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Age Discrimination In Employment: The 1978 ADEA Amendments And The Social Impact of Aging

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I. INTRODUCTION

In February, 1978, President Carter's executive reorganization plan transferred enforcement of the Age Discrimination in Employment Act (ADEA) from the Labor Department Wage-Hour Division to the Equal Employment Opportunity Commission.¹ In April, 1978, Congress enacted major amendments to the ADEA raising the mandatory retirement age for non-federal workers to seventy and abolishing mandatory retirement for nearly all federal workers.² The 1978 ADEA amendments altered the retirement programs of more than 50,000,000 American workers. It also restructured payment and collection of social security benefits and of retirement and profit sharing plan payments. By the amendments, Congress has attempted to reverse a long term historical trend toward early retirement and an increasing dependency ratio by providing guaranteed employment to age seventy for workers in private enterprise.

The 1978 ADEA amendments failed to solve many of the difficult technical problems involved in private suit enforcement of ADEA. The amendments attempted to overrule the United States Supreme Court's decision in *United Airlines, Inc. v. McMann*,³ which insulated forced retirement under pre-1967 pension plans at company option before age sixty-five from ADEA sanctions. It is doubtful, however, whether Congress succeeded in overriding the Supreme Court. Congress also failed to correct many other technical problems disclosed in the ten-year life of the ADEA. This article will explore the sociology behind the original ADEA, the structure of the 1967 ADEA, its weaknesses and

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1. Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978).

2. 29 U.S.C.A. §§ 624, 633a (West Supp. 1978).

3. 434 U.S. 192 (1977). The Louisiana Legislature used the infamous "grandfather clause" to deny the right to vote. Every person whose grandfather had not voted in the 1860 general election had to pass an impossible literacy test. *McMann* revives this ghost and hides it in the "impairment of contract" doctrine.

strengths during its ten-year life, and the effectiveness of the 1978 amendments in dealing with the problems inherent in the original Act.

II. AGE DISCRIMINATION IN EMPLOYMENT IN AMERICA

A. *History of Age Discrimination*

One of the mixed blessings of our culture is the expanding life expectancy of each generation since the Civil War. In 1850, when the average male life span was estimated to be 40 years,⁴ the problems created by modern trends toward longevity did not exist. By the 1960's, however, the United States had undergone a revolution in the make-up of its adult population. This revolution resulted, in large part, from this country's great social commitment in the last quarter of the nineteenth century to better health, better nutrition, and the development of preventive medicine. The immediate result of this campaign was a sharp decline in infant mortality, which made it possible for more persons to survive into adulthood and old age.⁵ In 1900, 48 out of every 100 children born could expect to live to 60. In 1950, 76 out of 100 children born could count on living to 60.⁶ According to the Bureau of the Census, the natural increase in population between 1900 and 1960 accounted for only half the increase in the number of persons over 60 between 1900 and 1960.⁷ Between 1880 and 1910, 18 million people immigrated to the United States,⁸ mostly healthy young adults. This figure accounts for about 20% of the increase in older Americans between 1900 and 1960.⁹ The remaining component, attributable to declining infant and maternal mortality rates, increased life expectancy, and better medical care for older Americans, accounts for three-tenths of the increase in older Americans.¹⁰

Since 1900, American industry, responding to trade union pressure, has recognized an employee's right to retire, generally at age 65. Since World War II, many employers have adopted retirement pension programs which offer small retirement stipends to long service employees. An adjunct feature of many of

4. See WHITE HOUSE CONFERENCE ON AGING, AGING IN THE STATES—A REPORT OF PROGRESS, CONCERNS, AND GOALS 24 (1961) [hereinafter cited as AGING IN THE STATES].

5. *Id.* at 23.

6. *Id.*

7. *Id.* at 24.

8. *Id.*

9. *Id.*

10. *Id.*

these programs is an "early retirement program" by which an employer can force a worker into retirement before 65, at the whim of the employer. One side effect of this type of retirement program is an increasing dependency ratio. At the turn of the century, 94 nonworkers depended upon every 100 workers. Most of these dependents were children.¹¹ In 1950, after a substantial decline in the birth rate during the 1920's and 1930's, the dependency ratio was 74 per 100. By 1960, the ratio had increased to 89 per 100, reflecting both the postwar baby boom and an increasing number of unemployed persons over 50.¹²

During the same period, an average American's life span has increased while his work-life expectancy has declined. In 1900, a 20-year old worker had an average life expectancy of 42.2 years and a work-life expectancy of 39.4 years. In 1960, a 20-year old worker had a 49.6 year life expectancy, but his work-life had expanded only 3.2 years to 42.6 years. His retirement, therefore, expanded from 2.8 years in 1900 to 7.0 years in 1960.¹³ In 1970, there were 19,799,000 men and women over 65 in the United States.¹⁴ 8,393,000 were males; 11,406,000 were females.¹⁵ A generation earlier, in 1930, there were 6,644,000 men and women over 65, 3,333,000 males and 3,311,000 females.¹⁶ In 1968, 837 out of every 1,000 persons over 65 received social security benefits.¹⁷ In 1970, 16.4% of all persons over 65 were employed. 83.0% were not in the work force. Persons not in the work force included 8,534,000 who said they were keeping house, 5,316,000 who were retired, 1,546,000 who were in bad health, and 97,000 who were unable to obtain work.¹⁸ It is therefore clear that work is not a significant factor in the support scheme or lifestyle of Americans over 65. Only 0.5% of all Americans over 65 were unemployed and seeking jobs.

This pattern is reflected in a lowering of the normal retirement age statistically. Although the American labor force increased 35% between 1930 and 1960, the increase was not spread uniformly throughout all occupational classifications. The number of public officials, lawyers, and accountants increased. Bakers, blacksmiths, boilermakers, carpenters, masons, painters,

11. *Id.* at 25.

12. *Id.*

13. YUNG-PIN CHEN, *INCOME—BACKGROUND* 55, table 5 (1971 White House Conference on Aging Monograph).

14. *Id.* at 54, table 3 (figures based on projections by U.S. Board of Census).

15. *Id.*

16. *Id.*

17. *Id.* at 73, table 29.

18. *Id.* at 79, table 36.

plasterers, seamstresses, laundry and dry cleaning workers, coal miners, and typesetters decreased in number. Totally new occupations associated with communications, computer technology, and aerospace technology have risen since 1930. One striking result of this uneven increase in occupational fields is the impact on older men and women in the work force. American males over 55 were proportionally underrepresented in the new occupations of the 1950's and 1960's.¹⁹ This was counterbalanced by the overrepresentation of males 55 or older in such occupations as farming, real estate sales, locomotive engineers, tailors and furriers, guards and watchmen, and shoemaking.²⁰ The implication which may be drawn from this phenomenon is clear: industry is not interested in investing time and money in retraining older workers for jobs created by changing technology, nor are younger workers likely to accept jobs in trades or skills that are obsolescent. Thus, the impact of obsolescence falls more heavily on the shoulders of older workers.²¹ During the 1960's, the rate of egress from the work force by workers over 55 more than compensated for the reduction in unemployment generally.²² This trend has continued throughout the 1970's, and may have been accelerated by the recessions of 1970-71 and 1975-77. When older workers who are willing to work are laid off, they are out of work for much longer periods than workers under 45.²³ The percent and relative number of American workers over 45 has been declining since 1950. This phenomenon has not been offset by retirement programs, by social security benefits, or by a meaningful alternative to employment for men over 45 who are dismissed from the work force

19. I. SOBEL, EMPLOYMENT—BACKGROUND 9 (1971 White House Conference on Aging Monograph).

20. See *id.* at 10-13, tables 3, 4, & 5 for a comprehensive analysis of this phenomenon. Employers literally force agism on older workers by preferring younger workers who will produce for a longer period of time after retraining for new occupations. Thus, passive agism results from a "phase-out" of obsolete technological training which inevitably results in a disproportionate number of layoffs and discharges, or forced early retirements that directly affect workers over 55.

21. Dr. Sobel states:

These data, in regard to rates of unemployment by age, represent the least important aspect of the problem. Such information can be likened to the relatively small, visible part of the employment iceberg. *The real problem is that many older workers after displacement, and after long quests for employment, tend to stop looking for work and are thus subsequently classified as out of the labor force rather than unemployed.* Thus, involuntary retirement at ages from 55 upward may present one growing and highly undesirable facet of manpower utilization.

Id. at 12. See also *id.* at 15-16, tables 6 & 7.

22. *Id.* at 9.

23. *Id.* at 18, table 8.

before "normal retirement" at 65. This condition, which was recognized as early as 1951,²⁴ is the phenomenon of age discrimination in employment.

B. *1950 Conference on Aging: Recommendations for Legislation*

The First National Conference on Aging, initiated by President Truman in 1950, produced a pioneer study on the impact of aging on the American work force. The study, called *Man and His Years, An Account of the First National Conference on Aging*,²⁵ concluded, among other things, that a trend for early retirement for workers aged 55-65 had appeared as early as 1940,²⁶ and persisted into 1950.²⁷ The study cited both voluntary and involuntary factors contributing to this decline. The voluntary factors included increased per capita income, higher savings, old age and survivors insurance benefits, pension programs, and charitable relief for poor persons.²⁸ The involuntary factors cited were changing production technology, physical ability, increasing job eligibility standards, and a decline in demand for certain jobs populated by older workers.²⁹ *Man and His Years* tentatively concluded that this decline was probably the product of involuntary factors, rather than a voluntary shift to earlier dates for opting out of the work force.³⁰

Man and His Years also cited the retirement policy of companies as a major reason for quitting the work force.³¹ In 1950, compulsory retirement generally occurred at 65. *Man and His Years* contained an extensive discussion of compulsory retirement practices,³² concluding that raising the compulsory retirement age, or

24. FEDERAL SECURITY AGENCY, *MAN AND HIS YEARS—AN ACCOUNT OF THE FIRST NATIONAL CONFERENCE ON AGING* 83 (1950) [hereinafter cited as *MAN AND HIS YEARS*].

25. *Id.* This work was the first comprehensive study of the social problems of aging in America conducted by an agency of the United States. The seminal study on the impact of aging on the economy and upon the lifestyle of older Americans is A. EPSTEIN, *THE CHALLENGE OF THE AGED* (1928).

26. *MAN AND HIS YEARS*, *supra* note 24, at 25.

27. *Id.* at 25-26.

28. *Id.*

29. *Id.*

30. *Id.* at 27-28.

31. *Id.* at 74-77. The industry participants in the 1950 conference were quick to point out the political advantages of forced retirement which opens up opportunities of promotion for younger people in the plant.

32. *Id.* at 76-78. The best analysis of compulsory retirement in the fifties is contained, however, in J. CORSON & J. MCCONNELL, *ECONOMIC NEEDS OF OLDER PEOPLE* 73-86 (1956). The study was commissioned by the Twentieth Century Fund under a special committee chaired by Arthur H. Dean. Compulsory retirement was found to be arbitrary and socially unacceptable, even if confined to persons 65 or older.

doing away with compulsory retirement altogether, would not significantly raise productivity in business or industry.

The 1950 Conference on Aging listed seven factors that restricted employment of older workers:

- (1) *Physical standards that are unnecessarily rigid;*
- (2) *Inadequate job analysis and specifications;*
- (3) *Failure to engineer jobs in terms of labor supply as well as in terms of the capacities of older workers;*
- (4) *Inadequate placement and assignment;*
- (5) *Consideration of workers on the basis of chronological age rather than in terms of their physiological age and individual abilities;*
- (6) *Widespread belief that workmen's compensation, group insurance and pension plans are more costly when older workers are hired; and*
- (7) *General prejudice against older workers.*³³

The 1950 Conference on Aging came to no conclusion about the wisdom of legislation outlawing age discrimination in private employment. Instead, it recommended that age limits in civil service jobs be removed.³⁴ It would be eleven years before a responsible body called for anti-age discrimination legislation.

C. *The 1961 White House Conference on Aging*

President Kennedy convened the Second National Conference on Aging at the White House in 1961. Following the 1950 Conference, some states had adopted anti-age discrimination legislation.³⁵ In 1948, New York had established a Joint Legislative Committee on Problems of Aging which made its report after the 1950 Conference. Connecticut, Florida, Iowa, and Michigan established institutes for gerontology.³⁶ Temple University held a series of conferences on the problems of making a living while growing old. The University of California and the University of Wisconsin had statistically analyzed retirement programs and their impact on older workers. The 1959 California studies showed 35% of the state's labor force was over 45, and 41% of the state's

33. MAN AND HIS YEARS, *supra* note 24, at 84.

34. *Id.* at 85.

35. The following jurisdictions had anti-age discrimination legislation prior to 1961: Alaska, 1960; Colorado, 1903; Connecticut, 1959; Delaware, 1960; Louisiana, 1934; Massachusetts, 1937 and 1950; New York, 1958; Oregon, 1959; Pennsylvania, 1956; Puerto Rico, 1959; Rhode Island, 1956; Wisconsin, 1959. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT 107 (1965) [hereinafter cited as THE OLDER AMERICAN WORKER].

36. AGING IN THE STATES, *supra* note 4, at 57.

unemployed were over 45. The United States Labor Department also produced studies, showing that the productivity and output of older workers was more consistent and equal or better in quality to that of younger workers.³⁷

Special counseling and placement programs for older workers also appeared during the 1950's. Louisiana tried to obtain employers' voluntary consent to elimination of age restrictions on job applications and employment advertising.³⁸ The Federal Office of Vocational Rehabilitation started training programs for older workers to provide them with marketable skills.³⁹ In spite of these positive steps by the states, the 1961 conference was thematically pessimistic.

The delegates to the 1961 conference characterized the problem of the older worker by two statements. First, older workers were widely discriminated against in obtaining work. Second, older workers unable to work to normal retirement at 65 suffered a corresponding loss in retirement income security.⁴⁰ The 1961 Conference on Aging did not adopt or recommend a model act outlawing age discrimination in hiring and retention. Instead, it listed its policy recommendations in summary fashion:

1. It is recognized that pertinent studies show that chronological age by itself is not a reliable measure of ability to do the job. There is, therefore, need for an educational and information program that will correct widespread but false impressions of employers and hiring personnel concerning older workers, and impress them with the facts about their abilities.
2. It is recommended that the President be authorized by Congress to appoint a Committee on Employment of Older Workers, with appropriate staff and funds, to spearhead and direct on a voluntary basis, a nationwide program at national, state, and community levels, to educate employers, labor and other groups concerning the qualification of middle-aged and older workers, and to promote policies of hiring on the basis of qualified [*sic*] and without regard to age.
3. It is recommended that the State legislate to prevent discrimination in hiring on the basis of age. . . .⁴¹

President Kennedy did not act upon the 1961 conference recommendations. Congress, however, added to Title VII of the Civil

37. *Id.* at 57-58.

38. *Id.*

39. *Id.* at 61.

40. *Id.* at 32-33.

41. STAFF OF SPECIAL SENATE COMM. ON AGING, 87TH CONG., 1ST SESS., THE 1961 WHITE HOUSE CONFERENCE ON AGING—BASIC POLICY STATEMENTS AND RECOMMENDATIONS 35 (Comm. Print 1961) [hereinafter cited as 1961 RECOMMENDATIONS].

Rights Act of 1964, section 715,⁴² which required the Secretary of Labor to investigate the problem of age discrimination in American labor. The Labor Department responded within a year.

D. *The Older American Worker*

In 1965, the Labor Department issued its section 715 report, commonly called *The Older American Worker*.⁴³ It had two parts. The first part was a series of surveys by the Labor Department of age discrimination in employment practices in key metropolitan areas. The second part, which appears first in the printed report, recommended a federal anti-age discrimination act. The data discovered by the Labor Department reinforced the 1950 and 1961 Conferences on Aging. *The Older American Worker* demanded federal anti-age discrimination legislation.

