheless, a recent report issued by the Urban Institute in Washington, D.C. estimated that, by the mid-1980's, 335,000 more workers aged 62-69 will remain in the labor force than would have done so in the absence of the Amendments. Wertheimer & Zedlewski, The Direct Effects of Mandatory Retirement Age Limits on Older Workers (1980).
of the ADEA.\textsuperscript{11} The exemptions allow an employer to take other-
wise prohibited action when age is a bona fide occupational qualifi-
cation (BFOQ),\textsuperscript{12} when the action is based on reasonable factors
other than age (RFOA),\textsuperscript{13} or for good cause.\textsuperscript{14}

The Good Cause Defense

Although section 4(f)(3) of the ADEA permits discharge or
discipline for good cause, until recently relatively few cases have
attempted to provide a definition of “good cause.”\textsuperscript{15} One recent ap-
pellate decision, however, suggests that the “good cause” defense
may be increasingly used in age discrimination litigation because
of the vagueness of the standards for good cause. In Harpring v.
Continental Oil Co.,\textsuperscript{16} the Fifth Circuit modified the McDonnell
Douglas\textsuperscript{17} test on the order and burden of proof in age discrimina-

\begin{itemize}
\item[11.] See note 5 supra.
\item[12.] 29 U.S.C. § 623(f)(1) (1976), as amended by Age Discrimination in Employment
\item[13.] Id.
\item[14.] Id. § 623(f)(3).
\item[15.] See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003, 1008 (1st Cir. 1979) (involuntary
termination, poor performance, subsection not cited); Cova v. Coca Cola Bottling Co., 574
F.2d 958 (8th Cir. 1978) (reasons for affirming trial court detailed, subsection cited but not
defined); Marshall v. Roberts Dairy Co., 572 F.2d 1271 (8th Cir. 1978) (medical reasons,
ineffectiveness); Anderson v. Viking Pump Div., Houdaille Indus., Inc., 545 F.2d 1127 (8th
215 (Iowa 1979) (good cause must relate to some specific personal fault, not merely a per-
son’s age, under similar section of state statute).
\item[16.] 628 F.2d 406 (5th Cir. 1980).
\item[17.] In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court held that a
prima facie case of racial discrimination is made by a showing that the plaintiff (1) belongs
to a group protected by the statute, (2) applied and was qualified for a job the employer was
seeking to fill, (3) was not hired, and (4) the employer continued to seek applicants with
similar qualifications. Id. at 802. In age discrimination cases, this has been interpreted to
require a showing that the plaintiff (1) belongs to the statutorily protected age group, (2)
was qualified for his or her position, (3) was discharged by the employer, and (4) was re-
placed by someone not in the protected group. Price v. Maryland Cas. Co., 561 F.2d 609, 612
But see Sahadi v. Reynolds Chem., 636 F.2d 1116 (6th Cir. 1980) (per curiam). The court in
Sahadi did not require the fourth element of proof, holding that a prima facie case was not
established by a showing of discharge and replacement by a younger worker (albeit one also
in the protected class) where the economic factor of retrenchment during a recession was
stated “good cause.” This may be interpreted as good cause although § 4(f)(3) was not spe-
cifically invoked. The court reasoned that a finding for the plaintiff would mean that every
terminated employee above age 40 would then be able to establish a prima facie case and
create a burden of rebuttal on the employer. Id. at 1118.
\end{itemize}
tion cases, holding that "[o]nce the prima facie case is made out, the employer then has the burden to produce evidence tending to show that the employee was discharged for a legitimate, nondiscriminatory reason such as good cause."18

In a Title VII case, the Supreme Court recently clarified the nature and extent of the employer's burden. The employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection."19 This burden, however, is one of production rather than of persuasion; the burden of persuasion remains on the plaintiff.20 In Harpring, the court noted that "[t]he employer does not have to show the legitimate reason for the discharge by a preponderance of the evidence, rather he merely has to come forward with relevant evidence to satisfy his burden of production."21 An employer thus may meet its burden merely by showing that the employee was discharged for good cause.22

As indicated in Harpring, moreover, an employee's prima facie case is easily rebutted, though the employee still has an opportunity to show that the employer's rebuttal is pretextual. This opportunity is slight, however, because most individual terminations for cause are based on subjective assessments of performance adequacy.23 Thus, the use of the "good cause" defense under section 4(f)(3) is likely to increase as its broad nature and its compatibility with the burden of proof become better understood.

