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Age Discrimination–Involuntary Retirement–McMann v. United Air Lines, Inc.

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RECENT DEVELOPMENT

AGE DISCRIMINATION—INVOLUNTARY RETIREMENT—*Age Discrimination in Employment Act Prohibits Involuntary Retirement of Employee at Age Sixty When Retirement Occurred Because of Retiree's Membership in an Employee Benefit Plan Mandating Early Retirement, Even Though Effective Date of Retirement Plan Preceded Effective Date of Act.* McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906).

United Air Lines hired Harris S. McMann in 1944, employing him in various nonpilot positions.[1] Although United provided an employee retirement program when McMann was hired, he did not choose to participate in that plan until 1964.[2] From the moment of his election to participate in the plan, McMann was on notice that age sixty was the "normal retirement age" for employees in his job category.[3] Under United's plan, "normal retirement age" meant that an employee had no legal discretion to continue working beyond age sixty, although United had legal discretion to retain an employee beyond that age.[4] United, however, had never exercised this option.[5] United's practice resulted in McMann's involuntary retirement on the first day of the month following his sixtieth birthday.[6]

McMann brought suit against United in the United States District Court for the Eastern District of Virginia,[7] claiming that his forced retirement before age sixty-five violated the provisions of the Age Discrimination in Employment Act of 1967 (ADEA),[8] which prohibits an employer from discharging any individual between the ages of forty and sixty-five on the basis of age.[9] McMann asserted, and United presented no contrary evidence, that his retirement at age sixty was based solely on an arbitrary age limit.[10] United claimed to be exempt

1. McMann v. United Air Lines, Inc., 542 F.2d 217, 218-19 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906).

2. *Id.* at 219.

3. *Id.* (application card and other documents specified normal retirement age of 60). The court noted that "normal" in this context may be ambiguous. *Id.*

4. *Id.*

5. *Id.*

6. McMann v. United Air Lines, Inc., 13 Fair Empl. Prac. Cas. 668, 668 (E.D. Va. 1975).

7. *Id.*

8. 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975).

9. McMann v. United Air Lines, Inc., 542 F.2d 217, 219 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906); *see* Age Discrimination in Employment Act of 1967, §§ 4(a)(1), 12, 29 U.S.C. §§ 623(a)(1), 631 (1970 & Supp. V 1975).

10. McMann v. United Air Lines, Inc., 542 F.2d 217, 219 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906).

from the prohibitions of the ADEA under a statutory exception that allows employers to retire employees by observing the terms of an employee benefit plan if the plan is not a subterfuge to evade the Act's purposes.[11] The district court granted United's motion for summary judgment, reasoning that because United's employee benefit plan predated the effective date of the ADEA it could not be a subterfuge and thus automatically qualified for the statutory exemption.[12]

The United States Court of Appeals for the Fourth Circuit reversed the district court, holding that the ADEA prohibited McMann's involuntary retirement at age sixty if the retirement occurred solely because of his membership in an employee benefit plan mandating retirement before age sixty-five even when the effective date of the retirement plan preceded the effective date of the Act.[13] In clarifying section 4(f)(2) of the ADEA, the *McMann* decision closed a loophole in the Act[14] that had allowed employers to force employees to retire before the age of sixty-five solely because of the employee's membership in a retirement plan.[15] The court focused on the language of the exemption and set out three major requirements to application of section 4(f)(2): that the plan be bona fide;[16] that the plan not be a subterfuge to evade the purposes of the ADEA;[17] and that the plan not excuse the failure to hire any individual.[18] After analyzing these criteria, the court concluded that an employee could be involuntarily retired at an age below sixty-five pursuant to an employee benefit plan

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11. McMann v. United Air Lines, Inc., 13 Fair Empl. Prac. Cas. 668, 669 (E.D. Va. 1975); *see* Age Discrimination in Employment Act of 1967, §4(f)(2), 29 U.S.C. §623(f)(2) (1970).

12. McMann v. United Air Lines, Inc., 542 F.2d 217, 219 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906); 13 Fair Empl. Prac. Cas. at 669.

13. 542 F.2d at 220. The court noted that United on remand might raise other valid defenses, but it reserved judgment on whether the statutory exemption for bona fide occupational qualifications would apply to McMann because of his nonpilot functions. *Id.* at 219 n.3.

14. *Id.* at 220-22.

15. *Id.* at 222; *see* Zinger v. Blanchette, 549 F.2d 901, 901 (3d Cir. 1977) (attorney forced to retire from Penn Central Railroad only months before 65th birthday), *petition for cert. filed*, 45 U.S.L.W. 3692 (U.S. Apr. 7, 1977) (No. 76-1375); Brennan v. Taft Broadcasting Co., 500 F.2d 212, 214 (5th Cir. 1974) (employee of WBRC-TV involuntarily retired at age 60); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330, 331 (D. Hawaii) (eight telephone company employees forcibly retired before age 65), *appeal docketed sub nom.* Usery v. Hawaiian Tel. Co., No. 76-2874 (9th Cir. Aug. 26, 1976). The Department of Labor considered *McMann* the most significant ADEA decision of 1976. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: A REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1976, at 19 (1977).

16. 542 F.2d at 219.

17. *Id.* at 220.

18. *Id.* at 220-21.

only for a reason other than age.[19] This conclusion permits a reading of section 4(f)(2) that incorporates the usual meanings of the terms "bona fide" and "subterfuge,"[20] but even more significantly incorporates the statutory language forbidding use of a plan as an excuse for failure to hire an individual and weighs the implications of joining an employee benefit plan.[21] The *McMann* interpretation thus gives broad effect to the purpose of the ADEA by forbidding the use of an arbitrary age limitation as an excuse for the involuntary retirement of employees protected by the ADEA.[22]

THE EMPLOYEE BENEFIT PLAN EXEMPTION

Congress enacted the ADEA to prohibit arbitrary age discrimination in employment and to encourage employment of workers according to ability rather than age.[23] The Act outlines educational