1. *The Labor Department Metropolitan Area Survey.* The Labor Department chose five metropolitan areas in the United States to see to what extent age discrimination in hiring adversely affected workers between 45 and 64. None of the five was located in a state having an anti-age discrimination act.⁴⁴ The survey also attempted to discover whether employer retention and promotion practices discriminated against workers 45 to 64.⁴⁵

a. *The Hiring Policy Survey.* In March, 1965, the Labor Department found that 8.6% of all new hirings in the five areas were of workers over 45. Workers over 45 constituted 27% of the unemployed population of the five areas.⁴⁶ One out of six employers had an open hiring policy with respect to age limits. The remainder set age restrictions on all job applicants.⁴⁷ New hires for workers 40-44 was at the level of national unemployment, or about 7.6%. New hires for workers 45-54, however, were less than half the national unemployment rate, and those between 55 and 64 were hired at one-fifth the national unemployment level.⁴⁸

42. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (prior to 1972 amendment).

43. The speed with which the Labor Department prepared *THE OLDER AMERICAN WORKER*, *supra* note 35, illustrates what government can do if someone lights a fire under a federal agency. The impetus in this case was President Johnson's personal concern for the problem of age discrimination.

44. *Id.* pt. I, at 3. The following states enacted age discrimination legislation between 1961 and 1965: California, 1961; Hawaii, 1964; Idaho, 1965; Indiana, 1965; Nebraska, 1963; New Jersey, 1962; North Dakota, 1965; Ohio, 1961; Washington, 1961. *Id.* at 107.

45. *Id.* at 3.

46. *Id.* at 4.

47. *Id.* at 3. This sample consisted of 540 employers. Four hundred fifty-four of these employers, representing 71% of aggregate employment, furnished data on 89,000 new workers hired during 1964. *Id.* at 4.

48. *Id.* at 4.

Older women were accepted more readily than older men.⁴⁹

One hundred forty-eight employers reported having a fixed upper age limit for employment; 303 stated they had no upper limit. A small group of employers reported an affirmative action program for the hiring and retention of older workers. Employers with stated age discrimination policies reduced hirings of workers over 45 to 6.9% of all hires, compared to 13.0% in the affirmative action group.⁵⁰ The main reasons employers gave for age discrimination in hiring were physical deterioration in workers, desire to promote workers from within, fear that older workers would ask for more pay than the job called for, and adverse impact on company pension plan funding.⁵¹ The Labor Department concluded that a significant number of American employers engaged in age discrimination in hiring.⁵²

b. The Retention and Promotion Survey. The Labor Department survey also noted a strong trend toward voluntary retirement before the commonly accepted age of 65 had begun in the middle 1950's and continued through the survey date of 1964-65.⁵³ The Social Security Administration reported that in 1963, 62% of all retirees at 65 or over did so voluntarily, whereas only 59% of retirees between 62 and 64 were voluntary.⁵⁴ Workers retired before reaching 65 tended to hold low-paying jobs with intermittent employment records prior to retirement.⁵⁵

The surveyed employers suggested that older workers were more of a liability than an asset because of physical infirmity and mental slowness. The Labor Department compiled materials from several sources to ascertain whether there was any scientific evidence for these employer opinions.⁵⁶ After review, the Department concluded:

- (a) Deterioration in muscle control and ability to coordinate hand and eye motion is not affected by change in the central nervous system at all before 60. After 60 no generalization can

49. *Id.* at 5-6.

50. *Id.* at 7.

51. *Id.* at 10-13.

52. *Id.* at 16-17.

53. *Id.* at 71.

54. *Id.* at 74.

55. *Id.* The Labor Department recommended employers review gradual or phased retirement policies for the benefit of older workers. *Id.* at 76-77.

56. *E.g.*, A. WELFORD, *AGING AND HUMAN SKILLS* (1958); Birren, *Age Changes in Skill and Learning*, in *EARNING OPPORTUNITIES FOR OLDER WORKERS* (1955); McFarland & O'Doherty, *Work and Occupational Skills*, in *HANDBOOK OF AGING IN THE INDIVIDUAL* (1959).

be made for deteriorating coordination, since individual performance varies widely.⁵⁷

(b) Although older workers tend to have less formal education than younger workers, and to require somewhat longer time to digest and understand new materials, there is no evidence indicating workers over 45 cannot be satisfactorily retrained for new occupational skills.⁵⁸

(c) Outside of those jobs which demand heavy physical labor, older workers performed as well or better than younger workers up to normal retirement age. Further, individual performance varied among older workers such that no conclusion could be drawn relating to over-all declining performance after 60 or even 65.⁵⁹

(d) Older workers were more likely to enjoy their work, to be absent less often and have fewer industrial accidents than younger workers.⁶⁰

The Labor Department concluded, therefore, that employers' intuitive judgments about decreasing performances had no rational justification.

c. *Economic Consequences of Age Discrimination.* Finally, the Labor Department examined the economic results of age discrimination in hiring and retention. Unemployment among white and nonwhite male workers increased steadily from 44 to 64.⁶¹ Long-term (more than 27 weeks) unemployment fell most heavily

57. THE OLDER AMERICAN WORKER, *supra* note 35, pt. I, at 82.

58. *Id.* at 82-84.

59. *Id.* at 86.

60. *Id.* at 87-88. Most studies have emphasized this conclusion. Walter R. Miles concluded, in 1939, that age is not a reliable measure of a person's probable capacity for work. W. MILES, PROBLEMS OF AGING 535-71 (E.V. Cowdry ed. 1939). Professor Welford reached the same conclusion in 1951. A. WELFORD, SKILL AND AGE, AN EXPERIMENTAL APPROACH 146,47 (1951). In 1956, the Twentieth Century Fund reported that, except for high coordination work or piece work, the productivity of older workers up to 65 was not significantly different from that of younger workers. The Fund writers attempted to conclude that productivity declined, but their conclusion was too noncommittal to contradict the contrary conclusion of other authors. J. CORSON & J. McCONNELL, *supra* note 32, at 58-61. For more recent discussion of this common prejudice, see H. Sheppard, *Aging and Manpower Development*, 11 AGING AND SOC'Y 84-200 (1969).

The most amazing recent study of productivity and aging is T. Rich, *An Exploratory Investigation of Old Age Employment in Select Industries with a Proposal* (1967) (unpublished masters thesis in Springfield College Library). Professor Rich was interested in the attitude of older workers toward their job, and conversely, company personnel managers' attitudes toward older workers. The results of the survey were astoundingly consistent: older workers were more willing to cooperate with management, to get along with younger workers, to adjust to new technology; less likely to panic under pressure; and more willing to accept responsibility than younger workers. Rich chose an age range of 40 to 64 which coincided with the Age Discrimination in Employment Act protected class.

61. THE OLDER AMERICAN WORKER, *supra* note 35, at 97-99.

on workers 45-64.⁶² This resulted usually in permanent unemployment.⁶³ Such early termination deprived older workers of social security benefits at eligibility age and dramatically decreased their pension plan rights under many company retirement programs.⁶⁴

2. *Recommendations for Action.* The Labor Department clearly had found overwhelming evidence of arbitrary age discrimination in employment practices in the five metropolitan areas.⁶⁵ Inferentially, the same widespread discrimination existed in other regions of the United States. The Department reviewed state experience with anti-age discrimination laws. It concluded that age discrimination in employment could be curbed only by an effectively enforced anti-age discrimination statute.⁶⁶ The Department made six specific recommendations to Congress:

- (1) Pension plans and profit sharing plans should provide a wider program of vesting rights in workers before normal retirement.
- (2) Annuity contracts for workers should be studied.
- (3) Workmen's compensation legislation needs to be reviewed for its adverse impact on hiring and retaining older workers.
- (4) Collective bargaining procedure should include a split seniority system for newly hired older workers integrated into existing seniority systems.
- (5) The Labor Department should be authorized to continue its education program among all employers. This program should concentrate on retraining and rehabilitating older workers.
- (6) Age discrimination in hiring and retention must be outlawed.⁶⁷

62. *Id.* The Labor Department cited its special project initiated in 1963 when the Studebaker Corporation closed its assembly plant in South Bend, Indiana. Two years after the plant closed (June 2, 1965), 508 of 3,827 workers over 50 who were laid off by Studebaker were still out of work, although they needed and were available to take any kind of work. *Id.* at 100.

63. *Id.*

64. *Id.* at 102-04.

65. *Id.* pt. II, at 21. "There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. The possibility of new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren." H.R. REP. NO. 805, 90th Cong., 1st Sess. 4, reprinted in [1967] U.S. CODE CONG. & AD. NEWS 2214.

66. State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a *well-administered and well-enforced statute*, coupled with an educational program. THE OLDER AMERICAN WORKER, *supra* note 35, pt. I, at 109-10.

67. See *id.* pt. II, at 21-25.

E. *The 1967 Age Discrimination in Employment Act*

In 1967, President Johnson sent Congress a message on aid for the aged. That message contained several significant passages relating to age discrimination.

Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people aged 45 and over who are unemployed. . . .

. . . In 1965, the Secretary of Labor reported to the Congress and to the President that approximately half of all private job openings were barred to applicants over 55; a quarter were closed to applicants over 45.

In economic terms, this is a serious—and senseless—loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families.⁶⁸

The House commenced hearings on anti-age discrimination legislation August 1, 1967. Legislation reached the Senate October 23, 1967 and passed November 6, 1967. A similar bill passed the House December 4, and after conference committee work, the Age Discrimination in Employment Act passed both houses December 5-6, 1967.⁶⁹

During House hearings, both houses agreed on the main aim of the new Act: to outlaw age discrimination in employment practices for workers 40 to 64.⁷⁰ The House thought the Act should be administered and enforced by the Secretary of Labor, who would deal with age discrimination cases on a case by case basis.⁷¹ The Act made it unlawful for an employer to “fail or refuse to hire” or to fire any worker because of that worker’s age, and forbade discrimination in terms and conditions of work because of age. Section 4 of the Act, according to the Committee Report, also prevented segregation or classification of employees on account of age, or wage reductions on account of age.⁷²

68. S. REP. NO. 1098, 90th Cong., 1st Sess. 169 (1967).

69. Pub. L. No. 90-202, 81 Stat. 602 (1967).

70. H.R. REP. NO. 805, 90th Cong., 1st Sess. 8, reprinted in [1967] U.S. CODE CONG. & AD. NEWS at 2219. Testimony indicated that 40 is the age at which employment discrimination against older workers becomes apparent.

71. *Id.* at ____, [1967] U.S. CODE CONG. & AD. NEWS at 2219-20.

72. The section by section analysis shows that section 4 was intended to make it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions

Any act prohibited by section 4, according to section 7, was to be investigated and compliance enforced by the Secretary of Labor.⁷³ The House also indicated that an act which injured a worker under section 4 of the Act would invoke the existing damage remedies of sections 16 and 17 of the Fair Labor Standards Act, which permitted successful parties to recover actual lost pay, attorneys' fees, and liquidated damages. Civil actions to enforce the Age Discrimination in Employment Act could be filed in federal district court for legal and equitable relief.⁷⁴

The ADEA purported to provide a sound remedy structure for the widespread kind of age discrimination in employment that *The Older American Worker* surveyed in 1965. Congress wanted to combine a program of employer education and vocational rehabilitation with a program of enforcement of anti-discrimination legislation.⁷⁵ It believed that the Age Discrimination in Employment Act was:

rich in potential usefulness and that it will speed the other changes necessary for full and effective use of older workers in ways that will strengthen the economy and that will also reduce the serious loss in happiness and well-being of those now unemployed or underemployed solely because of age.⁷⁶

If Congress legislated appropriately, the ADEA should pass structural analysis as a legislative document; it should be clear, consistent, and unambiguous.

or privileges of employment because of such individual's age; or (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of his age; or (3) to reduce the wage rate of any employee in order to comply with this act.

Id. at ___, [1967] U.S. CODE CONG. & AD. NEWS at 2216.

73. *Id.* at ___, [1967] U.S. CODE CONG. & AD. NEWS at 2222.

74. One of the major flaws in the Age Discrimination in Employment Act is its incorporation by reference of the remedy section and statute of limitations section of the Fair Labor Standards Act. According to 29 U.S.C. § 626(b) (1970), liquidated damages for future harm will be awarded only upon a showing of willful violations. The court will have jurisdiction to grant both legal and equitable relief as appropriate. This may include judgment compelling employment, reinstatement, promotion or enforcement of liabilities for amounts deemed to be unpaid minimum wages or unpaid over-time compensation. No real consideration seems to have been given to the fact that this incorporation by reference severely restricted class actions under the Age Discrimination in Employment Act, nor that it incorporated a statute of limitations which was radically different from that contained in the 1967 Act.

75. STAFF OF SPECIAL SENATE COMM. ON AGING, DEVELOPMENTS IN AGING: 1967, S. REP. NO. 1098, 90th Cong., 1st Sess. 24-28 (1967) [hereinafter cited as DEVELOPMENTS IN AGING, 1967].

76. *Id.* at 28.

III. STRUCTURAL ANALYSIS OF 1967 AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Legislative Purposes of the Act*

Section 2 of the Act makes four significant findings summarizing the history of age discrimination in employment:

- older workers are at a disadvantage in their effort to retain or regain employment;
- arbitrary age limits for hiring and discharge are a common practice which work to the disadvantage of older workers;
- older workers have a higher unemployment rate than younger workers; and
- arbitrary age discrimination is a burden on the free flow of interstate commerce.⁷⁷

Congress therefore concluded the Act should accomplish three legislative purposes: it should promote the employment of older persons for ability rather than age; it should prohibit arbitrary age discrimination in employment; and it should help employers and workers find ways of meeting problems arising from the impact of age on employment.⁷⁸ For analytical purposes, the remainder of the Act should conform to a logical, consistent program for administration and enforcement of these three legislative purposes without internal obstacles created by the Act itself.

B. *The Education Program*

Section 3 of the Act required the Secretary of Labor to: undertake studies and provide information to labor unions, management and the general public concerning the needs and

77. 29 U.S.C. § 621 (1970).

78. The legislative findings of section 2(b) of the Act parallel the findings of the Labor Department in *THE OLDER AMERICAN WORKER*, *supra* note 35, pt. II, at 21. Since 1967, law review commentators have analyzed and discussed the import of the purposes of the Age Discrimination in Employment Act. For a representative sampling of the literature see Agastein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y.L.F. 309, 315-17 (1973); Kovarsky & Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws on Employment*, 27 VAND. L. REV. 875, 875-93 (1974); Note, *Proving Discrimination Under the Age Discrimination in Employment Act*, 17 ARIZ. L. REV. 495, 496-500 (1975); Note, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116, 129-30 (1975); Note, *Age Discrimination in Employment: Available Federal Relief*, 11 COLUM. J. L. & SOC. PROB. 281, 282, 338-42 (1975); 16 B.C. INDUS. & COMM. L. REV. 688, 690-93 (1975); 45 U. CIN. L. REV. 123, 127-28 (1975). For a student work of special merit see Note, *Damage Remedies Under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47 (1976). This note is based upon the district court decision in *Rogers v. Exxon Research & Eng'r Co.*, 404 F. Supp. 324 (D.N.J. 1975).

abilities of older workers and their potentials for continued employment. . . .⁷⁹

To do this, the Secretary must implement a research program oriented toward finding new ways to employ older workers. The Labor Department also is to assist state agencies that enforce state anti-age discrimination laws. Moreover, the Secretary must assist private and public agencies in programs enforcing anti-age discrimination measures.⁸⁰ To do so, the Labor Department requires staff members to research the problems of older workers. The annual appropriation, however, for *all* anti-age discrimination programs from 1967 to 1974 was only \$3,000,000.⁸¹ The Labor Department initially allocated only 69 positions to ADEA enforcement in 1969⁸² and did not increase this number until fiscal 1975.⁸³ The annual budget for *all* age discrimination programs was \$500,000 in 1969 and only \$1,500,000 in 1974.⁸⁴ No one was assigned to ADEA research projects. In short, through neglect and lack of specific program provisions in the 1967 Act, Congress did not fund, and the Labor Department did not provide, any significant educational and research program on the problems of older workers from 1967 to 1975.