The BFOQ Defense

Employers have principally relied upon the defenses set out in section 4(f)(1)24 to defend alleged discriminatory practices. Of the two defenses within that section, the BFOQ defense is more popular than the RFOA defense. This preference is due in part to the judicial application of BFOQ standards under Title VII of the Civil

18. 628 F.2d at 408.
21. 628 F.2d at 408-09.
22. Id.
23. See id. at 407. "The witnesses for Conoco testified that Harpring's age had nothing to do with Conoco's dissatisfaction and ultimate discharge of Harpring." Id.
Rights Act\textsuperscript{25} to age discrimination cases.\textsuperscript{26} The BFOQ defense also is preferred because it allows the employer to set a specific age limit and to exclude all persons beyond that age even though some of those persons might otherwise be able to demonstrate an ability to perform the jobs in question.

An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty. Establishment of a BFOQ relating to age justifies an employer's violation of the heart of the ADEA, allowing him to apply a general exclusionary rule to otherwise statutorily protected individuals solely on the basis of class membership. The good cause and differentiating factor exemptions, on the other hand, are denials of the plaintiff's prima facie case.\textsuperscript{27}

To establish the BFOQ defense, the employer must show that its use of an age limit otherwise unlawful under the statute is based on a reasonable and factual belief that all or substantially all of the persons in that type of work would be unable to perform the job safely and efficiently after a certain age, and that the essence of the business would be undermined without this age limit.\textsuperscript{28} If the employer cannot meet this burden, it may justify its use of an age limit otherwise unlawful under the statute by demonstrating that it is "impossible or highly impractical" to measure and predict job performance for each individual.\textsuperscript{29}

The RFOA Defense

While the BFOQ defense is an affirmative defense, the RFOA

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\item \textsuperscript{25} 42 U.S.C. § 2000e-2(e) (1976).
\item \textsuperscript{26} See Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (citing Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) and Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.). cert. denied, 404 U.S. 950 (1971)).
\item \textsuperscript{27} Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591 (5th Cir. 1978).
\item \textsuperscript{28} See Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-36 (5th Cir. 1976).
\item \textsuperscript{29} Id. at 235 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n.5 (5th Cir. 1969)). The Usery court applied these standards, thereby augmenting the test articulated in Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), that there be a "rational basis in fact to believe . . . [that there was an] increase [in] the likelihood of risk of harm from continued employment of the individual." Under such a test the employer "need only demonstrate . . . a minimal increase in risk of harm." Id.
\end{enumerate}

In reaching its conclusion that public safety was an important factor in determining that the bus driver hiring age was a BFOQ, the court of appeals in Greyhound relied upon Spurlock v. United Air Lines, 475 F.2d 216 (10th Cir. 1972), in which United's requirement for employment as a flight officer was upheld as a BFOQ despite adverse impact against blacks as a class. 499 F.2d at 863.
defense is an employer's rebuttal to an employee's proof that age influenced an employment decision. The RFOA defense has been asserted successfully when adverse economic conditions affected an entire company and when company reorganization required reassigning personnel. Moreover, employers have successfully asserted RFOA defenses when they terminated older employees who failed to meet assigned, objectively measured levels of performance or economic output.

Combining Defenses

The RFOA defense and the good cause defense have been combined in several cases. This combination suggests that when factors other than age affect an individual employee's status, the RFOA defense is in itself a sufficient explanation. Consequently, the RFOA defense is both bolstered and augmented by good cause when an older employee, discharged because of unsatisfactory performance, raises allegations of illegal treatment beyond the RFOA. In some instances, reasonable factors other than age verge on or merge with good cause. Either way, the employer is denying the allegation of impermissible discriminatory practices.

If the employer satisfies the explanatory burden of the RFOA or good cause defenses, the employee still has an opportunity to persuade the court that the employer's stated reasons are actually

33. The interchangeability of the RFOA and good cause defenses in such situations is illustrated in Price v. Maryland Cas. Co., 391 F. Supp. 613 (S.D. Miss. 1975), aff’d, 561 F.2d 609 (5th Cir. 1977), where the trial court cited § 4(f)(3) and discussed good cause, while the court of appeals referred to the same section but based its ruling on the RFOA defense.
The employee's opportunity to rebut the employer's defense reflects a recognition that the RFOA defense permits employers to portray a wide range of practices as "reasonable" which may not be reasonable. The merging of the RFOA and good cause defenses must be distinguished, however, from employers' attempts to advance simultaneously both RFOA and BFOQ exceptions under section 4(f)(1). This combination of an affirmative defense and a denial is rarely asserted. As the district court commented in Marshall v. Goodyear Tire & Rubber Co., "[a] defense based on age will not entitle the defendant to claim an exception under 4(f)(1) for differentiation based on reasonable factors other than age. The defendant has intermixed its RFOA and BFOQ defenses."