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19. *Id.* at 219, 221. This interpretation is supported by the legislative history of the ADEA, in which then Secretary of Labor Wirtz explained that the Act "recognizes those plans that are worked out for rational reasons, so long as they do not result in differentiation just on the basis of age where there is not justification in fact." *Age Discrimination in Employment: Hearings on H.R. 3651, 3768 & 4221 Before the General Subcomm. on Labor of the Comm. on Education & Labor,* 90th Cong., 1st Sess. 14 (1967) [hereinafter cited as *House Hearings*]. The regulations promulgated by the Wage and Hour Division of the Department of Labor under 29 U.S.C. §628 (1970) provide examples of rational reasons for terminating an employee. *See* 29 C.F.R. §860.102 (1976) (differentiation based on bona fide occupational qualifications); *id.* §§860.103-.104 (differentiation based on reasonable factors other than age). The Secretary of Labor's amicus brief in *McMann* suspected that involuntary retirement provisions are never based on rational cost reasons. Brief for the Secretary of Labor as Amicus Curiae at 11-12, 20. The Secretary consistently has denied application of the section 4(f)(2) exception when age was the basis for involuntary retirement. *Id.* at 20. *But cf.* Dunlop v. General Tel., 13 Fair Empl. Prac. Cas. 1210, 1212 (C.D. Cal. 1976) (neither statutory language nor history supports contention that section 4(f)(2) applies only to pension plans that would otherwise suffer financial burdens), *appeal docketed sub nom.* Usery v. General Tel., No. 76-2371 (9th Cir. June 25, 1976).

20. *See* notes 41-43, 76 *infra* and accompanying text.

21. 542 F.2d at 219 & n.1, 220-21.

22. *Id.* at 222.

23. 29 U.S.C. §621(b) (1970). The Act states that "[i]t is therefore the purpose of the [Act] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* The congressional hearings and debates on the ADEA reflected the grave need for federal legislation prohibiting age discrimination in employment despite the existence of Executive Order 11,141, which was issued in 1964 and banned age discrimination in employment by anyone under a federal contract, and 24 state statutes similar to the ADEA. *E.g.*, S. REP. NO. 723, 90th Cong., 1st Sess. 13 (1967); H.R. REP. NO. 805, 90th Cong., 1st Sess. 13, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214-15; *Age Discrimination in Employment: Hearings on S. 88 & 830 Before the Subcomm. on Labor of the Comm. on Labor & Public Welfare,* 90th Cong., 1st Sess. 31, 37-39, 52, 97, 146 (1967) [hereinafter cited as *Senate Hearings*]; *House Hearings, supra* note 19, at 7-8, 45, 448; 113 CONG. REC. 31,250, 31,253-54, 34,740, 34,742-43, 34,746-47, 34,749-50, 34,752 (1967).

and informational programs to promote the employment of older workers[24] and contains remedial provisions[25] to protect the employment of workers between the ages of forty and sixty-five.[26] The remedial provisions of the Act include prohibitions against discharge, failure to hire, and other forms of discrimination with respect to compensation, terms, conditions, or privileges of employment when such action results from consideration of an individual's age.[27] The statute provides several exceptions to these remedial provisions,[28] including section 4(f)(2), which states:

> It shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this [Act], except that no such employee benefit plan shall excuse the failure to hire any individual.[29]

Because section 4(f)(2) carves out an exception to a remedial statute, each word of the section must be narrowly construed.[30] According to the Fourth Circuit, an employer must prove that he meets various stringent criteria in order to invoke this defense to an alleged violation of the ADEA.[31] The court in *McMann* set out three threshold prerequisites to application of the exemption, as well as the major premises on which the court rested its decision.

The initial prerequisite of the *McMann* interpretation requires that a plan mandating retirement be an employee benefit plan within the

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24. 29 U.S.C. § 622 (1970) (Secretary of Labor responsible for studying needs, abilities, and potentials of older employees and for providing information to unions, management, public, and Congress).

25. *Id.* § 623.

26. *Id.* § 631 (Supp. V 1975).

27. *Id.* § 623(a) (1970). Violations of the Act may result in judicial and administrative relief. *Id.* § 626(b)-(c).

28. *Id.* § 623(f) (exemptions for bona fide occupational qualifications, reasonable factors other than age, bona fide seniority or employee benefit plans, and discharge for good cause).

29. Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970).

30. *See, e.g.*, Peyton v. Rowe, 391 U.S. 54, 65 (1968) (remedial statutes should be literally construed); Arnold v. Ben Kenowsky, Inc., 361 U.S. 388, 392 (1960) (statutory exemptions should be narrowly construed and applied only to situations plainly within their terms and spirit); Phillips Co. v. Walling, 324 U.S. 490, 493 (1945) (exemptions to remedial statutes must be narrowly construed to reflect plain meaning of language and statutory intent). Courts have not interpreted the ADEA, however, as a remedial measure of the same magnitude as title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975). *See* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 396-97 (1976).

31. 542 F.2d at 219-20.

meaning of the statute.[32] Because an employee retirement plan is one of the three types of benefit systems explicitly mentioned in the statute,[33] the *McMann* court had no difficulty determining that United's plan was encompassed within section 4(f)(2).[34]

The Fourth Circuit also had little difficulty with the second threshold requirement, which demands that the employee be an actual participant in the employee benefit plan.[35] Because the parties had stipulated that McMann elected to participate in United's plan, this criterion was satisfied and did not prevent United's use of section 4(f)(2) as a defense to McMann's allegations.[36]

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32. *Id.* at 219. *See generally* Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970) ("It shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan . . . .").

33. *See* Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970).

34. 542 F.2d at 219. The Fifth Circuit recently faced the more difficult question whether a profit-sharing retirement plan, although not specifically mentioned in the statute, qualifies as an employee benefit plan within the meaning of section 4(f)(2). *See* Brennan v. Taft Broadcasting Co., 500 F.2d 212, 215 (5th Cir. 1974). The court held that such a plan does qualify for the exception because it falls within the plain meaning of the phrase "employee benefit plan." *Id.* at 217. In reaching this conclusion, the court determined that the three types of plans mentioned in the statute—retirement, pension, and insurance—were descriptive examples rather than a comprehensive list of the forms of plans that might qualify for the exemption. *Id.* at 215; *see* 29 C.F.R. § 860.120(b) (1976) (exception may apply if essential purpose of plan financed from profits is to provide retirement benefits for employees). In brushing aside arguments that the Act's legislative history showed a congressional intent that the exception apply only when necessary to hold down a plan's costs, the court noted that the Act's meaning was clear, that a case by case analysis of congressional intent would be burdensome, and that statutory language should be used to indicate prohibited conduct. 500 F.2d at 216-17.