C. Congressional Definition of Age Discrimination

Section 4 of the Act defined unlawful age discrimination in employment. There are three prohibited activity categories: employer discrimination, employment agency discrimination, and union discrimination.

1. *Employer Discrimination.* Subsection (a) of section 4 renders it unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way

79. 29 U.S.C. § 622(a) (1970).

80. *Id.*

81. 29 U.S.C. § 634 (1970). The 1974 amendments increased the annual appropriation to \$5,000,000. 29 U.S.C. § 634 (Supp. V 1975). The 1978 amendments deleted any reference to a specific sum and authorized "such sums as may be necessary to carry out this chapter." 29 U.S.C.A. § 634 (West Supp. 1978).

82. STAFF OF SPECIAL SENATE COMM. ON AGING, DEVELOPMENTS IN AGING: 1973 AND JANUARY-MARCH, 1974, S. REP. NO. 846, 93d Cong., 2d Sess. 111 (1974). [hereinafter cited as DEVELOPMENTS IN AGING, 1973].

83. *Id.*

84. *Id.*

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.⁸⁵

The prohibitions, which echo the provisions of section 703(a) of the Civil Rights Act of 1964,⁸⁶ withstand only superficial examination. An employer cannot refuse to hire, discharge, segregate, or classify his employees between 40 and 65 because of their age. "Because of such individual's age," however, is at best over-vague, at worst downright ambiguous. The phrase is analogous to the common law notion of "proximate cause" which has terrorized personal injury law for 100 years. Can an employer categorize employees who are (i) over 55, (ii) have less than 12 years of formal education, and (iii) more than 20 years seniority, and discharge all of them because they did not meet a job description that required all workers to have completed high school? What is the standard for "limit, segregate or classify" so that enforcement officers can ascertain what is forbidden by the Act? Did Congress intend to prohibit employers from taking into account an employee's age in evaluating his performance, or is age one discriminatory factor among many an employer may consider in job selection, placement, hiring, and retention? Did Congress intend to codify the principle of seniority in retention practices?

The prohibitions in section 4(a) of the Act allow judges a great deal of freedom in assigning and characterizing employer activity as discriminatory or nondiscriminatory. If Congress wished to avoid precise definition of a prohibited act, it succeeded.

2. *Employment Agency Discrimination.* Subsection (b) defines prohibited activity for employment agencies:

It shall be unlawful for an employment agency to fail or to refuse to refer for employment or otherwise to discriminate against any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.⁸⁷

Other than the false command "It shall be unlawful," which appears in all three subsections of section 4, this provision seems clear. Any employment agency that does not refer workers 40-65 for employment breaks the law. It also breaks the law if it classi-

85. 29 U.S.C. § 623(a) (1970).

86. 42 U.S.C. § 2000e-2(a) (1970).

87. 29 U.S.C. § 623(b) (1970).

fies applicants for employment on the basis of their being between 40 and 65, and their being below 40. The committee report accompanying the ADEA simply repeats the statutory language in explaining its meaning.

3. *Labor Union Discrimination.* Congress also tried to reach union activities. It therefore made it unlawful for a labor organization:⁸⁸

- (1) to exclude or to expel from its membership or otherwise to discriminate against any individual because of his age;
- (2) to limit, segregate or classify its members or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, or as an applicant for employment, because of such individual's age;
- (3) to cause or attempt to cause any employer to discriminate against an individual in violation of this section.⁸⁹

The committee report, as in subsections (a) and (b), simply restates the statute to explain its meaning.⁹⁰

In the structure of the ADEA, the section which makes conduct unlawful follows the section on legislative findings and the section authorizing the Department of Labor to investigate the problems of aging and employment. The Act, however, does not define or identify the class of protected citizens. The statute also uses the false imperative "It shall be unlawful" to describe three prohibitions classified as to object, rather than as to functional discriminatory activities. The three sections were not drawn to establish a parallel set of prohibited acts. Some acts forbidden to a labor organization may be performed by an employment agency, *e.g.*, refuse to accept potential applicants for employment because of age. Congress intended each of the three subsections to prohibit the following specific acts:

88. The Act defines a labor organization as:

a labor organization engaged in an industry affecting commerce and any agent of such an organization and includes any organization of any kind, any agency or employee representation committee, group, association or plan so engaged in which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board

29 U.S.C. § 630(d) (1970).

89. *Id.* § 623(e) (1970).

90. H.R. REP. NO. 805, 90th Cong., 1st Sess. —, reprinted in [1967] U.S. CODE CONG. & AD. NEWS 2221.

- (1) classifying employees on the basis of chronological age;
- (2) refusing to accept an application for employment on account of the applicant's chronological age;
- (3) discharging an employee on account of the employee's chronological age;
- (4) any other act which discriminates against an employee or applicant for employment on account of his chronological age.

Any employer, employment agency, or labor organization violating the ADEA is subject to the penalty provisions of the Act.

4. *Age Limits.* Section 4 did not limit age discrimination. Theoretically, any classification of employees 18-35 favoring younger over older employees, as most union apprentice training programs do, violates the Act. Therefore, Congress limited the application of section 4 by section 12, to employees over 40 and less than 65.⁹¹ Consequently, union apprentice training programs do not violate the Act, because their age limitations terminate below the minimum age limitation of section 12. Nor would an employer violate the Act by placing workers over 65 in an inferior status to workers under 65. The 1978 amendments raise the mandatory retirement age to 70.

D. *Bona Fide Retirement Plan Escape Clause*

Section 4(f) of the Act imparts Congressional approval to three kinds of age discrimination. First, no employer, employment agency, or labor union violates the Act if it contravenes sections (a), (b), (c), or (e) in furtherance of a bona fide occupational qualification based on chronological age.⁹² Second, the Act does not prohibit an employer, employment agency, or labor organization from discriminating against a person on "reasonable factors other than age."⁹³ According to the original version of the ADEA, an employer may follow an employee seniority system or "any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter,"⁹⁴ even though it clas-

91. Section 12 states that "[t]he prohibitions in this chapter shall be limited to individuals who are at least forty years of age but less than sixty-five years of age." 29 U.S.C. § 631 (1970) (amended 1978).

92. It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (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

Id. § 623(f)(1).

93. *Id.*

94. It shall not be unlawful for an employer, employment agency or labor organization—

sifies, or discriminates against employees on the basis of age. This section creates interpretative problems: are these exceptions matters an employee must negate to prove a case of age discrimination under sections 4(a), (b), (c), or (e)? Is the employer required to "confess and avoid" age discrimination by any of these three defenses? Do these defenses have any practical application to an employment agency or a labor organization? Does the "bona fide retirement plan" exception authorize corporate "early out" programs that forcibly retire persons between 40 and 64, on the ground these forced retirees will receive some pension program benefits before "normal retirement" at 65? Under one plausible interpretation, this subsection permits emasculation of the provisions of sections 4(a), (b), (c), and (e) by employers, if not by labor organizations or employment agencies. A skilled employer will be able to justify termination on "reasonable factors other than age" or justify early dismissal by citing the existence of "a bona fide retirement plan" that pays small benefits to early retirees compared with their former income.

E. *Age Discrimination is a Wage Claim*

Section 6 of the ADEA empowers the Secretary of Labor to delegate persons to enforce the Act, and instructs him to cooperate with local, regional, and state anti-age discrimination agencies.⁹⁵ It precedes section 7, the enforcement or penalty provisions of the Act. Unfortunately, section 7(b) states that the ADEA will be enforced by the "remedies and procedures"⁹⁶ of the Fair Labor Standards Act. The specific provisions of the FLSA incorporated into the ADEA include:

1. *Investigation Regulations.* The Secretary of Labor is bound to observe the same procedures in investigating an ADEA case as he is in investigating a minimum wage or overtime act violation.⁹⁷ The Secretary and the Wage-Hour Division may compel attendance of witnesses at conciliation hearings by subpoena under the provisions of the Fair Labor Standards Act.⁹⁸

(2) to observe the terms of a bona fide seniority system or 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 chapter, except that no such employee benefit plan shall excuse the failure to hire any individual

Id. § 623(f)(2). The 1978 amendments to section 4(f)(3) of ADEA adds a proviso against forced early retirement. 29 U.S.C.A. § 623(f)(2) (West Supp. 1978).

95. 29 U.S.C. § 625 (1970).

96. *Id.* § 626(b).

97. *Id.* § 211 (Supp. V 1975).

98. *Id.* § 209.

2. *Penalties and Civil Liability.* Any action that violates the ADEA also violates 29 U.S.C. section 215⁹⁹ which prohibits the withholding of wages payable as minimum wages, or the refusal to pay overtime for more than 40 hours work a week. Thus, an ADEA action is also a "wage claim" for unpaid wages, for which an aggrieved party can recover unpaid minimum wages or overtime compensation, and liquidated damages.¹⁰⁰ Section 6(b), however, limits recovery of liquidated damages to "cases of willful violations of this chapter."¹⁰¹ Also, a successful ADEA plaintiff can recover reasonable attorney's fees and court costs from his employer.¹⁰² This prescription for simplistic relief incorporated from the FLSA must be read into the provisions of section 7(c) which give "any person aggrieved" a "civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." Although the drafters may have intentionally limited the remedies available under the ADEA to those provided unpaid minimum wage claimants under the FLSA,¹⁰³ it is more probable that no one paid much attention to the conflict between the broad language of section 7(c), and 29 U.S.C. section 216(a) and (b).

3. *Statute of Limitations.* For reasons unascertainable from the committee report or contemporary debate, Congress incor-

99. *Id.* § 626(b) (1970).

100. Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wage, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages.

Id. § 216(b) (Supp. V 1975).

101. *Id.* § 626(b) (1970).

102. *Id.* § 216(b) (Supp. V 1975). The language used seems to suggest that the remedy structure of the Age Discrimination in Employment Act is *not* tied to that of the Fair Labor Standards Act alone. Nonetheless, the common interpretation of section 7 is that the remedies enumerated in section 7 and in the Fair Labor Standards Act are *all* the remedies available to an aggrieved party under the Age Discrimination in Employment Act. Consequently, the courts have been unwilling to go beyond an award of back pay, reinstatement, liquidated damages in rare instances, or injunction against continuing violations such as advertisements. *See, e.g.,* Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1217 (N.D. Ga. 1973); Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230, 239 (N.D. Ill. 1973), *rev'd*, 499 F.2d 859 (7th Cir. 1974); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971); Brennan v. Weis Markets, 5 Fair Empl. Prac. Cas. 850 (M.D. Pa. 1973); Hodgson v. Bowman, 4 Fair Empl. Prac. Cas. 165 (E.D. Tenn. 1972).

103. This conclusion, except for *Bertrand v. Orkin Exterminating Co., Inc.*, 419 F. Supp. 1123 (N.D. Ill. 1976), and *Rogers v. Exxon Research & Eng'r Corp.*, 404 F. Supp. 324 (D.N.J. 1975) is consistent with the case law cited in note 102 *supra*. *Rogers* has been overruled and is no longer precedent. *Bertrand* has not yet been reviewed by the Seventh Circuit. The limiting of remedies to those enumerated in the statute is consistent with earlier cases under the Fair Labor Standards Act. *See, e.g.,* Crabb v. Welden Bros., 164 F.2d 797 (8th Cir. 1947); *Northwestern Yeast Co. v. Broutin*, 133 F.2d 628 (6th Cir. 1943).

porated the two year statute of limitations contained in section 6 of the Portal to Portal Act into the ADEA.¹⁰⁴ This incorporation conflicts with the provisions of section 7(d) which fix an internal statute of limitations contingent upon the date of notice to the Secretary of Labor of intent to sue.¹⁰⁵ Arguably then a court might conclude that the notice requirements in section 7(d) are not a statute of limitations.

F. *Remedy Structure—Right to Sue*

Section 7(c) of the ADEA authorizes a civil suit in federal or state courts to recover unpaid wages, liquidated damages, attorney's fees, and court costs, and to receive "equitable relief." No injured party can file a civil action, however, without first complying with the provisions of section 7(d):

No civil action may be commenced by an individual under this section until the individual has given the Secretary not less than 60 days' notice of an intent to file such action. Such notice shall be filed—

- (1) within 180 days after the alleged unlawful practice occurred, or
- (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.¹⁰⁶

The Secretary must attempt conciliation of a dispute when notified by a private party under this section that the private party intends to sue.¹⁰⁷ This provision must be read with section 14(b) which says:

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit

104. 29 U.S.C. § 255 (Supp. V 1975).

105. *Id.* § 626(d) (1970). Section 7(c) provides that:

Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, that the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

Id. § 626(c).

106. *Id.* § 626(d). The 1978 amendments attempt to provide equitable exceptions to the claim bar provisions of this section. 29 U.S.C.A. § 626(d) (West Supp. 1978).

107. 29 U.S.C. § 626(d) (1970).

may be brought under section 626 of this title before the expiration of 60 days after proceedings have been commenced under the state law unless such proceedings have been earlier terminated.¹⁰⁸

Appellate courts have construed these two sections as "jurisdictional" requirements, which, if not observed, bar an injured party from suit.¹⁰⁹

G. Other Provisions of the Act

To complete the structural analysis of the ADEA, several ancillary provisions need be reviewed.

1. *Definitions.* Section 11 contains the ADEA's definitions, which instead of preceding the operative clauses, follow them as an afterthought. Some of these definitions are important to the enforcement of the Act:

a. employer is "a person engaged in an industry affecting commerce who has 25 or more employees for each working day of 20 or more calendar weeks."¹¹⁰

b. Labor organization is an entity engaged in an industry affecting commerce, any agent of that entity, or any joint council, which exists for the purpose of dealing with employers concerning the terms and conditions of work. However, the entity must have at least 25 members to be subject to the Act.¹¹¹ This excludes many small collective bargaining units from the Act.

c. Industry affecting commerce is any activity in commerce in which a labor dispute would hinder or obstruct the free flow of commerce, namely, any activity or industry affecting commerce as defined by the Labor Management Reporting and Disclosure Act of 1959.¹¹² This definition seems to exclude local, regional, and state employees. However, an extended definition of

108. *Id.* § 633(b).

109. *See, e.g.,* *Adams v. Federal Signal Corp.*, 559 F.2d 433 (5th Cir. 1977); *Rucker v. Great Scott Supermarkets*, 528 F.2d 393, 394-95 (6th Cir. 1976); *Moses v. Falstaff Brewing Co.*, 525 F.2d 92, 94 (8th Cir. 1975); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975); *Law v. United Airlines, Inc.*, 519 F.2d 170, 171 (10th Cir. 1975); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1199-1200 (5th Cir. 1975); *Curry v. Continental Airlines, Inc.*, 513 F.2d 691, 694 (9th Cir. 1975); *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485, 488-89 (5th Cir. 1974); *Goger v. H.K. Porter Co., Inc.*, 492 F.2d 13, 17-18 (3rd Cir. 1974). It remains to be seen whether the 1978 amendments alter these decisions.

110. 29 U.S.C. § 630(b) (1970). This section was amended in 1974 to include a person engaged in "industry affecting commerce who has 20 or more employees." 29 U.S.C. § 630(b) (Supp. V 1975).

111. 29 U.S.C. § 630(d) (1970).

112. *Id.* § 630(h).