### Police Officer, Firefighter, and Airline Pilot Cases

ADEA litigation involving age as a BFOQ in both hiring and mandatory retirement has focused primarily on three occupations: police officers, firefighters, and airline pilots. In all three occupations, the limits imposed for hiring generally fall below the ADEA lower limit of age forty. Mandatory retirement specifications vary for police officers and firefighters, while commercial airline pilots are forced to vacate the cockpit by the Federal Aviation Agency (FAA) "Age 60 Rule." Recent and pending cases involving these

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38. Id. at 8049 (emphasis in original).


40. Complete data on the age limits of state and local government employees is not available, but recent studies indicate compulsory retirement for police generally ranges between 50 and 55 years of age. Hiring limits are as low as 32, not generally above 40, and average about 34. FLYNN & SILVER, POLICE SELECTION MAXIMUM AGE STANDARDS: A REVIEW (1980).

41. 14 C.F.R. § 121.383(c) (1980).

42. A number of recent actions involving police and firefighters were resolved prior to trial. E.g., EEOC v. City of Virginia Beach, No. 79-557 (E.D. Va. 1980) (consent decree entered) (police hiring); EEOC v. County of Alameda, No. 79-1230 (N.D. Cal. 1980) (consent
occupations could determine whether the BFOQ exception and mandatory retirement ages will remain in widespread use.

A few decisions distinguish the rigors of actual firefighting from the responsibilities of supervising the work of other persons. In Aaron v. Davis,43 a district fire chief and his assistant successfully challenged mandatory retirement at age sixty-two despite the defense’s argument of “risk of harm to the public or to other firemen.” 44 Similarly, in EEOC v. City of St. Paul,45 an age sixty-five BFOQ was upheld for firefighters and captains, but not for fire chiefs. The St. Paul court stated:

[S]usceptibility to heart attack and possession of the muscle strength and endurance required by District Chiefs may be ascertained with greater accuracy by individual testing. . . . [T]he endurance required of Captains and Firefighters—who must perform strenuous tasks for several hours near extreme heat—cannot be satisfactorily determined by individual testing. For Captains and Firefighters it is reasonably necessary to rely on age as an indicator of inability to perform adequately.46

In contrast, the Seventh Circuit in EEOC v. City of Janesville47 ruled that an age fifty-five retirement limit could be applied to all police officers, including the chief. The decision in Janesville rested on statutory construction of the language in section 4(f)(1) that provides: “age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”48 The court defined the particular business involved as the entire police department, not as just the occupation of chief. Thus, the court did not reach the issue of whether retirement at age fifty-

44. Id. at 461.
46. Id. at 1146.
47. 630 F.2d 1254 (7th Cir. 1980), rev'g 480 F. Supp. 1375 (W.D. Wisc. 1979).
five is more or less rational for a chief than for subordinates. The Seventh Circuit's broad definition of the "particular business" involved in Janesville seems to thwart the ADEA's remedial purposes; by defining "business" in the aggregate, discrimination against specific classes of workers may be masked.

Another important aspect of the Janesville decision is the factual basis of the claimed exemption under section 4(f)(1). In Janesville, the City relied on the Wisconsin statute governing retirement of protective workers. In relying on the state statute, the City deferred to a valid legislative act; however, it failed to consider any empirical findings on the relationship between age and the job performance of police chiefs in Wisconsin.

Few other reported cases shed light on the proper standards to be applied in determining the validity of a BFOQ defense. In Arritt v. Grisell, the trial court granted summary judgment upholding an age thirty-five hiring limit on the basis of the police chief's affidavit that the job required "driving at high speeds, shooting weapons with great accuracy, [and] apprehension of criminals by force." The Fourth Circuit reversed in order to provide the plaintiffs with an opportunity to rebut the affidavit and introduce their own evidence. Similarly, in Beck v. Borough of Manheim the Court emphasized the need for stamina, the use of force, and the absence of backup officers in emergencies as justifying an age sixty BFOQ; thus, mandatory retirement at sixty for police officers was upheld. In Rodriguez v. Taylor, the City of Philadelphia had refused to permit a forty-one year old candidate to apply for a po-

49. The court distinguished the case from its ruling in Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), noting that there "a BFOQ defense was asserted to justify the mandatory age-based retirement of a generic class of employees," but was not applied to the entire business. 630 F.2d at 1258.