At least one commentator has critized the *Taft Broadcasting* court for failing to reconcile its interpretation of the phrase "employee benefit plan" with the purpose of the benefit plan exception. Levien, *The Age Discrimination in Employment Act: Statutory Requirements & Recent Developments*, 13 DUQ. L. REV. 227, 245-46 (1974). All three plans specified in the Act involve increased costs for the employer as the age an employee joins the plan rises. *See Senate Hearings, supra* note 23, at 24, 27, 29, 30, 34, 333; *House Hearings, supra* note 19, at 14, 45, 54, 56, 66, 68-71; Levien, *supra* at 245 & n.105; Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U.L. REV. 383, 402 (1966). The exemption is designed to enable employers to employ older workers at the same cost as younger workers, although the older workers will receive a lesser amount of pension, retirement, or insurance coverage. *See Senate Hearings, supra* at 27; notes 83, 85 *infra* and accompanying text. Benefits under the plan involved in *Taft Broadcasting*, however, were calculated on the basis of profits, and thus were unrelated to the age of the employee. 500 F.2d at 214, 216. Retention of employees beyond age 60 did not increase the cost of maintaining the profit-sharing plan. Thus, the employer had no reason for retiring employees except arbitrary age considerations. *See* Levien, *supra* at 244.

35. 542 F.2d at 219; *see* Hodgson v. American Mut. Ins. Co., 329 F. Supp. 225, 228 (D. Minn. 1971) (unlike participating female employee, nonparticipating female employee could not be forcibly retired at age 62); 29 C.F.R. § 860.110(b) (1976). This requirement seems to derive from the exception's provision that an employer "observe the terms of . . . any bona fide employee benefit plan." Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970).

36. 542 F.2d at 218-19.

A third preliminary hurdle to application of the employee benefit plan exception requires that an employer retire his employees before age sixty-five only "to observe" the terms of the plan.[37] Although United's plan permitted the employer to retain an employee beyond age sixty, the court did not directly address this issue but instead concluded that because United had never exercised its discretionary power the plan should be viewed as requiring retirement at age sixty.[38] The court acknowledged, however, that section 4(f)(2) may be applicable only when the employer has no legal discretion to permit a plan participant to continue working beyond the plan's specified retirement age.[39]

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37. Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970); U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: A REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1974, at 17 (1975). *But see* Zinger v. Blanchette, 549 F.2d 901, 902-03 (3d Cir. 1977) (no discussion of consequences of employer's option to allow continued employment), *petition for cert. filed*, 45 U.S.L.W. 3692 (U.S. Apr. 7, 1977) (No. 76-1375); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330, 331 (D. Hawaii) (employer had option to force employees to retire at 60), *appeal docketed sub nom.* Usery v. Hawaiian Tel. Co., No. 76-2874 (9th Cir. Aug. 26, 1976); Dunlop v. General Tel., 13 Fair Empl. Prac. Cas. 1210, 1213 (C.D. Cal. 1976) (compulsory retirement not necessary to "observe" plan; only necessary that retirement be authorized and carried out pursuant to plan), *appeal docketed sub nom.* Usery v. General Tel., No. 76-2371 (9th Cir. June 25, 1976); Steiner v. National League of Professional Baseball Clubs, 377 F. Supp. 945, 946-47 (C.D. Cal. 1974) (employer had option to defer umpires' retirement beyond age 55); 29 C.F.R. § 860.110(a) (1976) (not specified that involuntary retirement permissible only under compulsory retirement plan).

38. 542 F.2d at 219 & n.2. *But see* Brief for the Secretary of Labor as Amicus Curiae at 9-11 (thorough discussion of need "to observe" requirements of plan).

39. 542 F.2d at 219 n.2. This conclusion apparently stemmed from confusion in the *McMann* amicus brief, which misinterpreted the *Taft Broadcasting* dissent as requiring compulsory retirement so that neither the employee nor the employer could exercise discretion to continue a worker's employment. *See* Brief for the Secretary of Labor as Amicus Curiae at 10 (plan must state in categorical terms that its members are subject to compulsory retirement at a time or under conditions differing from those of the statute) (quoting Brennan v. Taft Broadcasting Co., 500 F.2d 212, 218 (5th Cir. 1974) (Tuttle, J., dissenting)). In fact, the dissent in *Taft Broadcasting* focused on the plan's failure to state categorically that "no person shall work beyond age sixty, *except upon approval of management.*" 500 F.2d at 220 (Tuttle, J., dissenting) (emphasis added). Thus, the dissent was addressing the need for the plan to articulate clearly that the employee had no choice to continue beyond a specified age. *Id.*

Support for a mandatory retirement requirement stems from a strict interpretation of the term "to observe" to mean doing what is required rather than taking advantage of what is permitted. Brief for the Secretary of Labor as Amicus Curiae at 9. Moreover, the original version of the enacted bill used the words "to separate involuntarily an employee under a retirement policy or system," whereas the final version of the ADEA uses the words "to observe the terms of . . . any employee benefit plan." *Compare* S. 830, 90th Cong., 1st Sess. § 4(f)(2) (1967) *and* H.R. 4221, 90th Cong., 1st Sess. § 4(f)(2) (1967) *with* Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970). The language of the final version appears more restrictive and lends credence to the interpretation that only a retirement plan demanding mandatory retirement before age sixty-five, regardless of the desires of the employee or the employer, can fall within the section 4(f)(2) exemption.

The remaining criteria are more crucial limitations on the section 4(f)(2) exemption. The exemption extends only to bona fide employee benefit plans that are not subterfuges to evade the purposes of the Act.[40] The *McMann* court determined that the term "bona fide" means only that the plan exists and actually pays benefits.[41] Other courts generally have not disputed this interpretation,[42] which conforms to the dictionary definition of "bona fide."[43]

Courts, however, have construed inconsistently the requirement that a plan not be a subterfuge to evade the purposes of the Act. The United States Court of Appeals for the Fifth Circuit in *Brennan v. Taft Broadcasting Co.*[44] advanced the broadest interpretation of the employee benefit plan exception by construing the subterfuge clause of section 4(f)(2) to hold that an employee benefit plan established before enactment of the ADEA could not be a subterfuge to evade the Act.[45] Other courts have criticized the superficiality of this approach,[46] and the *McMann* court specifically rejected this interpretation of the subterfuge language, declaring that the Fifth Circuit's view ignored the other requirements of the section and the legislative history and underlying purpose of the ADEA.[47] *McMann*

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40. Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970).