"employee" added in 1974 now expressly includes such employees.¹¹³

2. *Required Notice.* Section 8 of the Act requires every employer, employment agency, and labor organization to post a notice on its premises stating information about the ADEA.¹¹⁴

3. *Criminal Penalty.* Section 10 imposes a \$500 fine or imprisonment for one year, or both, upon conviction of interfering with or impeding a duly authorized representative of the Secretary of Labor engaged in the performance of his duties.¹¹⁵

4. *Rules and Regulations.* Section 5 requires the Secretary of Labor to continue to study age discrimination in employment.¹¹⁶ He must submit a progress report on research and enforcement each January to Congress.¹¹⁷

5. *Incidental Penalties and Prohibited Acts.* Section 4(d) forbids retaliation against any person who takes part in the investigation or trial of an ADEA complaint.¹¹⁸ Section 4(e) prohibits discriminatory listing or advertising that shows age requirements.¹¹⁹

H. *Structural Defects in the ADEA*

This structural analysis of the ADEA shows the Act, when adopted, had inherent weaknesses. First, the notice and deferral periods required by sections 7 and 14 were unwieldy and almost impossible to understand. The Act did not state clearly the duty

113. *Id.* § 630(f) (Supp. V 1975).

114. *Id.* § 627 (1970).

115. *Id.* § 629.

116. *Id.* § 624.

117. *Id.* § 632. The 1978 amendments require the Secretary to provide a special report on the effects of raising the mandatory retirement age to 70. 29 U.S.C.A. § 624(a)(1)(A) (West Supp. 1978).

118. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d) (1970).

119. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such employer or membership in or any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

Id. § 623(e).

of an aggrieved party to exhaust available state and federal administrative procedures before instigating civil litigation. Second, the Act failed to define the elements of an age discrimination complaint, or to establish the duty of the aggrieved party relative to presenting a *prima facie* case of discrimination. Third, the remedy structure of the Act, borrowed from the Fair Labor Standards Act, was limited in scope and pecuniary reward for successful prosecution of a claim. Fourth, the Secretary of Labor received no efficient delegation of authority to investigate and try ADEA cases. Fifth, the Act did not apply to half the workers between 40 and 64 who were being victimized by age discrimination. Sixth, it did not cover municipal, regional, or state employees, nor did it apply to Federal employees.

In 1974, Congress revised the ADEA and extended it to state and local government employees. Congress also added a new section 15 which made the Act applicable to Federal employees.¹²⁰ Congress, however, did not substantially revise the original ADEA despite continuous warning from the Labor Department that the Act was not working. Moreover, haphazard and ineffectual judicial handling of the ADEA compounded the problems inherent in the structure of the Act.

IV. THE DECLINE AND FALL OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Non-Judicial Follow-up Studies*

Congress has had an opportunity to evaluate the ADEA every January, because the Labor Department faithfully submits its annual report on the Act. These reports also form the basis for the Senate Committee on Aging's own annual report, *Developments in Aging*. Comparison of the Labor Department and Senate reports to the stated purposes of the ADEA reveals some notion of the success of the Act.

1. *Congressional Follow-up Studies.* In 1967, Congress found that older workers were disadvantaged, subject to arbitrary limits on hiring and discharge on account of age, and unemployed more often and for longer periods of time than younger workers.¹²¹ It established three legislative objectives for the Age Discrimination in Employment Act to remedy these social ills: promoting employment of older persons based on their ability rather than age, prohibiting arbitrary age discrimination in employment, and

120. *Id.* § 633(a) (Supp. V 1975).

121. *Id.* § 621(a)-(b) (1970).

helping employers and workers find ways of meeting problems arising from the impact of age on employment. Within two years after adoption of the ADEA, Congress received recommendations for fundamental revisions in the 1967 Act.¹²² These recommendations were incorporated in a working paper called *Employment Aspects of the Economics of Aging*.¹²³ Further Congressional studies appeared in 1972 and 1974.

a. *Employment Aspects of the Economics of Aging*. The 1970 Task Force on the Economics of Aging studied the economic results of age discrimination in employment. The task force quickly pointed out that the first result of the decline in participation in the work force was an increased dependency ratio; more non-productive persons were depending on less producing persons for existence.¹²⁴ The 1970 dependency ratio was 93.2 persons depending on every 100 working persons.¹²⁵ In 1967, the year in which the ADEA became law, unemployment clearly fell most heavily upon workers over 45.

Table 1. Male Unemployment 1967¹²⁶

Age	Percent with 3 or more spells of unemployment
16-19	20.5
20-24	19.2
45-55	22.7
55-64	28.2
65 plus	30.3

This table clearly indicates that male workers over 45 were much more likely to have to face unemployment than men under 45. The trend was more pronounced the closer the worker came to 65. This chart showed a steady drop in the number of men over 60 still in the labor force.

Table 2. Labor Force Participation (in percent)¹²⁷

		<u>Actual</u>	<u>Projected</u>		
Males, age	1954	1960	1965	1970	1980
60-64	84.3	79.5	76.5	76.9	75.7
65-69	58.2	45.8	42.1	36.4	31.3

122. STAFF OF SPECIAL SENATE COMM. ON AGING, DEVELOPMENTS IN AGING: 1969, S. REP. NO. 875, 91st Cong., 2d Sess. 8 (1970) [hereinafter cited as DEVELOPMENTS IN AGING, 1969].

123. STAFF OF SPECIAL SENATE COMM. ON AGING, 91st Cong., 1st Sess., ECONOMICS OF AGING: TOWARD A FULL SHARE IN ABUNDANCE (Comm. Print 1970) [hereinafter cited as ECONOMICS OF AGING].

124. *Id.* at 4.

125. *Id.* at 5.

126. *Id.* at 6.

127. *Id.* at 7.

The Task Force's projections indicated that if current participation trends continued, one out of six men 55 to 59 would not be working at age 64.¹²⁸ This is in effect long-term unemployment which leads to involuntary retirement.¹²⁹ The Task Force stated:

Various indices suggest that the critical period in the work-lives of adult men occurs sometime during their late forties and early fifties. For example, with rare exceptions in every year since 1947 the unemployment rate among men began to rise after the age category of 35-44.¹³⁰

The Task Force recommended, among other things, that Congress fund a rapid increase in staff support to enforce the ADEA. The Task Force noted that in three years the Labor Department made no attempt to study the causes of involuntary retirement as mandated by section 5 of the Act.¹³¹

Congress itself must take a long, hard look at the effect of involuntary retirement policies on the lives of individuals who must leave their jobs, and on the effect of these policies on the economy and social fabric of the nation. Because employment income is clearly so much higher than retirement income, individuals should have choices, alternatives as to whether they wish to continue to work or to retire.¹³²

Congress, however, did not respond to this warning with appropriate action.

*b. Developments in Aging, 1972.*¹³³ The Senate Committee Aging Report for 1972 was a scathing denunciation of the status quo in age discrimination in employment. The ADEA had been on the books for five years, during which period the Labor Department had filed 136 civil actions to enforce the Act. The report neglected to state the outcome of these 136 civil actions. The Department's annual report for 1972 showed that refusals to hire on account of age had increased from 683 cases to 818 cases in 1972. The same report showed an increase in reported failures to promote older workers.¹³⁴ Despite the increase in reported violations, the Wage-Hour Division had 69 persons assigned to enforce the ADEA, down five from 1971. It asked for an appropriation of

128. *Id.*

129. *Id.* at 10-12.

130. *Id.* at 11.

131. *Id.* at 13.

132. *Id.*

133. STAFF OF SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1972 AND JANUARY-MARCH, 1973, S. REP. NO. 147, 93rd Cong., 1st Sess. (1973) [hereinafter cited as DEVELOPMENTS IN AGING, 1972].

134. *Id.* at 66.

only \$1,451,000 for enforcement, against its appropriation ceiling of \$3,000,000.¹³⁵ 1972 followed the 1970-71 recession. Unemployment for workers of all ages remained very high. However, older workers above 45 continued to lose their jobs during 1972 at a faster rate than the general unemployment rate.¹³⁶

On the strength of its examination, the Senate Committee on Aging recommended amending the ADEA to include state and local governmental employers and employers with 20 instead of 25 employees under the Act's coverage, and to increase the appropriation limit from \$3,000,000 to \$5,000,000.¹³⁷ The Committee probably should have recommended redesigning the enforcement system for the ADEA, because its report showed how poorly the present enforcement system functioned.

c. *Developments in Aging, 1974.*¹³⁸ In fiscal 1973, the Department of Labor found almost 15,000 American workers 40 to 65 were victimized by age discrimination in employment,¹³⁹ and found more than 2,900 American employers to be violating the ADEA.¹⁴⁰ Still, ADEA enforcement activities were funded at the low rates shown in *Developments in Aging, 1972*.¹⁴¹ The Labor Department noted that the "25 employee limit" on ADEA coverage in effect sanctioned age discrimination against half of all workers 40-64 in America.¹⁴² The amendments proposed in *Developments in Aging, 1972* were still under consideration. They were not to be adopted for four more months.¹⁴³

d. *Recent Developments.* There were no amendments to the ADEA between April, 1974 and April, 1978. Most suggestions for changing the Act emanated from outside Congress. In 1974, a student note¹⁴⁴ contended that the available statistical evidence did not support 65 as the upper limit for outlawing arbitrary age discrimination in employment, and proposed extending the Act's protection to anyone over 65.¹⁴⁵ In the same year, Professor Irving Kovarsky and Dr. Joel Kovarsky suggested extending the Act to collective bargaining agreements, which would make age discrim-

135. *Id.* at 67.

136. *Id.* at 68.

137. *Id.* at 72.

138. DEVELOPMENTS IN AGING, 1973, *supra* note 82.

139. *Id.* at 110.

140. *Id.*

141. *Id.* at 111.

142. *Id.*

143. Age Discrimination in Employment Act Amendments of 1974, Pub. L. No. 95-256, 88 Stat. 74 (adopted Apr. 8, 1974).

144. Note, *Age Discrimination in Employment: Correcting A Constitutionally Infirm Legislative Judgment*, 47 So. CAL. L. REV. 1311 (1974).

145. *Id.* at 1315-18, 1346-52.

ination a grievable offense under current practice.¹⁴⁶ In 1975, a second student note¹⁴⁷ recommended extending the upper age limit of section 12 to workers above 65, and establishing a special agency to enforce the ADEA.

2. *Labor Department Reports.* Much of the earlier Labor Department reports were reprinted in *Developments in Aging, 1972* and *Developments in Aging, 1974*. The Labor Department Annual Reports for 1976, 1977, and 1978 provide additional insight into the present efficacy of the Wage-Hour Division's ADEA enforcement efforts.

a. *1976 Annual Report.* The 1976 Labor Department report covered the period from July 1, 1974, to June 30, 1975. During fiscal 1975, 4,717 complaints were filed with the Wage-Hour Division alleging some form of age discrimination in employment.¹⁴⁸ The Wage-Hour Division claimed to have provided some form of relief to 3,376 workers, including many workers who did not file a personal complaint against their employer on account of age discrimination.¹⁴⁹ The Wage-Hour Division included in its "workers aided" statistics workers in establishments in which one worker filed a complaint, and the side effect of conciliation was to protect others not yet discharged. The Wage-Hour Division cited 1,642 employers for ADEA violations in fiscal 1975.¹⁵⁰ Twenty-three hundred and fifty workers received back pay, or some other form of monetary relief in fiscal 1975; the total amount of wages or compensation collected was estimated to be \$6,600,000.¹⁵¹ The Labor Department also reported that more than two-thirds of all suits filed by private litigants in fiscal 1975 were dismissed on "procedural grounds."¹⁵²

This brief summary demonstrates that the Wage-Hour Division's enforcement program from July 1, 1974, to June 30, 1975 was not an overwhelming success. Assuming that 2,350 complainants out of 4,717 recovered some benefits during fiscal 1975, the Labor Department batting average is .498. Measured against relief sought in dollars, however, the Department's batting average

146. Kovarsky & Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 885-86 (1974).

147. Note, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116, 135 (1974).

148. U.S. DEP'T OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, ANNUAL REPORT TO CONGRESS 6 (1976) [hereinafter cited as 1976 ANNUAL REPORT].

149. *Id.* at vii.

150. *Id.*

151. *Id.*

152. *Id.* at 14.

is .411.¹⁵³ Because the damages allowed in age discrimination cases are easily calculated, this does not represent the glowing figure Labor seems to represent it to be.

b. *1977 Annual Report.*¹⁵⁴ During fiscal 1976 the Wage-Hour Division obtained monetary relief for ADEA complainants in 742 cases.¹⁵⁵ The Wage-Hour Division recovered \$3,548,751.30 in back pay, liquidated damages, and other compensable items.¹⁵⁶ The Wage-Hour Division recovered 44.4% of all the money damages it demanded of employers during fiscal 1976.¹⁵⁷ During the year ending December 31, 1976, the Wage-Hour Division filed 47 civil suits to enforce the ADEA.¹⁵⁸ The Wage-Hour Division and the Labor Department claimed that the 2,161 complaints filed during fiscal 1976 represented the grievances of 5,121 employees. Thus the real batting average for ADEA enforcement during 1976 is less than the .380 reported for resolution of all complaints. In 1976, age discrimination was widely reported to the Wage-Hour Division, but very seldom alleviated by conciliation or by litigation.

c. *Current Enforcement Experience.* The Labor Department shifted its fiscal reporting to a fiscal year commencing September 21, 1976. Between June 21, 1976, and September 21, 1976, the Wage-Hour Division received 818 complaints.¹⁵⁹ The Wage-Hour Division obtained some compensation for 141 employees affected by these complaints, which represents a .172 batting average.¹⁶⁰ A memorandum circulated internally to ADEA compliance officers in May, 1977 stated that ADEA compliance regulations were the least effective program administered by the Wage-Hour Division in terms of cost/benefit ratio to injured parties.¹⁶¹ President Carter's Executive Reorganization Plan transferred all ADEA enforcement to the Equal Employment Opportunity Commission in early 1978, making new enforcement data very difficult to use and to derive. The 1978 Labor Department Annual Report on the ADEA has not been issued as of November, 1978.

153. *Id.*

154. U.S. DEP'T OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, ANNUAL REPORT TO CONGRESS, 1977 [hereinafter cited as 1977 ANNUAL REPORT].

155. *Id.* at 3.

156. *Id.*

157. *Id.*

158. *Id.* at 19.

159. U.S. Dep't of Labor, Statistics on Compliance—Monthly Report by Program Phase for Month ending September 20, 1976 (1977).

160. *Id.*

161. U.S. Dep't of Labor, Administrative Report (N.D. 1971) (in possession of Wage-Hour Division, U.S. Dep't of Labor, Boston, Mass.).

B. *An Analysis of Judicial Decisions on The Age Discrimination in Employment Act*

Between 1969 and June 1, 1977, there were 147 reported decisions on ADEA cases reported in the West System and in the Bureau of National Affairs Employment Practices Reporter. From June 1, 1977, to August 9, 1978, 127 decisions were reported in the same systems and in the Commerce Clearing House Employment Practices Decisions Reporter. The reported decisions include district court, court of appeals, and Supreme Court cases. In 1977, the first 147 cases reported in these systems were the object of intensive study to determine why plaintiffs won or lost ADEA cases.¹⁶² That study was based on two assumptions: first, nearly all ADEA decisions had been surveyed and classified, and second, any unreported decisions in ADEA cases would follow the pattern of these reported decisions. The survey included both interlocutory rulings at trial and appellate levels, and final decisions on the merits. For that study, and for this follow-up, each decision between the same litigants was analyzed separately to reduce the basis for the decision to the narrowest possible under the rules of decision established by the ADEA. Each case was therefore assigned a holding on the narrowest possible ground for decision to avoid multiple regressions. The 1977 study confirmed the Labor Department's contention that more than half of all ADEA cases plaintiffs lost were dismissed on procedural issues. The results of the 1977-78 follow-up study appear below. In the last fourteen months, ADEA plaintiffs have been doing somewhat better in the courts, although it is too soon to announce a trend toward more effective judicial enforcement of the Act.

1. *Reasons Given for Decisions.* (See table following)

From 1969 to June 1, 1977, the plaintiff won approximately 41% of all cases, the defendant won approximately 59% of all cases. The most frequently cited judicial reason for deciding an ADEA case prior to June 1, 1977, was sufficiency or insufficiency of notice to the Labor Department, cited in 42 cases, 11 decisions

162. For the empirical investigation of the causes for winning and losing ADEA cases, see Reed, *The First Ten Years of the Age Discrimination in Employment Act*, 4 OHIO N. L. REV. 748, 759 (1977).