In Hodgson, the carrier met the burden of proving that elimination of a maximum hiring age of 35 for bus drivers would increase the likelihood of harm to passengers.

50. The statute involved was the Wisconsin Public Employees Retirement Act, Wis. Stat. Ann. § 66.906 (1965), permitting the forced retirement of protective service employees at age 55. Id. at 1258.

51. In that sense, Janesville is a direct descendant of Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam), which upheld a state law requiring uniformed police officers to retire at age 50.


53. Id. at 802.

54. 567 F.2d 1287 (4th Cir. 1977).


sition as a museum guard. Because the City failed to establish that age forty was a BFOQ for such positions, it was found to have violated the ADEA.\(^7\)

The occupation of airline pilot also has been the subject of litigation involving the validity of age as a BFOQ. The BFOQ exemption is based on the factual premise that determining fitness on an individual basis is impossible or impractical.\(^8\) The principal dispute thus centers on: (1) the degree to which recent advancements in medical science make it possible to predict accurately the occurrence of disabling conditions that incapacitate pilots in flight; and (2) whether a pilot beyond age sixty can safely and efficiently perform his or her job.

More than twenty years ago, the FAA determined that reliable individual testing was not feasible for commercial airlines.\(^9\) Recently, Congress held extensive hearings and ordered a review of the continued propriety of the “Age 60 Rule” by the National Institutes of Health.\(^60\) The study, conducted for the National Institutes of Health by the Institute of Medicine of the National Academy of Sciences, concluded that although some increased risk of cardiovascular failure or stroke was associated with age, there was no evidence to identify age sixty as a medically prudent retirement age.\(^61\) Although considerable support for modifying the age limit has been demonstrated, a proposed amendment of this rule was narrowly defeated in Congress before this study was conducted.\(^62\)

Advances in both medical science and the technology of flight simulation equipment now make it possible to test individually the performance ability of all airline pilot applicants. Thus, it is possible to measure and predict job performance for each individual.\(^63\) It may be impracticable to do so, however, when the cost of screen-

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61. Airline Pilot Age, Health and Performance: Scientific and Medical Considerations, Institute of Medicine, National Academy of Sciences (1981).
63. The court in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), set out the elements for a BFOQ defense, including a showing that it is “impossible or highly impractical” to measure and predict job performance for each individual. See notes 28-29 & accompanying text supra.
ing applicants is balanced against public safety requirements. If the ADEA's remedial purpose is not to be frustrated by setting questionable age limits on the basis of unwarranted generalizations, then a closer relationship between contemporary evidence and the granting of BFOQ exemptions must be required.

Establishment of a maximum hiring age for airplane pilots involves similar issues. The principal reported case, *Murnane v. American Airlines, Inc.*, relies heavily on the "Age 60 Rule." The *Murnane* court held that safety precluded the hiring of a forty-three year old pilot because he would almost have reached the mandatory retirement age before he would have become a captain. The court accepted the defendant's argument that a pilot's related skills and experience as, for example, a military flier, are nontransferable; thus, pilots not trained by American Airlines could not shorten the promotion period by receiving credit for previous experience. "While such experience has some minimal value, the best experience an American Captain can have is flying for American Airlines."

The court's finding of nontransferability of skills could be justified on the basis of the unique safety concerns essential to air transportation. Nontransferability of skills as a general proposition, however, could exclude many persons from employment. It would allow employers to circumvent the purposes of the Act by claiming BFOQ exemptions on the basis of unsupported and stereotyped assertions.


65. Related to the "Age 60 Rule" limitation on pilots is the practice of pilots approaching age sixty to "downbid" and become flight engineers. Flight engineers are not required by the FAA to relinquish their jobs at age sixty as they do not actually fly the airplane. See 14 C.F.R. § 121.383(c) (1980). Consequently, because there is no "Age 60 Rule" for flight engineers, employees in that classification may not be involuntarily retired under terms of a benefit plan in accordance with section 4(f)(2) of the ADEA. See *Criswell v. Western Air Lines, Inc.*, 21 Empl. Prac. Dec. 30,466 (C.D. Cal. 1979).


67. 482 F. Supp. at 144-45. Most major airlines have an "Age 30 Guideline," an informal upper limit beyond which most applicants for flight jobs are not hired. Insofar as the ADEA does not encompass persons below age 40, rejecting applicants in that range solely for age is permitted; a ruling against the pilot age BFOQ would, however, have the practical effect of removing the "Guideline" completely.

68. 482 F. Supp. at 146.