41. 542 F.2d at 219.

42. Brennan v. Taft Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974) (plan was bona fide or "authentic and genuine" because it "truly existed" and paid benefits); *see* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 837 n.2 (3d Cir. 1977) (stipulation that plan was bona fide led court to assume pension payments were substantial); Bradley v. Kissinger, 418 F. Supp. 64, 70 (D.D.C. 1976) (compulsory contributions by employer and annuity payments to participants meant plan was bona fide within meaning of statute); *cf.* Dunlop v. General Tel. Co., 13 Fair Empl. Prac. Cas. 1210, 1213 (C.D. Cal. 1976) (citing *Taft Broadcasting*, the court defined bona fide as "authentic and genuine"), *appeal docketed sub nom.* Usery v. General Tel., No. 76-2371 (9th Cir. June 25, 1976). *Contra*, Brennan v. Taft Broadcasting Co., 500 F.2d at 218-19 (Tuttle, J., dissenting) (bona fide employee benefit plan never existed if required agreement between parties was lacking; terms of plan never categorically spelled out and accepted by employee).

43. *See* BLACK'S LAW DICTIONARY 223 (rev. 4th ed. 1968) (bona fide defined as "[r]eal, actual, genuine, and not feigned"). *See generally* Kovarsky, *Economic, Medical, and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 907-08 (1974) (factors relevant to determining whether a plan is bona fide include: whether compulsory retirement age is specified, whether the plan is established by the employer or a union, whether retirement may be postponed, whether retirement is voluntary, and whether the plan provides substantial benefits).

44. 500 F.2d 212 (5th Cir. 1974).

45. *Id.* at 215; *accord*, McGovern v. United Air Lines, Inc., Civil No. 75-C-309, at 5 (N.D. Ill. Oct. 31, 1975) (unpublished opinion) (plan could not be a subterfuge because it substantially predated Act).

46. *See* Zinger v. Blanchette, 549 F.2d 901, 904-05 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3692 (U.S. Apr. 7, 1977) (No. 76-1375); McMann v. United Air Lines, Inc., 542 F.2d 217, 220 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330, 331 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Tel. Co., No. 76-2874 (9th Cir. Aug. 26, 1976).

47. 542 F.2d at 220-22.

asserted that *Taft Broadcasting* ignored the actual requirement of the statute by incorrectly focusing on whether an employee benefit plan was a subterfuge to evade the Act rather than considering whether a plan was a subterfuge to evade the purposes of the Act.[48] Because the Act's subterfuge provision is drafted in the present tense, it makes the exception applicable only to a plan "which is not a subterfuge."[49] The Fifth Circuit in *Taft Broadcasting* ignored the tense of this statutory language and concluded that a plan predating the Act "was [not] adopted as a subterfuge."[50] Although the *Taft Broadcasting* court found the language of the statute unambiguous and refused to review the legislative history,[51] both the House and Senate Reports accompanying the ADEA noted that the section 4(f)(2) exemption applied to "new and *existing* employee benefit plans, and to both the establishment and *maintenance* of such plans."[52] The *McMann* court stated that this legislative history required that the maintenance of a discriminatory plan be considered independently under the exemption and that an employer must demonstrate that a plan is not being *maintained* as a subterfuge to evade the Act.[53] Because United had failed to present such evidence in *McMann*, the Fourth Circuit concluded that it could not claim exemption under section 4(f)(2).[54]

The United States District Court for Hawaii paved the way for the *McMann* conclusion in *Dunlop v. Hawaiian Telephone Co.*[55] The court there dispensed with the *Taft Broadcasting* rationale and determined that a plan established before enactment of the ADEA could be a subterfuge to evade the purposes of the Act.[56] The court considered it inconceivable that Congress automatically would allow every plan in existence prior to the ADEA to be exempted from the Act, whether or not the plan continued to discriminate on the basis of age.[57] The district court, however, did not presage *McMann*'s definition of subterfuge, but concluded instead that the term "subterfuge" must have been used in the Act to mean failure to pay substantial

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48. *Id.* at 220; *see* Brennan v. Taft Broadcasting Co., 500 F.2d 212, 215 (5th Cir. 1974) (plan effectuated far in advance of ADEA could not be a subterfuge for evasion).

49. Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970).

50. 500 F.2d at 215.

51. *Id.* at 215-17.

52. S. REP. NO. 723, *supra* note 23, at 4; H.R. REP. NO. 805, *supra* note 23, at 4, [1967] U.S. CODE CONG. & AD. NEWS at 2217 (emphasis added).

53. 542 F.2d at 221.

54. *Id.* at 222.

55. 415 F. Supp. 330 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Tel. Co., No. 76-2874 (9th Cir. Aug. 26, 1976).

56. *Id.* at 331.

57. *Id.*

benefits.[58] After the Fourth Circuit decided *McMann*, the United States Court of Appeals for the Third Circuit adopted *Hawaiian Telephone*'s definition of subterfuge in *Zinger v. Blanchette*,[59] in which the court distinguished the illegal discharge of an older employee without payment of substantial benefits from the legal retirement of an older employee with payment of substantial benefits.[60]

THE DEFINITION OF SUBTERFUGE

Although *Hawaiian Telephone, Zinger,* and *McMann* agreed that *Taft Broadcasting* had misinterpreted the subterfuge clause, the opinions diverged on the meaning of subterfuge. Because this definition is crucial in determining whether the employee benefit plan exemption applies, the treatment of the subterfuge language in these opinions should be compared.

The district court in *Hawaiian Telephone* rejected *Taft Broadcasting*'s automatic exemption for plans predating the Act and determined that in order for a plan to qualify for the section 4(f)(2) exemption, it must pay substantial benefits.[61] The court premised this conclusion on its belief that the plain or usual meaning of subterfuge would render the other words of section 4(f)(2) meaningless.[62] The court concluded that the section does permit age discrimination in discharging employees pursuant to a valid plan as long as the plan is not a subterfuge to deny these employees sufficient benefits.[63] Because the telephone company paid substantial benefits to involuntarily retired workers, the district court found that the plan was not a subterfuge and that the company's actions were exempt from the provisions of the ADEA.[64]

The Fourth Circuit opinion in *McMann* criticized the *Hawaiian Telephone* approach for manipulating the statute to fit within an

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58. *Id.*

59. 549 F.2d 901 (3d Cir. 1977), *petition for cert. filed,* 45 U.S.L.W. 3692 (U.S. Apr. 7, 1977) (No. 76-1375).