Table 3. Rank of Reasons Given for Decision, Cases
Decided June 1, 1977 to August 9, 1978

Rank	Reason	Cases	Total	No.	Reason for Winning	No.	Reason for Losing
					%		%
1.	Nature of Remedy	28	22.1	13	20.6	15	23.4
2.	Notice to USDL	22	17.3	9	14.3	13	20.3
3.	Deferral to State	21	16.5	11	17.5	10	15.6
4.	Sufficiency of Evidence	16	12.6	5	7.9	11	17.2
5.	Bona Fide Retirement Plan	8	6.3	3	4.8	5	7.8
6.	Jury trial rights	7	5.5	4	6.4	3	4.7
7.	Prerequisite for class action	5	3.8	4	6.4	1	1.6
8.	Refusal to follow conciliation procedure	3	2.4	2	3.2	1	1.6
9.	Bona fide occupational qualification #	1	0.8	1	1.6	0	0.0
10.	ADEA constitutional limitation on state power #	1	0.8	1	1.6	0	0.0
11.	Injunctive relief #	0	0.0	0	0.0	0	0.0
12.	Miscellaneous*	15	11.8	10	15.9	5	7.8
TOTAL		127	100.0	63	100.0	64	100.0

Notes: # Although these categories fall below the 2 case cut-off for reporting as a separate reason, these categories played a significant part in the 1969-77 study discussed in part in 4 OHIO N. L. REV. 748, 759 (1977), and it is fascinating to see the decline in litigation on these issues in one year's time.

* Miscellaneous other reasons include one case each decided on the basis of mistake on employer's identity card, whether a government employee gets trial de novo on review of civil service action, leave for a pro se plaintiff to amend complaint, the constitutional right to work after 70, misnomer of defendant's employer, lack of civil state action for relief from age discrimination in Michigan, use of the 3 year statute of limitations for willful violations, tolling of the statute of limitations, and no reason. Two cases each were decided on the application of the fifth amendment due process clause to age discrimination, the application of the fourteenth amendment due process and equal protection clauses to age discrimination, and two cases were per curiam decisions without opinions.

for the plaintiff, and 31 for the defendant. This represented 28.6% of all cases decided under the ADEA. Twenty-two cases cited sufficiency or insufficiency of evidence to support the plaintiff's case, 6 times in plaintiff's favor, and 16 times against the plaintiff. These cases represented 15.0% of all decisions. The issue of judicial deference to state agency enforcement of state anti-age discrimination laws came up 19 times, third in importance in ADEA cases, accounting for 12.9% of all decisions. Fourteen cases on this issue were decided for the plaintiff, 5 for the defendant. The fourth highest reason for decision, the nature of the remedy provided for ADEA litigants, including the measure of damages, the type of harm compensable under the ADEA, and the theory of a prima facie case, came up 15 times, accounting for 10.2% of all decisions, of which 10 cases went for the plaintiff, and 5 went for the defendant.

The 127 cases decided in the past 14 months, on the other hand, show a marked shift in emphasis and in relative impact. The plaintiff won 63 cases during the past 14 months, while losing 64 cases, which is about as close to the type of win-lose probabilities established by coin toss as one may come. The most frequently cited reason for a judicial decision in the past 14 months has been some aspect of the nature of the remedy provided by the ADEA, which appeared in 28 cases, 13 for the plaintiff and 15 for the defendant, followed by notice or lack thereof to the Labor Department, appearing 22 times, 9 for the plaintiff, and 13 for the defendant. The third largest number of cases was decided on the issue of deference to state anti-age discrimination law enforcement agencies. This reason appeared in 11 cases for the plaintiff and 10 for the defendant, for a total of 21 cases, representing 16.5% of all decisions. The fourth highest reason was sufficiency or insufficiency of evidence, which showed up in 16 cases, 5 for and 11 against the plaintiff.

The largest remaining category of ADEA cases during the past 14 months were those dealing with the issue of whether or not the plaintiff had been retired pursuant to a bona fide retirement plan. Eight cases were decided on this issue, 3 for and 5 against the plaintiff, making up 6.3% of all decisions. The remaining decisions included 7 cases on jury trial rights, 1 each on bona fide occupational qualifications, tolling the statute of limitations, application of due process and equal protection rights under the ADEA, and several other reasons already discussed in the notes to Table 7.

The 63 cases in which plaintiffs succeeded in preserving their age discrimination act claims against the defendant from June 1,

1977, to August 9, 1978, showed some changes from the distribution of the 61 cases decided between 1969 and 1977, which went in favor of the plaintiff. The largest number of cases decided for the plaintiff in the earlier study, 14, constituting 23.0% of all 61 cases, were on the issue of whether or not the plaintiff had to defer to state anti-age discrimination agencies before seeking federal relief. The largest number of cases in the past 14 months determined for the plaintiff, 13, were on the issue of the nature of the remedy, the kind of damages, whether punitive damages were available, recovery for pain and suffering, and the like. This represented 20.6% of all decisions for the plaintiff. The 8 year sample listed as second in importance to judges in ruling for plaintiffs, the fact of proper notice to the Department of Labor. This factor appeared 11 times, representing 18.0% of all cases for the plaintiff. The second highest reason for deciding in favor of the plaintiff in the 1977-78 survey was deferral to state anti-age discrimination enforcement, which occurred 11 times, representing 17.5% of all plaintiff's decisions. The third place in the 8 year study went to nature of remedy, with 10 cases representing 16.4% of all decisions for the plaintiff. The third largest number of decisions for the plaintiff, 9, were on the issue of proper notice to the Labor Department, constituting 14.3% of all decisions.

The implications of this shift may be quite significant. As cases construing the plaintiff's compliance with notice provisions under the ADEA decline because litigants no longer try to find equities to by-pass lack of notice, the courts have been turning their attention to the measure of damages, the type of damages, and the theory of recovery under the ADEA. At this point, the change in emphasis over such a short period of time does not lead to a conclusion that notice law under the ADEA is settled, but the new figures indicate a more profound judicial attempt to wrestle with the remedy structure and proof problems inherent in ADEA litigation.

In the 14 months between June, 1977, and August, 1978, the plaintiff in 64 ADEA cases lost, either on the merits, on an interlocutory motion vital to his case, or on a "technicality." In the 8 years prior to June, 1977, 36% of all cases lost by plaintiffs were lost on account of the plaintiff's failure to comply with the required notice of suit to the Labor Department specified by section 7 of the ADEA. In the past 14 months, this percentage has declined to 20.3% of all decisions, representing the second greatest reason for deciding against the plaintiff. The reason most often given since June, 1977 for plaintiff's losing has been the nature of the remedy, appearing 15 times and representing 23.4% of all

decisions against the plaintiff. In third place, accounting for 11 losing decisions, is insufficiency of evidence to support a verdict or judgment, which represented 17.2% of all decisions. Deferral to state enforcement agencies accounted for 10 cases lost by plaintiffs, making it fourth in importance and representing 15.6% of all decisions. In the 8 year survey, sufficiency of evidence was cited in 16 cases, comprising 18.6% of all losses. Deferral to state agencies was also fourth in the 8 year survey, representing 5 cases or 5.8% of all losing cases. The bona fide retirement plan defense won 5 cases for defendants in 1977-78 for 7.8% of all cases lost by plaintiffs. In the 8 year survey, bona fide retirement plan defenses won 9 cases for defendants, representing 9.3% of all cases lost by plaintiffs.

2. *Decisions not on Merits.* In reviewing the findings reported in Part 1, some of the reasons for decisions can be classified as "substantive" or "decisions on the merits." In this class belong:

	1969-77 Survey		1977-78 Survey	
	No.	%	No.	%
(a) Sufficiency of evidence	29	14.2	16	12.6
(b) Nature of remedy	31	15.2	28	22.1
(c) Bona fide retirement plan	11	5.4	8	6.3
(d) Bona fide occupational qualification	8	3.9	1	0.8
(e) ADEA is constitutional limitation on state power	4	2.0	1	0.8
TOTAL	83	40.7	54	42.6

In the class of "procedural" or "decisions not on the merits" would be the following:

	1969-77 Survey		1977-78 Survey	
	No.	%	No.	%
(a) Notice to U.S. Labor Dept.	50	24.5	22	17.3
(b) Deferral to state agency	28	13.7	21	16.5
(c) Right to jury trial	11	5.4	7	5.5
(d) Refusal to follow conciliation procedure	8	3.9	3	2.4
(e) Injunction appropriate relief	5	2.5	0	0.0
(f) Met prerequisites for class action	7	3.4	5	3.8
(g) Miscellaneous	12	5.9	15	11.8
TOTAL	121	59.3	73	57.3

Without regard to outcome, nearly 2 out of 3 ADEA cases are still determined on non-substantive grounds. When the losing record is analyzed, it looks like this:

	1969-77 Survey		1977-78 Survey	
	No.	%	No.	%
(a) Notice to U.S. Labor Dept.	35	29.7	13	20.3
(b) Deferral to state agency	13	11.0	10	15.6
(c) Right to jury trial	8	6.8	3	4.7
(d) Failure to follow conciliation procedure	6	5.1	1	1.6
(e) Met prerequisites for class action	3	2.5	1	1.6
(f) Miscellaneous	7	5.9	5	7.8
TOTAL	72	61.0	33	51.6

This indicates the Labor Department's assertion that 2 of 3 ADEA claims are dismissed on technicalities by the courts certainly was true for the 8 years between 1969 and 1977. Since June 1, 1977, however, only slightly over half the cases decided against the plaintiff have been based on procedural or technical issues, rather than the merits of the case.

V. JUDICIAL CONSTRUCTION OF LIABILITY UNDER THE ADEA.

A. *The Legal Standard for a Prima Facie Case of Age Discrimination in Employment*

The preceding analysis should demonstrate the ADEA has been frustrated by a conjunction of its structural ambiguities and the ineffective mediation system Congress adopted to deal with non-judicial adjustment of ADEA complaints. At the same time, the courts have been stumbling toward a doctrine of prima facie liability bearing some semblance to the doctrines evolved under Title VII of the Civil Rights Act.

1. *The Early Cases.* Prima facie liability under the ADEA did not seem to be an issue in early ADEA decisions. For example, *Stringfellow v. Monsanto Co.*¹⁶³ was a case filed by six Monsanto employees who were discharged effective May 1, 1969 from the El Dorado, Arkansas, nitrogen plant which was being shut down by the company. These six were involuntarily retired, rather than reassigned to a different plant. Monsanto management screened its employees at El Dorado to decide whom to retain, and prepared evaluation sheets on all personnel; twelve were retained, ten were discharged. Only three evaluated employees were under 40. After shutdown, the average age of the three departments affected, Maintenance, Manufacturing, and Per-

163. 320 F. Supp. 1175 (W.D. Ark. 1971).

sonnel, declined slightly.¹⁶⁴ All the plaintiffs contended termination should have been by seniority rather than by department-wide evaluation, asserting the ADEA created a seniority system for all employees. Chief Judge Oren Harris rejected this view:

The method of the company's impartial evaluation of the ability and job performance of each of the plaintiffs and other employees evaluated by Monsanto was based upon established factors and criteria ordinarily utilized for such purpose. The Court concludes that the differentiation resulting from the application of such factors and criteria in the plan of evaluation which Monsanto used was based on reasonable factors other than age and in the opinion of the Court constitutes a lawful practice envisioned under 29 U.S.C.A. § 623(f).¹⁶⁵

This case pretty well decided the ADEA did not establish a seniority system that allowed those with the greatest time on the job to resist removal.

In *Monroe v. Penn-Dixie Cement Corp.*,¹⁶⁶ the plaintiff won a jury verdict on the allegation that Penn-Dixie willfully discharged him because of his age. The district court overturned the jury verdict on a motion for judgment n.o.v., finding the plaintiff was not within the Act's protection because he was fired prior to the effective date of the Act, although his five weeks paid vacation carried his salary period into the Act's effective date. Chief Judge Sidney O. Smith added, in dicta, an explanation of his refusal to find that Monroe was not discharged by reason of age, without elaborating on the traditional notion that there was sufficient evidence to sustain the jury verdict. Unfortunately, no restatement of the facts occurs in the opinion.¹⁶⁷

*Cochran v. Ortho Pharmaceutical Co.*¹⁶⁸ failed to pass on the theory of plaintiff's complaint because Judge Mitchell dismissed the suit on the ground the plaintiff did not file the necessary notice of intent to sue with the Labor Department.¹⁶⁹ In *Gebhard v. GAF Corp.*,¹⁷⁰ the plaintiffs, four salaried supervisors, involuntarily retired by GAF Corporation, sued on an implied contract theory. GAF supposedly induced them to render continued serv-

164. Maintenance from 48.4 to 47.3; manufacturing from 52.5 to 51.5; personnel from 53.6 to 52.5. *Id.* at 1180.

165. *Id.* at 1180-81.

166. 335 F. Supp. 231 (N.D. Ga. 1971).

167. *Id.* at 234.

168. 376 F. Supp. 302 (E.D. La. 1971).

169. *Id.* at 303.

170. 59 F.R.D. 504 (D.D.C. 1973).

ices by guaranteeing their employment to 65.¹⁷¹ The court held the so-called implied contract void, however, because it did not comply with the Statute of Frauds. Further, the GAF retirement plan directly refuted the existence of such an implied contract, because it provided for both voluntary and *involuntary* retirement at 55. Finally, the plaintiffs simply had not filed their notice within 180 days of discharge date, and were thus unable to sue.¹⁷²

Some helpful guidelines appeared prior to 1974. In *Hodgson v. Greyhound Lines, Inc.*,¹⁷³ the United States District Court for the Northern District of Illinois held a bench trial in which the Wage-Hour Division was able to prove that Greyhound Lines engaged in discriminatory hiring practices. Judge Parsons held that the defendant had refused to consider employing anyone over 35 as a new driver. This was not, as the defendant claimed, a bona fide occupational qualification vitally linked to passenger safety. Judge Parsons concluded:

I find, that a physical examination is no more valid a test of driving ability for a 25 year old than for a 45 year old. Therefore, I cannot utilize defendant's second reason as a criterion for deciding that a man of 25 would, merely by virtue of being 25, be a safer driver than the man of 45. I cannot state with definitive certainty that such physical examinations as are given would be capable or incapable of discovering the physical and sensory changes common to all men¹⁷⁴

Greyhound had established its "no hire over 35" policy in 1928. It contended that, as it was bound to exercise the highest degree of care in protecting passenger safety, it could not hire men over age 35, because they would be "extra board" drivers for 10-15 years before being promoted to a regular run. The court found, however, that a number of men well over 40 were "extra board" drivers, despite the alleged greater physical and mental strain of this type of duty. Although Greyhound's own statistics showed that the best driver safety record was compiled by a driver having 16 years experience, and operating a regular run, the company

171. *Id.* at 506.

172. *Id.* at 507.

173. 354 F. Supp. 230 (N.D. Ill. 1973), *rev'd*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). In reversing, the court of appeals held that the district court had placed too heavy a burden of proof on Greyhound. Greyhound, the court held, need only show it had a rational basis to believe its age restrictions decreased the risk of harm to passengers. 499 F.2d at 863. Moreover, the company need only demonstrate a *minimal* decrease in the risk of harm. *Id.* The court concluded that Greyhound had factually established a valid bona fide occupational qualification defense to ADEA liability. *Id.* at 865.