69. While the second prong of the *Weeks-Diaz* test articulated in *Tamiami* requires the BFOQ to be "reasonably necessary" to the "essence" of the business, see note 28 & accompanying text *supra*, both the first and second prongs must be met to qualify for the
Constitutional Challenges

In addition to bringing actions under the ADEA, individuals claiming that they have been discriminated against on the basis of age by a governmental employer may raise constitutional challenges to the governmental action. Thus, a second issue of significant controversy is the appropriate standard of judicial review of age discrimination claims raised under the equal protection clause of the fourteenth amendment. Various standards of judicial review have been applied in discrimination cases. Discrimination based on race has been uniformly judged under a strict scrutiny standard because minorities are deemed a “suspect class”—a group of persons who are highly probable recipients of discriminatory treatment.

Although sex is not considered a suspect class, classifications based on sex have been subjected to more rigorous judicial scrutiny than the rational basis test. Age discrimination, on the other hand, has received only the less stringent review of the rational basis test.

The first prong—“a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant’s membership in the class”—is at the core of the controversy. See Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 (5th Cir. 1976). Advances in flight simulator technology over the past ten years permit highly accurate determinations of pilot proficiency, so that any justification for a claim under the first prong covering pilots appears to be lacking. In holding that Murnane himself would not have been hired for reasons unrelated to age (lack of judgment, poor performance on flight simulator), the court implicitly acknowledged that these technological advances may be used to deny prospective pilots a position without depriving an entire class of persons the opportunity to be considered for jobs. See 482 F. Supp. at 149-51.

Under a strict scrutiny analysis, a statutory classification will be upheld only if the state demonstrates an “overriding statutory purpose,” see McLaughlin v. Florida, 379 U.S. 184, 192 (1964), and the means used by the state to achieve its statutory goal are “precisely drawn in light of the acknowledged purpose.” Sugarman v. Dougall, 413 U.S. 634, 643 (1973).

Under a rational basis test, a statute “will not be set aside if any set of facts reasonably may be conceived to justify it.” McGowan v. Maryland, 366 U.S. 420, 426 (1961). Justice Marshall, in his dissent in Murgia, urged that in cases of age discrimination in employment the party relying on a mandatory retirement statute as a defense be required to show a “reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest.” 427 U.S. at 325 (Marshall, J., dissenting). This test is more rigorous than the rational basis approach used by the Court in Murgia. See also L. Tribe, American Constitutional Law 1077-82 (1978) (advocating use of an intermediate test in cases involving age discrimination).

For a discussion of distinctions pertaining to age discrimination cases, see THE NEXT...
Exemplifying the attitude of those who distinguish age from other classifications, the court in *Cunningham v. Central Bever-age, Inc.*74 stated: "The discrimination suffered by the aged is different from that suffered by females or blacks."75 Similarly, the Supreme Court, finding that age does not constitute a suspect classification because all persons age,76 noted that "[s]uch persons... have not... been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." The "replacement of an older employee by a younger worker [thus] does not raise the same inference of improper motive that attends replacement of a black by a white person in Title VII cases."77

The cases rejecting the argument that age is a suspect class have failed to recognize that people age sequentially. One is presumed to be incapable of job performance once classified according to the group characteristic. When age is the characteristic, rather than the immutable characteristics of race or sex more readily accorded judicial notice, the person is "subjected to unique disabilities" only when he or she attains the specified age. At that time, it is unimportant that earlier the person was not in the protected class or subjected to bias.

**Equal Protection**

The constitutionality of mandatory retirement was initially upheld in *Massachusetts Board of Retirement v. Murgia,*79 a case involving state police. The Court concluded that the public interest in police protection and safety outweighed the state’s obligation to use some basis other than age for retiring persons.

Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age,

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74. 486 F. Supp. 59 (N.D. Tex. 1980).
75. Id. at 62 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976), and Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977)).
79. 427 U.S. 307, 314-15 (1976). The Supreme Court acknowledged that it had previous opportunities to address the same issues and that it had not done so. Id. at 308 n.1.
mandatory retirement serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective.

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."

The Court's analysis in Murgia reveals two problems. First, the rational basis standard tolerates "imperfect classifications" that serve to shield admittedly discriminatory practices even when empirical evidence reveals a more perfect classification. Inasmuch as the rational basis standard is judicially created, imperfect classifications are perpetuated by the judicial process. Second, the rational basis standard may permit the court to reject challenges to the BFOQ defense without requiring the defendant to put forth evidence of the factual basis of the BFOQ defense. For example, in Touhy v. Ford Motor Co., a private action, the defendant was granted summary judgment without a showing that its policy of terminating company pilots at age sixty was based on something more than an analogy to the FAA's "Age 60 Rule" for commercial pilots. There was no evidence that it was "impossible or impractical" to deal with employees individually. Yet, because the FAA "Age 60 Rule" is presumptively reasonable, the adoption of the rule by the private employer was considered reasonable as well.