60. *Id.* at 905. Other cases involving the benefit plan exemption have not analyzed it in depth. *See* de Loraine v. MEBA Pension Trust, 499 F.2d 49, 51 n.7 (2d Cir.) (forced early retirement not raised in trial court), *cert. denied,* 419 U.S. 1009 (1974); Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 229 (D. Minn. 1971) (plaintiff could not be involuntarily retired because not member of plan).

61. 415 F. Supp. at 331, 333; *cf.* Walker Mfg. Co. v. Industrial Comm'n, 27 Wis. 2d 669, 685, 135 N.W.2d 307, 316 (1965) (subterfuge under Wisconsin age discrimination statute means either that benefits paid were insubstantial or that continued payment was unlikely).

62. 415 F. Supp. at 332-33.

63. *Id.* at 331-32.

64. *Id.* at 332-33.

inaccurate reading of Department of Labor regulations interpreting the Act.[65] The regulation relied on in *Hawaiian Telephone* merely tracks the statutory language and does not justify the conclusion that subterfuge must be given the contrived meaning of failure to pay substantial benefits: "The Act authorizes involuntary retirement irrespective of age provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2)."[66] In his January 1975 report to Congress, the Secretary of Labor stated that involuntary retirement before age sixty-five is unlawful unless mandatory retirement "is essential to the plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the plan for the sole [p]urpose of moving out older workers, which purpose has now been made unlawful by the ADEA."[67] *Hawaiian Telephone's* interpretation of subterfuge to mean failure to pay substantial benefits thus is inconsistent with both the plain meaning of the term "subterfuge" and with the interpretation of section 4(f)(2) espoused by the Department of Labor.

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65. 542 F.2d at 222 n.6; *see* Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330, 332 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Tel. Co., No. 76-2874 (9th Cir. Aug. 26, 1976).

66. 29 C.F.R. § 860.110(a) (1976). These regulations merit some weight as the contemporaneous interpretation of a statute by the agency authorized by Congress to enforce the Act. *Cf.* United States v. American Trucking Ass'n, 310 U.S. 534, 538-40, 549 (1940) (deferring to contemporaneous construction of motor carriers safety statute by Interstate Commerce Commission and Department of Labor). In this instance, however, because, in the view of the *Hawaiian Telephone* court, the regulation's words are ambiguous and change the customary meaning of the words Congress employed, the regulations should not be given the extraordinary weight accorded them. *See* United States v. Dickerson, 310 U.S. 554, 562 (1940) (although contradictory or ambiguous legislative materials will not be permitted to control customary meaning of words or to overcome rules of syntax or construction, they cannot be deemed incompetent or irrelevant).

67. U.S. DEP'T OF LABOR, *supra* note 37, at 17. Although this statement appears to be the only comprehensive discussion of involuntary retirement, it should not be given extraordinary weight because it is not a contemporaneous interpretation of the statute and appears to contradict the spirit of earlier Department of Labor bulletins. *See* General Elec. v. Gilbert, 429 U.S. 125, 141-42 (1976) (rejecting EEOC's interpretation of title VII that conflicted with position of agency taken six years earlier); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (although rulings and interpretations of Fair Labor Standards Act Administrator do not control judicial decision, they constitute body of informed judgment to which courts may resort for guidance); United States v. American Trucking Ass'n, 310 U.S. 534, 549 (1940) (interpretations of Wage and Hour Division entitled to great weight as contemporaneous construction of statute by body charged with enforcing it). The authority of the Secretary of Labor to investigate involuntary retirement, to report his findings, and to make legislative recommendations to Congress suggests that this report deserves some weight, however. *See* 29 U.S.C. § 624 (1970). *But see* Zinger v. Blanchette, 549 F.2d 901, 908 (3d Cir. 1977) (Secretary should propose congressional amendments rather than attempt to change ADEA by administrative fiat), *petition for cert. filed,* 45 U.S.L.W. 3692 (U.S. Apr. 7, 1977) (No. 76-1375).

The *Zinger* opinion adopted a definition of subterfuge similar to that in *Hawaiian Telephone.*[68] Although the *Zinger* court recognized the discriminatory nature of retiring an employee merely for reaching a specified age, it nevertheless exempted such a retirement from the scope of the ADEA despite that Act's express prohibition of age discrimination.[69] The court defined subterfuge as failure to pay substantial benefits[70] and described the primary purpose of the Act as preventing age discrimination only in the hiring and *discharging* of employees.[71] The court therefore concluded that only discharge without compensation is illegal, as distinguished from retirement with benefits.[72]

This interpretation of the subterfuge clause appears too narrow given the stated purpose of the ADEA.[73] In addition, the Third Circuit interpreted the terms "bona fide," "retirement," and "not a subterfuge" as essentially synonymous.[74] In the court's view, Congress changed the original version of the bill to include the phrase "bona fide" solely for clarification.[75]

To avoid interpreting the statute with superfluous language and phrases, the Fourth Circuit in *McMann* narrowly defined subterfuge as retirement before age sixty-five pursuant to a bona fide employee benefit plan on the sole basis of an arbitrary age cutoff.[76] This

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68. *See* 549 F.2d at 904-05; *accord,* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 838 (3d Cir. 1977) (if plan provides "adequate pension pursuant to a bona fide retirement program," involuntary retirement at age 60 is legal).

69. 549 F.2d at 910. Although recognizing numerous reasons for prohibiting involuntary retirement before age 65, even with adequate pension provisions, the Third Circuit preferred to await congressional clarification of section 4(f)(2). *Id.* at 909; *see* note 92 *infra.*

70. *Id.*

71. *Id.* at 905.

72. *Id.*

73. *See* 29 U.S.C. § 621(b) (1970).

74. 549 F.2d at 905, 909 n.20.