174. 354 F. Supp. at 235.

asserted that men over 40 could not acquire the necessary 16 years driving experience within the usual period of time for employment. The court reviewed Greyhound's statistics, and concluded they did not show a significant difference in accident rates for drivers over or under age 40.¹⁷⁵

The *Greyhound* court followed a pattern common enough in Title VII Civil Rights Act litigation. It found the plaintiff had made a *prima facie* case when he showed Greyhound refused to hire drivers over age 35. Therefore, it required the defendant to carry the burden of justifying its discriminatory activities on the grounds that it was a bona fide occupational qualification.¹⁷⁶ *Greyhound* adopted this rationale from *Hodgson v. First Federal Savings & Loan Association of Broward County*,¹⁷⁷ a Wage-Hour Division suit brought against a mammoth south Florida savings and loan association to enjoin the Association from refusing to hire two women over 40 as tellers. First Federal had 35 tellers, all under 40. It refused to hire the two, otherwise qualified, allegedly because they were too heavy. The Association tried to justify its discrimination on objective factors, *e.g.*, heavy women could not stand up as long as slim ones. The Association lost. The court extended a limited injunction restraining it from discriminating against potential hirees over 40. The Labor Department appealed loss of back wages for one hiree. In review, Judge Tuttle said:

In discrimination cases, the law with respect to burden of proof is well settled. *The plaintiff is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendant to justify the existence of any disparities.*¹⁷⁸

This doctrine, adopted from Title VII litigation, requires the plaintiff to show only the elements of a claim, whereupon the defendant must show by a preponderance of evidence that the discriminatory act was justified on some basis other than a federally protected interest.¹⁷⁹ In early 1974, therefore, an ADEA plaintiff would most likely have to establish the existence of a claim for relief by some competent evidence, thus forcing the defendant to disprove the plaintiff's case by a preponderance of the evidence.

175. *Id.* at 236-37.

176. *Id.* at 231-32.

177. 455 F.2d 818 (5th Cir. 1972).

178. *Id.* at 822 (emphasis added).

179. See, *e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Robinson v. P. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971).

It was unclear in 1974, however, whether a plaintiff had to prove discrimination *solely* on the basis of age to establish a *prima facie* ADEA case. In *Schulz v. Hickok Manufacturing Co.*,¹⁸⁰ plaintiff successfully established a *prima facie* case from the depositions of another employee also discharged by Hickok. The deponent was Theodore Saloman, who was fired October 28, 1970 by Hickok's national sales manager, Harry McLean. McLean died in an airplane crash January 18, 1972. When Saloman was dismissed, McLean told him the reason for his discharge was, "I don't know. Call it their youth movement."¹⁸¹ The plaintiff also offered statistical evidence which showed the average age of the eight district managers for Hickok declined from 53.39 years to 40.75 years.¹⁸² The court held the defendant then had the duty to rebut the plaintiff's case. The defendant introduced evidence showing that Schulz's poor divisional sales record led to his discharge. That submission included McLean's evaluation of Schulz, which stated Schulz's "[l]ack of mobility, energy and enthusiasm over too long a period made development of sales team very difficult."¹⁸³ The court, however, thought McLean probably made up the evaluation after Schulz had been discharged, because Schulz, when discharged, was told only that he should "be doing more business," without further explanation by his superiors.¹⁸⁴ Although Schulz's sales were dropping, the court said that this evidence was insufficient to justify Schulz's discharge.¹⁸⁵ The logical inference from *Schulz* was that if an employer discharges an employee by reason of his age, together with other factors, the discharge is *prima facie* age discrimination.

2. *The Laugesen Rule.* *Laugesen v. Anaconda Co.*¹⁸⁶ identified some of the elements required to prove a *prima facie* case of liability under the ADEA. The plaintiff, Thor Laugesen, who was discharged by Anaconda, was within the age group protected by the ADEA. He elected to file suit and tried the case to a jury, who decided for the defendant. Laugesen introduced into evidence a personnel evaluation done on him prior to discharge which stated that he "had too many years on the job."¹⁸⁷ Laugesen's evidence also included statistics that showed similar level supervisors were

180. 358 F. Supp. 1208 (N.D. Ga. 1973).

181. *Id.* at 1212.

182. *Id.* at 1213.

183. *Id.* at 1216.

184. *Id.*

185. *Id.* at 1215-16.

186. 510 F.2d 307 (6th Cir. 1975).

187. *Id.* at 310-11.

younger after the date of his discharge than at earlier selected dates. Laugesen appealed to the Sixth Circuit, alleging a multitude of theoretical and evidentiary errors. Principally, he claimed the district court erred by not instructing the jury that if they found the plaintiff had made a prima facie case, the burden of proof shifted to the defendant to disprove the plaintiff's case.¹⁸⁸ The Sixth Circuit rejected Laugesen's theory, stating the Supreme Court did not have jury trials in mind when it decided the burden of proof rules in *McDonnell-Douglas Co. v. Green*.¹⁸⁹ The plaintiff, in a jury trial on age discrimination in employment, always had the burden of proof—unless the defendant admitted liability—on all material issues. The trial court was right, said the circuit judges, when it refused to tell the jury the defendant had the burden of proving nondiscrimination.¹⁹⁰

The trial judge, however, had instructed the jury that in order to recover, Laugesen had to show he was discharged *solely* because of age. This, the circuit judges said, was reversible error:

However expressed, we believe it was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge him (Laugesen) and that he was nevertheless entitled to recover *if one such factor was his age and if in fact it made a difference in determining whether he was to be retained or discharged*.¹⁹¹

Laugesen means that *age must not be a factor* in the decision to discharge, limit, segregate, classify, refuse to hire, or refuse to promote an employee. If age enters into the decision making process at any point, the decision is contrary to law.

3. *The Rogers Rule*. A second 1975 ADEA case attempted to add significant concepts to the theory of relief. *Rogers v. Exxon Research & Engineering Co.*¹⁹² appeared to be a garden variety ADEA suit. The plaintiff, a 60-year-old research chemist, was involuntarily retired by his employer, and claimed his retirement constituted age discrimination. His employer said Rogers was discharged because of mental instability. Dr. Rogers died during litigation, and his spouse and daughter, who were substituted as plaintiffs,¹⁹³ claimed actual damages for lost wages, liquidated

188. *Id.* at 312.

189. *Id.*

190. *Id.* at 313.

191. *Id.* at 317.

192. 404 F. Supp. 324 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

193. *Id.* at 336.

damages, punitive damages, and damages for pain and suffering arising from the mental distress of being let go. The plaintiff won a jury verdict for \$30,000 out-of-pocket lost salary and fringe benefits, and \$750,000 for pain, suffering, and mental distress. The defendant's motion for judgment n.o.v. or, alternatively, a new trial, was denied on condition plaintiff accept a remittitur of \$550,000 on the damages found for pain and suffering. Plaintiff accepted the condition.¹⁹⁴ Judge Stern wrote a special opinion justifying his findings and rulings which plowed a new furrow in ADEA theory:

It is the Court's view that the ADEA essentially establishes a *new statutory tort*. Once liability is established under the statute, therefore, *the panoply of usual tort remedies is available to recompense injured parties for all provable damages*.¹⁹⁵

Judge Stern noted that Title VII litigation had recognized the right of an injured party to receive compensatory damages for the totality of harm caused by wrongful conduct.¹⁹⁶ Comparing the ADEA with the Civil Rights Act of 1964,¹⁹⁷ Judge Stern concluded the greatest wrong done to an older worker was both invisible and psychic, rather than economic:

In measuring the wrong done and ascertaining the appropriate remedy here, the Court is aware that *the most pernicious effect of age discrimination is not to the pocketbook but to the victim's self respect*. As in this case, the out-of-pocket loss occasioned by such discrimination is often negligible in comparison to the physiological and psychological damage caused by the employer's unlawful conduct.¹⁹⁸

Judge Stern cited a number of cases decided under the Civil Rights Act to support his conclusion that damages for pain and suffering could be awarded in an ADEA case.¹⁹⁹ He also allowed the plaintiff liquidated damages.²⁰⁰

The *Rogers* case was followed some months later by *Bertrand v. Orkin Exterminating Co.*,²⁰¹ in which Judge Decker of the District Court for the Northern District of Illinois sustained plain-

194. *Id.* at 327.

195. *Id.* (emphasis added).

196. *Id.*

197. *Id.* at 328.

198. *Id.* at 329 (emphasis added).

199. *Id.* at 332 (citing *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974) among other cases, for authority).

200. *Id.* at 333-35.

201. 419 F. Supp. 1123 (N.D. Ill. 1976). See also *Walker v. Pettit Constr. Co.*, 437 F. Supp. 730 (D.S.C. 1977).

tiff's claim to damages for pain and suffering as part of a claim upon which relief can be had under the ADEA.²⁰² Judge Conti in the District Court for the Northern District of California reached the opposite result, however, in *Sant v. Mack Trucks, Inc.*²⁰³ He threw out the plaintiff's claim for damages from mental distress, and pain and suffering, stating:

From a policy point of view, to allow recovery for pain and suffering would transform the ADEA from an act that seeks to eliminate and redress age discrimination to one for *personal injuries*. . . . If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.²⁰⁴

Obviously Judge Conti was prescient. He knew that the Third Circuit Court of Appeals would douse the flame lit by *Rogers* with a good dose of conservatism.

In January, 1977, the Third Circuit doused *Roger's* flame with a good dose of strict interpretation of supposed congressional policy.²⁰⁵ The court decided that the ADEA did not make a new tort, which permitted recovery for pain and suffering. Judge Weiss's opinion stressed his interpretation of congressional policy, which was to deter litigation by demanding potential litigants exhaust administrative relief before filing a lawsuit.²⁰⁶ The thrust of the ADEA's remedy scheme, according to Judge Weiss, is "that private lawsuits are secondary to administrative remedies and suits brought by the Department of Labor."²⁰⁷ A private litigant's right to sue depends upon exhaustion of the conciliation process. Judge Weiss was horrified that parties might file ADEA suits to recover money damages not expressly listed in the Fair Labor Standards Act as recoverable wage claims:

An entitlement to an award for pain and suffering without guidelines of any sort is a vague and amorphous concept traditionally found in a private lawsuit, but is uncommon in administrative actions. Certainly, if an award for such an intangible were to be made in an administrative setting, statutory authorization or administrative regulations would be expected.²⁰⁸

202. 419 F. Supp. at 1132-33.

203. 424 F. Supp. 621 (N.D. Cal. 1976).

204. *Id.* at 622 (emphasis added).

205. 550 F.2d 834 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

206. *Id.* at 841.

207. *Id.*

208. *Id.* (citation's omitted).

Judge Weiss also thought a claim for pain and suffering would impair the conciliation process by introducing an element of uncertainty into the negotiating process. It would surely "substantially increase the volume of litigation in the trial courts."²⁰⁹ He said Congress did not intend ADEA claimants to recover for every wrong done to them as a proximate result of employer age discrimination in employment.²¹⁰ Therefore, the court held the plaintiff's claim for compensatory damages for pain and suffering was not a claim on which relief can be had, and remanded the case for a new trial. Judge Weiss also pointed out that Rogers's lawyers did not attempt conciliation through the New Jersey Department of Law and Public Safety, a "jurisdictional defect" which normally would bar the suit, but the circuit court, in its mercy, would not dismiss the suit for want of jurisdiction.²¹¹ Thus, the brief career of *Rogers* is probably over, unless the Seventh Circuit Court of Appeals sustains the district court in *Bertrand v. Orkin Exterminating Co.*²¹²

This synopsis of cases attempting to structure a remedy theory for ADEA cases shows that winning a "nature of remedy" case may indeed be to lose the fruits of victory in a morass. Essentially, an aggrieved party who files a suit alleging discrimination by reason of age may recover lost wages, lost fringe benefits, and in case of a willful violation, liquidated damages. It is not clear what elements the plaintiff has to prove, nor it is clear what burden of proof the plaintiff carries. He might have a simple requirement to submit some probative evidence thus forcing the defendant to prove a rebuttal. On the other hand, the plaintiff may have the traditional burden of proof requirements of an ordinary civil litigant.

B. *The Bona Fide Retirement Plan Defense*

The bona fide retirement plan defense essentially is a device similar to common law confession and avoidance. It allows an employer to admit to forcibly discharging employees between the ages of 40 and 64, thus denying the plaintiff the opportunity to

209. *Id.*

210. *Id.* at 840.

211. *Id.* at 843-44.

212. The United States District Court for the Northern District of Illinois subsequently reaffirmed *Bertrand*, after the Third Circuit's reversal of *Rogers*. 432 F. Supp. 952 (N.D. Ill. 1977). During the *Rogers* era, one district court apparently adopted the *Laugeson* rule; in *Cannaughton v. Monsanto*, 423 F. Supp. 660 (E.D. Mo. 1976), the defendant successfully rebutted the plaintiff's case by showing that age played no part in Monsanto's decision to terminate the plaintiff.

prove his case before the jury. It then permits the employer to avoid the act by alleging the forcible retirement was "pursuant to a seniority system or a bona fide employee benefit plan,"²¹³ excusing it from liability under the Act. Because "bona fide" is a vague concept, the defense quickly prompted ADEA litigation over the meaning of this defense. The ensuing litigation resulted in a split of opinion among the Third, Fourth, and Fifth Circuits, resolved only by the United States Supreme Court decision in *McMann v. United Airlines, Inc.*²¹⁴

1. *Brennan v. Taft Broadcasting Co.*²¹⁵ The Fifth Circuit Court of Appeals received the first chance to review this defense. The Wage-Hour Division initiated a lawsuit against Taft Broadcasting on behalf of Rufus Jones.²¹⁶ Taft bought WBRC-TV in 1957 and established a retirement plan which employees could electively accept. The plan provided for mandatory retirement at age 60 unless waived by the company.²¹⁷ In 1963, Jones elected to participate in the plan and was retired June 1, 1970.²¹⁸ Although the Wage-Hour Division alleged Jones had been retired in violation of the ADEA, the Court of Appeals determined that Congress never intended the ADEA to invalidate pre-existing retirement programs requiring forcible retirement prior to age 65.²¹⁹ The Wage-Hour Division argued that the Taft Plan, essentially an employee profit-sharing plan, was not the kind of plan insulated by the "bona fide employee benefit plan" exception to ADEA liability. The court, however, refused to accept the Wage-Hour Division's contentions that the Internal Revenue Service definition of "employee benefit plan" should control the outcome under the ADEA. It also rejected the Division's argument that the legislative history behind the Act supported the "no grandfather clause" construction it urged on the court,²²⁰ stating this was an

213. 29 U.S.C. § 623(f)(2) (1970) provided: "It shall not be unlawful for an employer . . . (2) to observe the terms of a bona fide seniority system of any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this chapter." Section 623(f)(2) was amended in 1978. See 29 U.S.C.A. § 623(f)(2) (West Supp. 1978), and text accompanying notes 287-94 *infra*.

214. 434 U.S. 192 (1977).

215. 500 F.2d 212 (5th Cir. 1974).

216. *Id.*

217. *Id.* at 214.

218. *Id.*

219. *Id.* at 216-17.

220. *Id.* at 217. The Fourth Circuit subsequently accepted this argument in *McMann*. The Secretary's position on the "grandfather clause" issue has not been consistent. Secretary of Labor Marshall now has readopted the position held by Secretary Brennan that section 4(f) of the ADEA does not permit a preexisting retirement program to be a defense to ADEA liability for forcible early retirement.

attempt to override the plain meaning of the Act by reference to legislative history, an ingenious argument after the long interpretative argument the court presented in justification of its result. The majority concluded that the plaintiff ought to lose; because Jones would receive at least \$15,000 under the profit sharing plan, the plan, in their collective wisdom, was bona fide.²²¹

Judge Tuttle dissented, arguing the Taft Plan never became a "bona fide employee benefit plan" within the meaning of section 4(f) of the ADEA. He quoted the following provision from the plan:

The normal retirement date of each Participant is the June 1 on which he has reached age 60. A Participant retiring from employment with the company on his normal retirement date is deemed retired under the Plan as of such date.²²²

This, he said, did not amount to compulsory termination at age 60. The summary of benefits provided Jones in 1963 did not state he would be forcibly retired at age 60;²²³ in fact, it stated that later retirement was optional with the employee. Judge Tuttle then concluded:

My second ground for disagreement is that, even though Jones were to be held to have been fully bound by the purported plan because of his application, even though he was misled as to its critical terms, the plan as fully spelled out still does not have the effect contended for it by the Company, or as found for it by the court. . . .