Had the "Age 60 Rule" been subject to the strict scrutiny standard, the rule itself, and most likely the Touhy employer's age sixty rule, would have had to overcome evidentiary challenges going to the predictability of pilot performance and the likelihood of medical incapacitation at age sixty.

The Murgia doctrine, while arguably justified when the public's physical safety is involved, has since been expanded to occu-

80. Id. at 314-16 (footnotes and citations omitted) (emphasis added).
82. 14 C.F.R. § 121.383(c) (1980).
83. Although not absolutely bound by the FAA rule, the court in Touhy relied largely on an analogy to its provisions and their presumptive reasonableness. 490 F. Supp. at 264.
pations not involving the public's physical safety. In *Martin v. Tamaki*, the court held that the Los Angeles Department of Water and Power could retire its employees at age sixty-five because, in emergencies, younger personnel would better assure citizens of an uninterrupted source of water and power. While such a criterion may be rational for employees involved directly in the production and distribution of power, it is not rational for white-collar employees like Mr. Martin, a public relations representative. The rational basis standard, however, permits such disparities in classification without a detailed examination of their justification.

Other decisions also ignore the concerns for public safety that influenced the Court's decision in *Murgia*. Indeed, these other decisions make no occupational distinctions but instead focus on the relationship of the challenged statutory classification to the legislative objective. In *Trafelet v. Thompson*, mandatory retirement of state judges at age seventy was held rationally justified on three grounds: (1) the work of judges "makes unique and exacting demands on faculties that age tends to erode"; (2) imposing a requirement that results in allowing the appointment of new judges on a regular basis assures excellence in the judiciary; and (3) judges are subject to a special retention system making them ex-

84. 607 F.2d 307 (9th Cir. 1979).

85. *Id.* at 310. Cf. EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980) (upholding mandatory retirement of all police officers at age 55). See notes 47-51 & accompanying text supra.

86. Where legislative purposes conflict, enactments having discriminatory consequences on older workers can result. Recent decisions urge employment opportunities for younger workers as a valid reason for removing older ones. E.g., Vance v. Bradley, 440 U.S. 93, 101 (1979); Martin v. Tamaki, 607 F.2d 307, 310 (9th Cir. 1979). But see Gault v. Garrison, 569 F.2d 993, 996 (7th Cir. 1977), *cert. denied*, 440 U.S. 945 (1979) (holding that mandatory retirement of public school teachers at age 65 was violative of equal protection absent a showing of a rational basis for such classification). Justice Pell, in dissent, pronounced that: "[T]here is a growing surplus of teachers with the forecast that this surplus will continue to grow in size with many recent graduates majoring in education being unable to find employment." *Id.* at 1000. Similarly, a state court has upheld statutory termination of the oldest employees who are eligible for pensions in order to ensure that as few others as possible are left without income, specifically finding no conflict between state law and the ADEA. Schultz v. Piro, 397 A.2d 484 (Pa. Commw. Ct. 1979).


empt from opposition during elections. Similarly, in Vance v. Bradley, the Supreme Court, relying on the presumed validity of legislative acts, reversed the district court's holding that a statute providing for mandatory retirement of foreign service officers at age sixty served no rational purpose. The Court stated that "'[t]he District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion.'" This rationale can be criticized, however, because almost any rebuttal proffered by defendants would serve to establish "conflicts in the evidence," thus constraining a trial court's conclusion that a rational basis exists.

Vance, in conjunction with Murgia, reaffirms the Court's view that age does not merit treatment as a suspect category. Vance also shows that, when generalized presumptions constitute the defense against a claim based on empirical evidence, a legislative purpose can be validated by inexact and general standards in order to promote legislative convenience.

Vance goes beyond Murgia in one important respect. By adopting justifications for compulsory retirement which are not bias-free, the Vance Court accepts the idea that mandatory retirement creates "predictable promotion opportunities and thus spur[s] morale and stimulate[s] superior performance in the ranks." Thus, while the Murgia Court addresses the need to "remove from police service those whose fitness for uniformed work presumptively has diminished with age," the Vance Court allows the removal of persons who, while fully fit, interfere with the expectations of other workers through their continued presence.