75. *Id.* at 907 (administration bill failed to mention term "bona fide"). *Compare* S. 830, 90th Cong., 1st Sess. § 4(f)(2) (1967) (no "bona fide" provision) *and* H.R. 4221, 90th Cong., 1st Sess. § 4(f)(2) (1967) (same) *with* Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1970) (containing "bona fide" provision).

76. 542 F.2d at 220. Several previously decided cases would satisfy the subterfuge criterion of *McMann* in their enunciation of rational reasons for the compelled retirement of employees. *See, e.g.,* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 837-38 (3d Cir. 1977) (involuntary retirement upheld when based on medical reasons); de Loraine v. MEBA Pension Trust, 499 F.2d 49, 51 (2d Cir.) (marine engineer, recalled from retirement during Vietnam war, retired after peak had subsided), *cert. denied,* 419 U.S. 1009 (1974); Thompson v. Chrysler Corp., 406 F. Supp. 1216, 1217 (E.D. Mich. 1976) (retirement for health reasons upheld under narrow construction of section 4(f)(2)), *decision pending,* Nos. 76-1542, 76-1543 (6th Cir., filed Oct. 19, 1977); Steiner v. National League of Professional Baseball Clubs, 377 F. Supp. 945, 948 (C.D. Cal. 1974) (umpire retired because baseball teams considered his performance poor); Stringfellow v. Monsanto Co., 320 F. Supp. 1175, 1178, 1181 (W.D. Ark. 1970) (reduction in number of necessary workers forced selected involuntary retirement of some workers based on evaluation of 18 job criteria).

definition is consistent with *McMann*'s broad interpretation of the purpose of the ADEA.[77] Any employee benefit plan that retires a worker before age sixty-five solely because of age clearly contravenes the express purpose of the Act to promote employment of older workers.[78] The Fourth Circuit therefore concluded that involuntary retirement pursuant to section 4(f)(2) legally can occur only if based on reasons other than age.[79]

The *McMann* court buttressed its definition of subterfuge by carefully examining the last phrase of section 4(f)(2), which states that an employer may not excuse the failure to hire an employee because of an employee benefit plan.[80] The Fourth Circuit concluded that the employment of any individual covered by the Act,[81] even someone recently retired, may not be denied because of an employee benefit plan.[82] The employee benefit plan exemption was not intended to authorize employers to use cost as a basis for refusing to hire older workers; it was designed to enable employees to contribute equal amounts for both older and younger workers, even though the older workers would receive less pension, retirement, or insurance coverage at retirement age.[83] Because the ADEA prohibits employment discrimination on the basis of age,[84] it clearly bans the use of arbitrary

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77. 542 F.2d at 220.

78. *See* 29 U.S.C. §621(b) (1970).

79. 542 F.2d at 220. *Contra*, Grossfield v. W.B. Saunders Co., 1 Fair Empl. Prac. Cas. 624, 625 (S.D.N.Y. 1968) (section 4(f)(2) available even if plan schedules retirement solely on the basis of an arbitrary age limit).

80. 542 F.2d at 221; *see* Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. §623(f)(2) (1970) (such employee benefit plans shall not excuse failure to hire any individual).

81. *See* 29 U.S.C. §631 (Supp. V 1975) (only employees between the ages of 40 and 65 are covered).

82. 542 F.2d at 220-21.

83. *See* McGovern v. United Air Lines, Inc., Civ. No. 75-C-309, at 5 (N.D. Ill. Oct. 31, 1975) (unpublished opinion) (section 4(f)(2) permits receipt of less than full benefits under plan); Age Discrimination in Employment Act of 1967, § 4(f)(2), 29 U.S.C. §623(f)(2) (1970) ("no such employee benefit plan shall excuse the failure to hire any individual").

The section 4(f)(2) exemption was included in the ADEA so that older workers would not be denied employment because employers would have to pay more for an older worker's fringe and retirement benefits. *See, e.g.*, S. REP. NO. 723, *supra* note 23, at 4, 14; H.R. REP. NO. 805, *supra* note 23, at 4, [1967] U.S. CODE CONG. & AD. NEWS at 2217; *Senate Hearings, supra* note 23, at 24, 27, 29-30, 112, 158-59, 166, 196; *House Hearings, supra* note 19, at 49, 54, 58, 62-64, 66, 448, 452, 499; 113 CONG. REC. 34,740, 34,749, 35,056 (1967). The exemption allows employers to pay equal amounts for both older and younger workers even if the older workers will receive a lesser amount of pension, retirement, or insurance coverage as a result. 29 C.F.R. §860.120(a) (1976); *Senate Hearings, supra* at 106-07, 157-60, 166, 239, 241, 296-97, 316, 321; *House Hearings, supra* at 14, 91, 480-81; 113 CONG. REC. 31,255, 34,745-47, 34,752 (1967). *See generally* Note, *Involuntary Retirement Under the Age Discrimination in Employment Act: The Bona Fide Employee Benefit Plan Exception*, 5 FORDHAM URB. L.J. 509, 512-14 (1977).

84. 29 U.S.C. §623(a)-(e) (1970).

age considerations in hiring.[85] Thus, neither an employee benefit plan, age, nor cost may be used to justify the refusal to hire any individual.

The *McMann* decision highlights the absurd result that would follow from retiring an employee pursuant to an employee benefit plan that terminates employment at an age under sixty-five. That same employee could demand to be rehired the next day under the provision in section 4(f)(2) forbidding an employer from using the plan to discriminate against hiring older workers.[86] This problem was also considered by the Fifth Circuit in *Brennan v. Taft Broadcasting Co.*,[87] but the court there could see no meaningful way to reconcile both the literal language of the failure to hire provision and of the subterfuge provision of section 4(f)(2).[88] The court, therefore, redefined the term "any individual" to mean any individual except one who is retired under an employee benefit plan.[89] The Third Circuit's opinion in *Zinger v. Blanchette*[90] also recognized the logical inconsistency between its substantial benefits definition of subterfuge and the prohibition against failure to hire any individual because of an employee benefit plan.[91] Rather than resolving this inconsistency, the

85. The legislative history of the ADEA reflects a desire to cure age discrimination by encouraging the hiring of older workers. Senator Javits sounded this theme when he introduced the section 4(f)(2) exemption:

> The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters. . . . [W]e ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Senate Hearings, *supra* note 23, at 27. This concern is highlighted throughout the legislative history. *See, e.g.*, *id.* at 22, 24-25, 27-30, 47, 107; *House Hearings*, *supra* note 19, at 14, 481, 499; 113 CONG. REC. 31,250-52, 34,740-41, 34,744, 34,747 (1967). Encouraging the hiring of older workers, however, was not the only goal of the ADEA; prohibition of discriminatory termination also was considered. *See Senate Hearings*, *supra* at 18, 37, 47, 96, 100, 104-07, 112-13, 258-59; *House Hearings*, *supra* at 45, 179, 452; 113 CONG. REC. 34,742-43 (1967). The *McMann* court utilized the concern for hiring, expressed in the last phrase of section 4(f)(2), to support its view that involuntary retirement based only on age qualifications is illegal under the Act. 542 F.2d at 220.