. . . [A]t the very least . . . such 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.²²⁴

Judge Tuttle's dissent oscillated between the theory that Jones was deceived when he joined the plan, and the theory that if he was not deceived, it was because the plan did not provide for mandatory retirement at age 60 as the company suggested. In either case, Jones was entitled to a new trial.²²⁵

221. *Id.*

222. *Id.* at 218.

223. *Id.* at 218-19.

224. *Id.* at 220.

225. *Id.* For three years following *Brennan*, no court of appeals had an opportunity to review the bona fide retirement plan defense. Consequently, *Brennan* was cited to sustain a forced early retirement in *Steiner v. National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C.D. Cal. 1974). The National League plan called for an "early out" at fifty-five for all officials, with a proviso permitting retention at the league's option after fifty-five. The League refused Steiner's request to be retained after age fifty-five.

2. *Zinger v. Blanchette*. The Third Circuit reviewed the bona fide retirement plan exception in *Zinger v. Blanchette*²²⁶ in early 1977. The plaintiff, an employee of the Penn-Central Railroad, was retired at age 64, which cost him \$834.12 in annual retirement benefits. The Penn-Central pension plan, originally the 1938 Pennsylvania Railroad plan, antedated the ADEA by nearly 30 years and granted the company the right to retire any employee between age 60 and 65. The receiver for the railroad admitted the discharge was discriminatory, but claimed the Penn-Central retirement program was a "bona fide retirement plan" exempt from statutory liability. The Third Circuit rejected the *Brennan* automatic "grandfather clause" concept,²²⁷ but felt, however, that the Act contemplated a difference between discharge and retirement. The court reviewed testimony before the 1967 Senate Committee on Aging, the bulletin of the Secretary of Labor interpreting the ADEA,²²⁸ and the 1975 Labor Department report to Congress. Ultimately the panel concluded that the Penn-Central system was bona fide, because both sides agreed it was so;²²⁹ thus the plan was insulated from ADEA attack. In essence, *Zinger* stands for the proposition that any "involuntary retirement pursuant to a bona fide plan that is not a subterfuge . . . is not unlawful,"²³⁰ whether or not the plan predates the ADEA.

3. *McMann v. United Airlines, Inc.: Reinstating the Grandfather Clause*. Harris McMann was hired by United Airlines in 1944 as a flight officer. At the time he was hired, United's retirement program, initiated in 1941,²³¹ set normal retirement age for employees in the plan at age 60.²³² Although participation

Steiner notified the Wage-Hour Division as required by section 7 of the Act, and commenced suit. He lost his case squarely on the notion that the league's retirement program pre-dated the ADEA, and was therefore valid. *Id.* at 948. A number of district courts accepted this result during 1975-77, the last being *Raymond v. Bendix Corp.*, 15 Fair Empl. Prac. Cas. 49 (1977), decided by the Eastern District of Michigan. Plaintiff was involuntarily retired at fifty-six by Bendix under a forced early retirement program. He filed the requisite notice of intention to sue, and commenced an action against Bendix for reinstatement and back pay. Bendix admitted the discharge, but defended its retirement program as a "bona fide retirement program." *Id.* at 51. The court reviewed the bewildering array of decisions under the bona fide retirement plan defense, and denied defendant's motion for summary judgment, holding that the plaintiff was entitled to present evidence to show the plan was not bona fide. *Id.* Bendix, however, had amended its pre-1967 plan in 1969 by lowering the early involuntary retirement age from 60 to 55.

226. 549 F.2d 901 (3rd Cir. 1977).

227. *Id.* at 904-05.

228. 29 C.F.R. § 860.110 (1977).

229. 549 F.2d at 909-10.

230. *Id.* at 910.

231. *McMann v. United Airlines, Inc.*, 542 F.2d 217, 218-19 (4th Cir. 1976).

232. *Id.* at 219.

was voluntary, McMann joined the program in 1964. In 1973, McMann turned 60 and was retired. McMann filed a notice of intent to sue with the Labor Department, followed in due course by suit in district court for reinstatement and back pay under the ADEA.²³³ Both McMann and United moved for summary judgment. United alleged that McMann was retired pursuant to a bona fide retirement plan that was not a subterfuge.²³⁴ The district court granted United's motion, and McMann appealed to the Fourth Circuit.

The Fourth Circuit initially found the plan bona fide on its face, because it existed and paid some benefit to McMann.²³⁵ The court then reviewed United's plan to see whether it was a subterfuge. It determined that section 4(f)(2) of the ADEA existed to promote hiring older workers, not to permit the discharge of older workers before age 65 through forced early retirement.²³⁶ The court also held that the meaning of "normal retirement age," according to the United plan, was to provide for mandatory early retirement at age 60, although United reserved the right to continue its employees after that date, thus making the early out program mandatory rather than optional.²³⁷

At this point, United invited the Fourth Circuit to follow *Brennan's* lead and hold its plan insulated from attack because it predated 1967, but the court refused to accept this position. It

233. *United Airlines, Inc. v. McMann*, 434 U.S. 192, 194 (1977).

234. The facts were stipulated by the parties. *Id.* at 193.

235. "It is conceded that the plan is 'bona fide' in the sense that it exists and pays benefits. United presented no evidence, however, to show that the provision of its plan requiring retirement at age 60 had any purpose other than arbitrary age discrimination." 542 F.2d at 219.

236. *Id.* at 220-21. The court continued:

Stated otherwise, there must be some reason other than age, for a plan, or a provision of a plan, which discriminates between employees of different ages. At this stage of the proceedings, United has offered no non-arbitrary justification for the age 60 retirement provisions in its plan.

Any other reading of the "subterfuge" clause would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire the presumptively otherwise qualified individual, for 29 U.S.C. section 623(f)(2) explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual."

Id. at 220.

237. While the meaning of the word "normal" in this context is not free from doubt, counsel agreed in oral argument [that] . . . [t]he employee has no discretion whether to continue beyond the normal retirement age. . . . Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer.

Id. at 219.

held that refusing to retain McMann was tantamount to refusing to hire him or any other person over age 60.²³⁸ Thus, the plan was a "subterfuge" within the meaning of section 4(f)(2) of the Act, and the case was remanded to the district court for appropriate findings.²³⁹ The airline applied for and was granted certiorari.

The Supreme Court voted 7 to 2 to reverse the Fourth Circuit.²⁴⁰ Chief Justice Burger wrote the majority opinion in which four other Justices (Blackmun, Powell, Rehnquist, Stevens) concurred. Justices Stewart and White concurred in the judgment, each writing a separate opinion. Justices Marshall and Brennan dissented. To understand the decision, each set of opinions requires close examination.

Chief Justice Burger first dealt with McMann's contention that "normal retirement age" does not mean mandatory retirement age, which would permit him to continue as an employee after age 60. Chief Justice Burger rejected this argument, and followed the Fourth Circuit which held it to be a mandatory retirement program for persons at age 60.²⁴¹ The majority then dealt with McMann's contention, accepted by the Fourth Circuit, that Congress never intended section 4(f)(2) to authorize involuntary retirement before age 65. McMann, arguing from the Congressional Record, had convinced the Fourth Circuit that the section was intended to make it economically feasible for employers

238. *Id.* at 221.

United rests on the *Brennan* court's conclusion that any action required by a plan predating the act is valid, since such a plan could never be a subterfuge. While we have already pointed out the fallacy in this reasoning, it is also refuted by the legislative history. The report states that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans differently, automatically validating the provision of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the maintenance of a discriminatory plan is to be considered independently under this exemption. An employer must demonstrate that a plan is not being maintained as a subterfuge to evade the Act, as well as showing benign establishment, in order to prevail.

Id. at 221-22.

239. *Id.* at 222-23.

240. 434 U.S. at 204.

241. *Id.* at 196. The United States Labor Department also adopted a position which paralleled this result. "The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned." 29 C.F.R. § 860.110(a) (1975). The 1975 Annual Report of the Department, however, apparently contradicts this statement, because it states that early retirements are unlawful unless the retirement plan mandates all personnel retire early.

to hire older workers, not to condone forced early retirement.²⁴²

First, Chief Justice Burger stated that resorting to legislative intent in order to interpret section 4(f)(2) was unnecessary because the statute was unambiguous.²⁴³ He then argued alternatively that legislative intent actually showed the contrary position because “[s]uch a pervasive impact on bona fide existing plans should not be read into the Act without a clear, unambiguous expression in the statute.”²⁴⁴ He referred to Senate subcommittee hearings on the original proposed version of section 4(f)(2) for authority that the Labor Department thought both the original and the final versions of the section insulated pre-existing plans from attack.²⁴⁵ He quoted a lengthy remark by Senator Javits made during committee hearings, later quoted by Justice Marshall’s dissent, to prove his point. The quotation, to say the least, was marginally helpful to the majority. The Chief Justice then cited the AFL-CIO’s testimony during committee hearings to prove the original version of section 4(f)(2) did not prevent forcible early retirement by employers. Because the proposed AFL-CIO amendment to section 4(f)(2) was not adopted, Chief Justice Burger concluded that Congress intended its revised version of the original section to insulate earlier plans from attack. The purpose of revising the original section was to protect older workers who were hired and not to protect existing workers. He then concluded:

[W]e do not pass on the wisdom of fixed mandatory retirements at a particular age. So limited, we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide preexisting plans

[A] plan established in 1941, if bona fide, as conceded here, cannot be a subterfuge to evade an Act passed 26 years later.²⁴⁶

The threat to the ADEA posed by this conclusion is obvious; by resurrecting the “impairment of contract” doctrine, the Court has made this a constitutional case.

Justice Stewart’s concurring opinion, although short, con-

242. 434 U.S. at 198.

243. *Id.* at 199.

244. *Id.*

245. *Id.* at 199-200. The Chief Justice, in a sarcastic footnote, further stated, “[l]egislative observations 10 years after passage of the Act are in no sense part of the legislative history.” *Id.* at 200 n.7. This refers to Justice Marshall’s citation of 1977 Congressional debate on the meaning of section 4(f)(2) in his dissent.

246. *Id.* at 203.

tains one significant point. He stated that the only issue in the case was whether or not the United plan was a subterfuge. He said it was not legally possible for a pre-1967 retirement plan to be a subterfuge, and therefore would not deal with the issues discussed by the majority and by Justice White.²⁴⁷

Justice White, in a concurring opinion, differed with the majority opinion on the ground that the question of "subterfuge" had to be decided under section 4(f)(2) of the Act with respect to any pre-existing retirement plan. Justice White said the decision not to change the pre-1967 plan in 1968 or thereafter had to be examined separately: "[t]here is no magic in the fact that United's retirement plan was adopted prior to the Act, for not only the plan's establishment, but also its maintenance must be scrutinized."²⁴⁸

He felt the issue was whether the ADEA prohibited mandatory retirement pursuant to a bona fide retirement plan, and concluded the Act did not do so. Justice White found the United plan bona fide in so far as it paid benefits to McMann,²⁴⁹ but rejected the Fourth Circuit's view that the "no subterfuge" requirement was a separate ground for invalidating early retirement programs. He concluded by saying that he found no indication from the record that the United plan was not bona fide; if it paid substantial benefits it was bona fide and beyond attack, whether or not it pre-dated 1967.²⁵⁰ He then rejected the majority opinion's grandfather clause argument.

Dissenting, Justice Marshall first found the provisions of section 4(f)(2) of the ADEA to be ambiguous,²⁵¹ therefore in need of construction. Justice Marshall noted the similarity in structure between the ADEA and the Civil Rights Act of 1964,²⁵² and he paralleled section 4(f)(2) to section 703 of the Civil Rights Act, which forbids involuntary retirement because of race, sex, national origin, or religion.²⁵³ If Congress adopted identical language in both sections, he stated, then section 4(f)(2) means that under

247. *Id.* at 204.

248. *Id.* at 205. Although the author disagrees with Justice White's conclusion that United's plan paid the type of "substantial benefits" the ADEA drafters intended as a substitution for full employment, Justice White clearly understood the issues and refused to fall for the "grandfather clause" position of the majority. His analysis clearly expounds the choices to be made. One would wish that summary judgment would have been denied, and the cause remanded for a trial on the issue of the "bona fides" of the United plan.

249. *Id.* at 206-07.

250. *Id.* at 207-08.

251. *Id.* at 209.

252. *Id.* at 209 n.2.

253. *Id.* at 208-09.

the ADEA forced retirement is tantamount to discharge.²⁵⁴

Justice Marshall found two possible meanings for section 4(f)(2). First, it could be read to permit involuntary retirement of employees age 40-64 if they receive retirement benefits. Second, he adopted an alternative view, which states the section only authorizes employers to pay lesser benefits to older employees whom they hire at a later than average age. He stated the crucial issue is choosing between these alternative meanings: "We need not decide on a strictly grammatical basis which reading is preferable. We are judges, not linguists, and our task is to divine congressional intent using all available evidence."²⁵⁵

The majority, he said, found that the primary purpose of the Act was to facilitate hiring older workers. Rejecting the majority and Justice White's reliance on legislative history relating to amendments not passed by Congress, Justice Marshall quoted the original draft version of section 4(f)(2) and compared it to the present Act, which deletes the specific authorization for forcible early retirement in the original draft.²⁵⁶ Justice Marshall argued this meant Congress did not intend to insulate pre-existing plans. Justice Marshall also returned to Chief Justice Burger's quotation of the exchange between Senators Javits and Yarborough over the purpose of section 4(f)(2),²⁵⁷ concluding that in no way

254. *Id.* Justice Marshall identified possible positions that can be taken on the meaning of section 4(f)(2). He did not agree with Justice White that section 4(f)(2) of ADEA permitted forced early retirement before 65. That was, of course, a question of fact, to which McMann's lawyers were willing to stipulate in the district court. *Id.* at 193.

255. *Id.* at 210.

256. There can be no question that had Congress enacted § 4(f)(2) in the form in which it was proposed by the Administration, forced retirement would be permissible. That section of the initial bill quite specifically allowed such retirement. It provided: "It shall not be unlawful for an employer . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act. . . ."

Id. at 211.

This original version was ambiguous, and the subsequent redraft of section 4(f)(2) eliminated the objection raised by Sen. Javits and quoted by Chief Justice Burger. Present section 4(f)(2), while vague about "observing the terms of a bona fide seniority system . . . or pension plan," at least provides an answer to the question proposed by Sen. Javits—can someone be involuntarily retired because of any provision in the plan mandating retirement before 65? The answer in section 4(f)(2) as enacted is no!

257. *Id.* at 211-13. The Chief Justice cited a portion of this exchange in a footnote. The entire exchange reads as follows:

MR. JAVITS: The meaning of this provision is as follows: an employer will not be compelled under this section to afford to older workers exactly the same pension, retirement or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer

did Congress suggest that the exemption in the section permitted involuntary retirement.

Finally, Justice Marshall pointed out that McMann, although forcibly retired at age 60, could not be refused a new position by United if he applied, and otherwise was qualified.²⁵⁸ Such a result cannot be defended logically, he suggested. Justice Marshall also noted that at the time of the decision, both the Senate and the House were considering clarifying amendments to section 4(f)(2)²⁵⁹ to prevent the construction reached in *Brennan*

through the use of this act to undertake some special relationship, course or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand that—in order to give that older employee employment on the same terms as others. I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. . . .

MR. YARBOROUGH: I wish to say to the Senator that that is basically my understanding of the provision of line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55 year old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained for pension plan. This will not deny any individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement or insurance plan.

MR. JAVITS: I thank my colleague. That is important to business.

113 CONG. REC. 31,255 (1967). This also appears at 434 U.S. at 214-15.

258. Of course, one may legitimately argue that the purpose of ADEA would be served if McMann was rehired on a year to year basis without accruing retirement benefits at his former highly expensive rate. High retirement program costs account for part of the push to retire workers before 65.