Irrebuttable Presumptions

Cases decided after Vance suggest that constitutional challenges to age discrimination have only limited prospects for success

89. 594 F.2d at 627.
93. Id. at 110 & n.28. "'The State is not compelled to verify logical assumptions with statistical evidence.'" Id. (citations omitted).
94. 440 U.S. at 109.
95. Id. at 98.
96. 427 U.S. at 315 (emphasis added).
as long as a rational basis standard is applied.97 In Malmed v. Thornburgh,98 the appellate court reversed the district court and upheld a Pennsylvania constitutional provision requiring state judges to retire at age seventy.99 The district court had held that the state constitutional requirement violated the fourteenth amendment because it validated the practice in the Pennsylvania judicial system of relying heavily on the reemployment of retired judges to do the same work as active judges, but at lower pay and without fringe benefits. The district court had found this practice to be but "a thinly veiled scheme for acquiring cheap judicial labor."100

The district court in Malmed also based its decision on Cleveland Board of Education v. LaFleur101 and related Supreme Court decisions102 that are grounded in the doctrine of irrebuttable presumption of incompetency. The district court found that the state's presumption that persons beyond age seventy are incompetent to serve as judges was rebutted by the state's extensive reemployment of senior judges. "[T]he Commonwealth itself places little credence in the validity of the presumption created by its mandatory retirement rule... [I]t is wholly unnecessary to trample on the rights of all who reach a given age merely in order

97. See note 92 supra.
99. Unlike previous state judge cases, see, e.g., Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), cert. denied, 444 U.S. 906 (1979); Rubino v. Ghezzi, 512 F.2d 431 (2d Cir.), cert. denied, 423 U.S. 891 (1975), the plaintiffs in Malmed had prevailed in district court on the unique factual circumstances of the case.
102. E.g., Vlandis v. Kline, 412 U.S. 441 (1973) (due process clause prohibits Connecticut from denying a student the opportunity to present evidence that he is a bona fide resident entitled to in-state tuition rates; Court rejected the state's use of an irrebuttable presumption of nonresidence against students attempting to gain Connecticut residency status); Stanley v. Illinois, 405 U.S. 645 (1972) (due process clause prohibits Illinois from automatically declaring children of unmarried fathers, upon the death of the mother, state wards and placing them in guardianships without a hearing concerning father's parental fitness). In each of these cases, the state made an irrebuttable presumption that neglected the due process rights of persons affected by the statutes when reasonable alternate means of making determinations were available. The underlying validity of the challenged rules or statutes was not at issue, but rather the lack of procedural safeguards involved in applying those statutes. In LaFleur, for example, mandatory maternity leave for classroom teachers after six months was rejected as arbitrary because the presumption of physical incompetency on which it was based was applied without considering the easily ascertainable capacities and abilities of each individual.
to weed out the few who are no longer fit."\textsuperscript{103}

The Third Circuit in \textit{Malmed} reversed the lower court on several grounds. First, the court subjected the irrebuttable presumption doctrine, a principle of substantive due process, to the rational basis test.\textsuperscript{104} Second, it put forth four rational purposes underlying the constitutionality of the mandatory retirement provision: (1) reducing court congestion; (2) eliminating the need to remove unfit judges selectively; (3) avoiding the harm done by unfit senior judges; and (4) conforming to professional association standards and current trends.\textsuperscript{105} The court of appeals ruled that the district court erred in ignoring the first three rationales and in reaching a contrary interpretation of the fourth.\textsuperscript{106} The \textit{Malmed} court's interpretation of the irrebuttable presumption of incompetency doctrine as requiring a rational basis treatment eliminates the conflict between the rational basis standard of equal protection and the irrebuttable presumption analysis of due process, at least in cases of age discrimination in employment. As interpreted by the Third Circuit in \textit{Malmed}, "the [irrebuttable presumption] doctrine is but another way of stating that if a plaintiff demonstrates that the inference is not 'rationally related' to a legitimate legislative classification, the inference will not pass constitutional muster."\textsuperscript{107} Under a traditional equal protection analysis, however, the issue of irrebuttable presumption of incompetence would not arise, for the plaintiff in such a case would be unable to demonstrate the impact of the challenged practice.\textsuperscript{108} Once the concept of compulsory retirement as furthering legitimate government interests is accepted