86. 542 F.2d at 220.

87. 500 F.2d 212 (5th Cir. 1974).

88. *Id.* at 218.

89. *Id.*

90. 549 F.2d 901 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3692 (U.S. Apr. 7, 1977) (No. 76-1375).

91. *Id.* at 909; *cf.* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 229 (D. Minn. 1971) (court failed to resolve inconsistency between legality of mandatory retirement pursuant to an employee benefit plan and illegality of refusal to hire or rehire pursuant to an employee benefit plan).

Zinger court stated its intent to wait for an explicit congressional amendment.[92] The Fourth Circuit's conclusion in *McMann*, on the other hand, successfully incorporates every phrase of section 4(f)(2), rather than merely interpreting selected phrases within the exception.[93]

The Fourth Circuit's narrow subterfuge definition resolves a second inconsistency that may arise under a broader interpretation of subterfuge. If one adopts either the preexisting plan interpretation[94] or the substantial benefits interpretation, [95] the crucial distinction between sanctioning or condemning age discrimination in employment becomes whether an employee chose to participate in an employee benefit plan.[96] *McMann* questioned the desirability of elevating the decision to participate to the level of voluntary waiver of rights guaranteed under the ADEA.[97] In the court's view, McMann's decision to join United's employee benefit plan, which provided lucrative benefits and was funded in part by employer contributions that he would not otherwise receive, was not the type of voluntary

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92. 549 F.2d at 909 (statute presents dilemma that involuntary retirement before age 65 is inconsistent with the last phrase of section 4(f)(2)). Such legislation currently is before the Congress in an amendment that inserts after the final phrase of section 4(f)(2): "and except that the involuntary retirement of any employee shall not be required or permitted by . . . any such employee benefit plan because of the age of such employee." H.R. 5383, 95th Cong., 1st Sess. §2(a) (1977). The House of Representatives passed H.R. 5383 on September 23, 1977, 123 CONG. REC. H9984 (daily ed. Sept. 23, 1977), and sent the measure to the Senate, which amended and passed the bill on October 19, 1977. 123 CONG. REC. S17,303 (daily ed. Oct. 19, 1977); *see id.* at S17,277 (both House and Senate versions of H.R. 5383 clarify section 4(f)(2) so that employee benefit plans can no longer be used to force retirement based on age).

93. Every word or phrase of section 4(f)(2) as enacted should be given meaning when interpreting the exemption. McMann v. United Air Lines, Inc., 542 F.2d 217, 220 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906); *see, e.g.*, Richards v. United States, 369 U.S. 1, 11 (1961) (statutory interpretation by resort to single sentence or phrase is misguided; reading of provisions as a whole required); United States v. Manasche, 348 U.S. 528, 538-39 (1955) (better to give effect to each phrase and word than to emasculate congressional language); Montclair v. Ransdell, 107 U.S. 147, 152 (1882) (courts must give effect to words of statute, avoiding construction that implies "the legislature was ignorant of the meaning of the language it employed"). *See also* Brief for the National Senior Citizens Law Center as Amicus Curiae at 4, de Loraine v. MEBA Pension Trust, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974) (criticizing Secretary of Labor's amicus brief in *Taft Broadcasting* for suggesting that Act permits mandatory retirement before age 65).

94. *See* Brennan v. Taft Broadcasting Co., 500 F.2d 212, 215 (5th Cir. 1974).

95. *See* Zinger v. Blanchette, 549 F.2d 901, 904-05 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3692 (U.S. Apr. 7, 1977) (No. 76-1375); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330, 331, 333 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Tel. Co., No. 76-2874 (9th Cir. Aug. 26, 1976).

96. *See* 29 C.F.R. §860.110(b) (1976).

97. 542 F.2d at 219 n.1.

action that should result in a waiver of statutory protection.[98] Moreover, the Fourth Circuit doubted that Congress intended to enable employees, either as individuals or through collective bargaining, to relinquish rights granted by the Act.[99] Only under the *McMann* interpretation are both participants and nonparticipants protected against age discrimination in retirement.

The Fourth Circuit's decision, however, leaves unresolved whether there is any rationale under section 4(f)(2) justifying involuntary retirement before age sixty-five, or whether *McMann* forecloses all involuntary retirement pursuant to an employee benefit plan. One means of promoting the goals of the ADEA[100] would be to interpret section 4(f)(2) as allowing employers to provide fewer benefits with equal contributions for older workers and not as addressing the problem of involuntary retirement.

The Supreme Court this Term will review the Fourth Circuit's conclusion in *McMann* that the ADEA prohibits involuntary retirement of an employee covered by the Act when retirement occurred only because of a retiree's membership in an employee benefit plan mandating retirement before age sixty-five.[101] The Fourth Circuit's narrow interpretation of section 4(f)(2) gives careful and logical meaning to every element of the exception; if the *McMann* definition of subterfuge is affirmed, involuntary retirement pursuant to section 4(f)(2) can occur only if there are rational reasons for such retirement. Arbitrary age limits no longer will suffice as a legal excuse.

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98. *Id.*; *cf.* Kasume Nakashima v. Acheson, 98 F. Supp. 11, 12 (S.D. Cal. 1951) (United States citizen voting in Japan after World War II did not waive citizenship rights because compelled by occupation forces); Akio Kuwahara v. Acheson, 96 F. Supp. 38, 42-43 (S.D. Cal. 1951) (same); Brief for the National Senior Citizens Law Center as Amicus Curaie at 3, de Loraine v. MEBA Pension Trust, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974) (early retirement provisions present option—not mandate—for employees to retire before statutory retirement age of 65). This conclusion apparently rested on the theory that the waiver of a right suggests an intentional action instead of a subtle consequence of participating in an employee benefit plan. *See id.*; *cf.* Brookhart v. Janis, 384 U.S. 1, 4 (1966) (waiver of constitutional right requires clearly established intent to relinquish or abandon); Johnson v. Zerbst, 204 U.S. 458, 464-65 (1938) (waiver must be intelligent and competent; intent to abandon known right or privilege is essential); Northern Assurance Co. v. Grand View Building Ass'n, 183 U.S. 308, 361 (1902) (contract waiver in insurance agreement may be made only by one who knows of surrounding circumstances and intends to dispense with right).

99. 542 F.2d at 219 n.1.

100. *See* 29 U.S.C. §621(b) (1970).

101. McMann v. United Air Lines, Inc., 542 F.2d 217, 220, 222 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-906).

CONCLUSION

Congress enacted the ADEA to prohibit arbitrary age discrimination in the employment of workers between the ages of forty and sixty-five.[102] Section 4(f)(2) of the Act provides an exemption for a bona fide employee benefit plan that is not a subterfuge to evade the purposes of the Act.[103] After thoroughly analyzing this exemption, the Fourth Circuit in *McMann v. United Air Lines* held that the exception could apply only when involuntary retirement before the age of sixty-five pursuant to an employee benefit plan was justified by a purpose other than arbitrary age discrimination.[104] For individual employers to select arbitrarily an age below sixty-five and retire employees still covered by the ADEA obviously contravenes Congress' intentions.[105]

McMann was the first decision to close the statutory loophole that enabled employers to utilize the section 4(f)(2) exemption to retire forcibly older workers pursuant to an employee benefit plan, regardless of whether the plan contributed to age discrimination in employment. Consideration of the policy surrounding involuntary retirement, especially before the age of sixty-five, buttresses the *McMann* court's decision. Medical advances have extended the lives of United States citizens,[106] but unfortunately these extra years too frequently are accompanied by the psychological, medical, and economic trauma of involuntary retirement.[107] Various justifications have been advanced to support mandatory retirement at a specified

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102. 29 U.S.C. §§621(b), 631 (1970 & Supp. V 1975). The maximum age was selected because it was considered to be a universally accepted retirement age and because at age 65 full Social Security benefits and benefits under many private pension systems become available. *See Senate Hearings, supra* note 23, at 47-48; *House Hearings, supra* note 19, at 143-44; 113 CONG. REC. 34,749-50 (1967). Congress presently is considering legislation to raise the maximum age limit for ADEA protection from 65 to 70. H.R. 5383, 95th Cong., 1st Sess. §2(a) (1977); *see* note 92 *supra*.

103. Age Discrimination in Employment Act of 1967, §4(f)(2), 29 U.S.C. §623(f)(2) (1970).

104. 542 F.2d at 220, 222.

105. *Id.*; *see* 29 U.S.C. §621(b) (1970); *Senate Hearings, supra* note 23, at 22, 37.

106. *See, e.g.*, Zinger v. Blanchette, 549 F.2d 901, 909 (3d Cir. 1977); *House Hearings, supra* note 19, at 448; NATIONAL INDUSTRIAL CONFERENCE BOARD, CORPORATE RETIREMENT: POLICIES AND PRACTICES 5-11 (1964); U.S. DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 303 (97th ed. 1976); Abramson, *Compulsory Retirement, The Constitution and the Murgia Case*, 42 MO. L. REV. 25, 25 (1977).

107. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 323-24 (1976) (Marshall, J., dissenting); *Senate Hearings, supra* note 23, at 21; 113 CONG. REC. 31,256-57, 34,742, 34,745, 34,747 (1967); R. ATCHLEY, THE SOCIOLOGY OF RETIREMENT 88, 121 (1975); Abramson, *supra* note 106, at 52; McDougal, Lasswell, & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. FLA. L. REV. 639, 641-43 (1976); Note, *Age Discrimination in Employment*, 50 N.Y.U.L. REV. 924, 924-25 (1975); Note, *supra* note 34, at 385-86.

age below sixty-five: older workers must be shunted aside to provide job opportunities for the young;[108] older workers inevitably are plagued by physical disabilities, psychological inflexibility, decreased learning ability, and reduced mobility;[109] and the increased costs of training, fringe benefits, and pensions are not recouped by the skills and experience that older workers bring to their jobs.[110] In reality, involuntary retirement based on arbitrary age considerations leads to a loss of experienced manpower,[111] unemployment disguised as "retirement,"[112] and discrimination that is no more tolerable than discrimination based on race, color, creed, or sex.[113] These considerations, as well as the legal arguments presented in *McMann*, persuasively argue in favor of a Supreme Court decision holding that arbitrary forced retirement below age sixty-five cannot be justified by the employee benefit exemption and is proscribed by the ADEA.

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108. *See, e.g., Senate Hearings, supra* note 23, at 103; Larkin, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. REV. 549, 554 & n.30, 569 & n.104 (1976); McDougal, Lasswell, & Chen, *supra* note 107, at 642-43; Note, *Age Discrimination in Employment*, 50 N.Y.U.L. REV. 924, 938 (1975).

109. *See, e.g.*, 29 U.S.C. §621(a)(2) (1970); *Senate Hearings, supra* note 23, at 23, 38, 52, 85-87, 146; *House Hearings, supra* note 19, at 7, 45, 154, 449; 113 CONG. REC. 34,746 (1967); Kovarsky, *supra* note 43, at 844-46; Larkin, *supra* note 108, at 552 & nn.22-23; Note, *supra* note 108, at 938; Note *supra* note 34, at 394-408.

110. *See, e.g., Senate Hearings, supra* note 23, at 112, 146; Note, *supra* note 34, at 399, 402-08. *But see Senate Hearings, supra* at 34; 113 CONG. REC. 34,742-43 (1967).

111. *Senate Hearings, supra* note 23, at 64; 113 CONG. REC. 34,749 (1967).

112. *Senate Hearings, supra* note 23, at 148-49; *Housing Hearings, supra* note 19, at 48.

113. *Cf.* Abramson, *supra* note 106, at 52 (society packages people by age, skin color, or religion).