\textsuperscript{105} \textit{Id.} at 572.
\textsuperscript{106} \textit{Id.} at 571-73. The perspective on the purpose and impact of the Pennsylvania provision varies. While the district court saw the mandatory retirement and reemployment of senior judges as exploitation, the Pennsylvania Constitutional Convention saw it as "substantially increas[ing] judicial manpower by bringing in younger judges while retaining the part-time services of willing and able retired judges . . . [and as] reducing court congestion . . . ." \textit{Id.} at 572. Few would challenge the convention's view of the validity of the state interest in reducing court congestion. Nothing, however, prevented the Convention from calculating the number of jurists necessary to reduce court congestion, in terms of average productivity per judge and the current active roster of jurists. Continued imbalances between the number of judges and cases on the docket, offset in large part by the part-time, post-retirement use of senior judges, should raise an inference of equal protection violations of a willful rather than inadvertent character. By focusing on the procedural rather than the substantive aspects of review, however, the Third Circuit avoided this inquiry in \textit{Malmed}.
\textsuperscript{107} \textit{Id.} at 573-74.
as valid under a rational basis standard, a statute imposing mandatory retirement at age thirty-five could be just as valid as at age sixty-five, and "neither would be vulnerable to constitutional challenge."\(^{109}\)

The distinction underlying the conflict between the rational basis test and the irrebuttable presumption analysis may be applied to ADEA situations. The irrebuttable presumption doctrine forbids arbitrary treatment of persons who have a common characteristic. This prohibition on arbitrary treatment may take two forms. First, it may permit all persons to remain in their occupations. This is because "[i]n practical application, the system bears no rational relationship to the state's purpose of removing unfit [persons]."\(^{110}\) Second, it may permit the state to determine treatment on an individual basis. In both situations, the court may consider evidence addressing the extent to which the performance of individuals of a large subgroup varies from group norms.

In contrast, applying the rational basis test to an ADEA situation would lead a court to accept group norms as rational without an inquiry into the empirical foundation of the classifications. In effect, the irrebuttable presumption is conceded without questioning the illegality of the practice if the purpose of the classification is deemed rational.

Application of one or the other method of analysis of age classifications developed under the equal protection and irrebuttable presumption doctrines could have a significant impact in ADEA cases. The issue does not seem to arise with respect to the RFOA defense. Because the Department of Labor's regulations expressly require that any complaints be "determined on an individual, case by case basis,"\(^{111}\) creation of a class exemption would violate the statute. The Department of Labor has interpreted the BFOQ defense, however, as allowing the use of group characteristics in setting age requirements.\(^{112}\) A narrow construction of this statutory defense is analogous to an equal protection analysis based on the rational basis standard. In an ADEA case, the use of group characteristics to determine age limits generally would be upheld. In contrast, a broad reading of the statute's purpose and

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109. *Id.* at 886.
111. 29 C.F.R. § 860.103 (1980).
112. *Id.* § 860.102.
function would be analogous to analysis under the strict irrebuttable presumption criterion for due process. Nonindividualized or group distinctions thus would be precluded.

Conclusion

Employment decisions should be based on the qualifications of individual workers without regard to group behavior or to characteristics extraneous to job performance. When group performance will be used to measure the ability of each individual within the group, the group treatment must first be justified by empirical evidence. Otherwise, the effects of age discrimination in employment will not be fully mitigated through the legal process because the court will run the risk of failing both to reflect the remedial character of the law and to focus on the distinction between individual and group standards.

Judicial interpretation of the section 4(f)(1) BFOQ exemption is critical to the effectiveness of the ADEA, because employers have demonstrated their preference for fixed age limits over an individual determination of the employee’s ability to do the job. Fixed age limits based on group performance standards must be closely tested, because such limits ignore the wide range of individual work capacity across age groups.

The standard of review for age discrimination claims raised under the fifth and fourteenth amendments is the crux of the constitutional litigation involving age discrimination. Unlike sex discrimination claims, which have provoked a degree of enhanced judicial scrutiny, claims of age discrimination are reviewed under the less strict rational basis test. The unique character of age discrimination that might arguably entitle it to stricter scrutiny has gone largely unacknowledged.

The effect of the Supreme Court’s reliance on the rational basis standard in age discrimination cases is the validation of almost any statutorily determined retirement age. ADEA plaintiffs thus are deprived in practice of the dual statutory and constitutional protection that covers victims of race and some types of sex dis-

113. The legislative history of the 1978 Amendments should aid judicial interpretation in this regard, although no reported cases dealing with the BFOQ exemption have referred to the congressional record. See note 5 supra.

discrimination. Furthermore, the failure to accord age equal standing with other suspect classifications\(^\text{115}\) causes the ADEA to be less protective than it could be in conjunction with constitutionally enforced prohibitions of arbitrary age limits.

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