259. 434 U.S. at 218. The House and Senate amendments originally differed in several respects:

HOUSE AMENDMENTS HR 5383

HOUSE PROPOSAL (H. R. 5383)

Section 1. This act may be cited as the Age Discrimination in Employment Act Amendments of 1977.

Section 2. (a) Paragraph (2) of section 4(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(1)) (2) is

SENATE AMENDMENTS

SENATE VERSION AFTER AMENDING

Section 1. That this act may be cited as the "Age Discrimination in Employment Amendments of 1977."

Section 2. (a) Section 4(f)(1) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(1)) is amended by inserting

v. Taft Broadcasting Co.,²⁶⁰ and by the majority opinion.²⁶¹

4. *Analysis of McMann.* Clearly, all three sets of opinions turned on two conditions: (1) section 4(f)(2) of the ADEA is vague or ambiguous, and (2) congressional intent at the time the Act was adopted determined the outcome of the case. This is true despite Chief Justice Burger's disclaimer that section 4(f)(2) was

amended by inserting after "individual" the following: "and except that the involuntary retirement of any such seniority system or any such employee benefit plan because of the age of such employee."

(b) The amendment made by subsection (a) shall take effect immediately upon the date of enactment. Provided, that in the case of employees covered by a bona fide collective bargaining agreement in effect at least 30 days prior to the date of enactment of this Act entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938 as amended) the amendment made by subsection (a) shall take effect in such a case where the provisions of such collectively bargained agreement would be prohibited, as a result of the amendment to section (12)(a)(2) of the Age Discrimination in Employment Act of 1967 made by section 4(b) of this Act upon the termination of such agreement or upon the expiration of two years from the date of the enactment of this act, whichever shall first occur.

123 Cong. Rec. H 9,967 (daily ed. Sept. 23, 1977)

after "section" a comma and the following: "Including the establishment of a mandatory retirement age less than the maximum age specified in section 12 of the Act."

(b) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12 of this act because of the age of such employee."

(c) The amendments made by subsections (a) and (b) of this Act, except that in case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment made by section 3 of this Act, the amendment made by subsection (b) shall take effect upon the termination of such agreement or January 1, 1980 whichever occurs first.

123 Cong. Rec. S 17,272 (daily ed. Oct. 19, 1977)

The differences in nuance between the two versions appear to be syntactic rather than substantive. The final version of the 1978 Amendments followed the Senate version. H.R. REP. No. 950, 95th Cong., 2d Sess. 7-15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1009.

260. 500 F.2d 212 (5th Cir. 1974). See text accompanying notes 215-25 *supra*.

261. It was this statement that Chief Justice Burger alluded to in his opinion. However, some of the original sponsors of the 1967 Act were those making the loudest objection to the Fifth Circuit holding in *Brennan*.

unambiguous. What is not clear from any of the opinions is how much thought the Court gave to the results of their decision. At the same time the Court heard argument in this case, Congress was debating major changes to the ADEA, including an amendment to overturn the results in both *Brennan* and *Zinger*.²⁶² Justice Marshall alone notes this significant development. To understand *McMann* and its impact on the future of anti-age discrimination law in the United States, the legal technicalities and the likely social impact of the thinking behind the decision need to be exposed.

a. *Technical Analysis.* Section 4(f)(2) of the ADEA is not clear on its face, and can be understood only within the context of the entire ADEA and the history of its formulation and adoption. The structure of section 4(f) provides the clearest source of internal support for *McMann*. The section lists three general exceptions to the rule barring age discrimination in employment: (a) observation of bona fide occupational qualifications, (b) discharge on reasonable factors other than age, and (c) observation of a bona fide seniority or benefit plan which is not a subterfuge.²⁶³ All three subsections are confession and avoidance defenses to ADEA liability, and must be read in conjunction with the Act's general purposes. The purposes of the Act may be extracted from the legislative history as well as from the declaration of purpose in the Act itself.

b. *Legislative History.* Legislative history confirms Justice White's interpretation of section 4(f)(2). The original committee report explained section 4(f)(2) in the following language:

Subsection (f) contained exceptions to the foregoing provisions of this section. . . . It also provides that it will not be unlawful to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, except that no employee benefit plan may excuse the failure to hire any individual.

262. See, e.g., 123 CONG. REC. S17,274 (daily ed. Oct. 19, 1977) (remarks of Sen. Williams). Sen. Williams states:

Since enactment and despite this clear expression of our intent, the courts have disagreed over the interpretation of this section. . . . Section 4(f)(2) was intended to permit and will continue to permit varying coverage of workers in different age groups to reflect those differences so long as they are based on valid assumptions and applied in a non-discriminatory manner.

Because some courts have not properly interpreted the meaning of this section the committee acted to clarify our original intention. The amendment to section 4(f)(2) forbids mandatory retirement required by a pension or other employee benefit plan or seniority system and serves to express congressional approval of the result reached by the fourth circuit in *McMann*.

263. 29 U.S.C. § 623(f)(2) (1970).

. . . It is important to note that exception (3) (section 4(f)(2)) applies to new and existing employee benefit plans and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vital to the legislation, and was favorably received by witnesses at the hearing.²⁶⁴

The report accords with later Senate floor debate in which Senator Yarborough explained the provisions of section 4(f)(2) as adopted by the committee.²⁶⁵

Further, Senator Javits reflected the consensus of the bill's sponsors in the following remarks from the congressional debate on the bill:

The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time, it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employee if it is adopted merely as a subterfuge for discriminating against older workers.²⁶⁶

Following this statement, Senator Javits repeated a question raised earlier in the debate by Senator Dirksen relating to the meaning of the exemption for seniority or benefit plans. Senator Javits answered this rhetorical question:

The meaning of the provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand

264. H.R. REP. NO. 805, 90th Cong., 1st Sess. 4, 9, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2217, 2222.

265. 113 CONG. REC. 31,255 (1967).

266. *Id.* at 31,254-55.

that—in order to give that older employee employment on the same terms as others.²⁶⁷

This statement was followed by the exchange between Senators Javits and Yarborough quoted by the majority opinion and by Justice Marshall's dissent in support of their divergent observations.²⁶⁸

Likewise, the House floor debate indicated a similar understanding of section 4(f)(2).²⁶⁹ In fact, the remarks of Representative Dent during floor debate restate the committee report issued by the Senate three weeks earlier: "It is important to note that exception (3) (section 4(f)(2)) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans."²⁷⁰ Because nothing in either the committee report or in floor debate in both Houses shows Congress intended to create a "grandfather clause" exception for pre-existing retirement plans, the majority of the Supreme Court created such an exception out of gossamer, and took a stance clearly contrary to the interpretation placed on this provision by Congress itself.²⁷¹ In the 1977 debate relating to amendments to the ADEA, several Congressmen and Senators repeated the thoughts expressed in 1967. Representative Cohen stated the issue most effectively:

I am particularly pleased that this bill seeks to clarify the section of the ADEA which provides an exemption "to observe the terms of a bona fide employee benefit plan." In making this provision, the Congress attempted to avoid a problem that was foreseen during the hearings and investigations. . . .

. . . If employers were required to enroll other workers in pension plans or group health insurance programs, it was anticipated that costs for such plans would greatly increase, discouraging employers from providing them. In order to avoid placing undue hardship on employers, it was the intent of Congress to permit the hiring of older workers without requiring that they be fully included in company employee benefit plans. This exemption was designed to encourage the hiring of older workers without bankrupting pension plans.

267. *Id.* at 31,255.

268. *Id.* See note 257 *supra* for text of colloquy.

269. See 113 CONG. REC. 34,740, 34,746 (1967).

270. *Id.* at 34,747.

271. Senators Javits and Williams, and Rep. Wampler in debating current amendments to ADEA expressly note that the results in *Zinger* and *Taft Broadcasting Co.* are inconsistent with the original intent of the 1967 ADEA. See 123 CONG. REC. S17,274 (daily ed. Oct. 19, 1977) (remarks of Sen. Williams); *id.* at S17,297 (daily ed. Oct. 19, 1977) (remarks of Sen. Javits); *id.* at H9,353 (daily ed. Sept. 13, 1977) (remarks of Rep. Wampler).

While there was absolutely no intention to allow this exemption to legalize involuntary retirement before age 65, this is what has occurred through interpretations by both the Labor Department and the courts.²⁷²

Consequently, it is hard to accept the majority opinion's conclusion that no express intent to legalize involuntary early retirement amounted to a confession that it was legal.

VI. THE 1978 AMENDMENTS: THEIR IMPACT AND A PREDICTION

A. Congressional Background

Early in the 1977 session of Congress, Senator Javits introduced a set of comprehensive amendments to the ADEA.²⁷³ Senator Javits, of course, had been one of the prime movers behind the original 1967 version of the ADEA. The Javits bill proposed the abolition of mandatory retirement for nearly all American workers by 1985. The bill also called for technical revisions to the Act in two critical areas: the bona fide retirement plan exemption, and the "notice is condition precedent to suit" doctrine. Senate Hearings on the Javits bill led to a Senate Human Resources Committee bill that imposed a number of special-interest limitations on the blanket abolition of mandatory retirement.²⁷⁴ At the same time, the House was preparing its own technical amendments to the ADEA²⁷⁵ sponsored by Representative Claude Pepper. Although both bills contained similar provisions changing the upper limit for mandatory retirement, the House and Senate bills were poles apart on technical measures to cure the defects in the ADEA previously noted in this article.²⁷⁶

272. *Id.* at H9,354 (daily ed. Sept. 13, 1977) (remarks of Rep. Cohen).

273. *Id.* at S17,275-77 (daily ed. Oct. 19, 1977) (remarks of Sen. Javits); H.R. REP. NO. 950, 95th Cong., 2d Sess. 7-15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1000.

274. S. REP. NO. 493, 95th Cong., 2d Sess. 1-34, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 976.

275. H.R. 5383, 95th Cong., 1st Sess., 123 CONG. REC. H9967 (daily ed. Sept. 23, 1977).

276. H.R. REP. NO. 950, 95th Cong., 2d Sess. 7-15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1000, reveals that:

1) The House offered technical amendments to section 4(f)(2) to overrule *McMann v. United Airlines, Inc.*, resembling the Senate version eventually receded to by the House.

2) The Senate proposed: (a) technical amendments to section 4(f)(2) which were eventually adopted by the conference committee, together with technical amendments to section 4(f)(1) redefining bona fide occupational qualification, which was dropped by the conferees; (b) technical amendments to sections 7(d) and (e) confirming certain equitable exceptions to the "notice is jurisdictional" doctrine, and (c) confirmation of jury trial rights under ADEA.

On September 23, 1978, the House passed H.R. 5383 and sent it to the Senate.²⁷⁷ On October 19, the Senate passed an amendment in substitution for H.R. 5383 which incorporated most of the provisions on the proposed Senate bill.²⁷⁸ There was considerable floor debate in both Houses relating to the raising of mandatory retirement for non-federal workers to age 70, and specific exemptions for highly paid executives and college professors from this provision.²⁷⁹ Some consideration was given to the bona fide retirement plan escape clause in both Senate and House debates.²⁸⁰ The Senate and House versions then were committed to a conference committee for a horse-trading session for the exact text of the new law. The conference committee report returned to the House and Senate March 14, 1978. Both Houses passed the resulting compromise bill on April 6 and sent it to the President for signature on April 8, 1978.

The resulting law followed in most respects the Senate version with very few exceptions. It incorporated major policy changes in addition to correcting technical deficiencies in the ADEA. The following analysis will deal first with technical changes, and second with the impact of raising the mandatory retirement age for American workers to age 70.

B. *The Technical Changes to ADEA*

Considering the dismal history of ADEA enforcement at the hands of an understaffed and over-worked Department of Labor Wage-Hour Division, and the equally disappointing results of private ADEA suits for reinstatement, back pay and damages, the technical corrections Congress provided were relatively narrow in scope. Congress generally exercised its prerogative to overrule specific cases it found hostile to its original intent in approving the 1967 ADEA, and did little more.

1. *Jury Trial Rights Under the ADEA.* In order of importance, the least significant technical change was the amendment introduced by Senator Kennedy on the Senate floor clarifying the jury trial rights of plaintiffs in ADEA suits. Agreed to without

277. 123 CONG. REC. H9984 (daily ed. Sept. 23, 1977).

278. *Id.* at S17,303 (daily ed. Oct. 19, 1977).

279. *See, e.g., id.* at H9954-55, 9957 (daily ed. Oct. 19, 1977) (remarks of Rep. Wampler); *id.* at S17,282 (daily ed. Oct. 19, 1977) (remarks of Sen. Pell); *id.* at S17,286-88 (daily ed. Oct. 19, 1977) (remarks of Sen. Chaffee and Sen. Hayakawa); *id.* at S17,289-91 (daily ed. Oct. 19, 1977) (remarks of Sen. Williams).

280. *See, e.g., id.* at H9975-76 (daily ed. Sept. 23, 1977) (remarks of Mr. Drinan); *id.* at S17,273 (daily ed. Oct. 19, 1977) (remarks of Sen. Williams).

vote, Senator Kennedy's amendment modified section (7)(c) of the ADEA by providing that:

In an action brought under paragraph (1) a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.²⁸¹

Prior case law on the right to a jury trial under the ADEA was divided on the nature and extent of jury trial rights. In *Morelock v. NCR Corp.*,²⁸² the Sixth Circuit denied the plaintiff's jury trial demand, holding that the ADEA limits damages to back pay, and the scope of remedies offered thereafter becomes primarily equitable in nature. Therefore, the court reasoned that a claim for reinstatement and back pay was not a seventh amendment jury trial claim.²⁸³ The Supreme Court in *Lorillard v. Pons*²⁸⁴ may have disposed of a portion of the *Morelock* decision because the Court held that a claim for back wages, coupled with reinstatement, presented a seventh amendment jury trial issue.²⁸⁵ The amendment proposed by Senator Kennedy, and adopted by the conference committee, tries to alter the application of traditional jury trial right doctrine²⁸⁶ to ADEA suits by mandating that legal and equitable claims (before 1978) presented by an ADEA suit will be jury trial issues by right. Because the issue is interpretation of the seventh amendment, the Kennedy proviso has a fair chance ei-

281. 29 U.S.C.A. § 626(c)(2) (West Supp. 1978).

282. 14 Fair Empl. Prac. Cas. 65 (6th Cir. 1976).

283. *Id.* at 66-68. "Appellant's action in this case is basically for reinstatement and injunctive relief. Such an action necessarily invokes the broad powers of the court and is necessarily equitable in nature. . . ." *Id.*

284. 434 U.S. 575 (1978).

285. *Id.* at 582-83.

286. The normal rule for determining when an issue is justiciable by the jury is whether or not the action may be characterized as having been, prior to 1789, the type of suit which would have merited a jury trial at common law.

The difficulty in applying the normal seventh amendment approach to wage hour claims and to ADEA claims results from the nature of the relief sought. First, reinstatement with back pay is relief unknown to the common law. Second, reinstatement is a command to someone to perform a specific act under pain of contempt; thus an award of back pay consequent on reinstatement looks more like equitable compensation than money damages.

On the other hand, claims for liquidated damages, for pain and suffering, and for mental distress proximately caused by the civil wrong of arbitrary age discrimination in employment, resemble common law claims for money damages. The Supreme Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (1978) helped to clarify this area somewhat. It is now clear that an ADEA claim for back pay and reinstatement presents a jury trial issue. In *Lorillard*, the Court expressly declined to determine the right to jury trial on a liquidated damages claim. *Id.* at 577 n.2.

ther of being held to violate the seventh amendment or of being whittled down to the limited scope of *Pons*. Frankly, it is rather difficult to find a legal justification for the Kennedy amendment. *Morelock* was wrongly decided, but the Supreme Court rectified *Morelock* in *Pons*, and the full reach of traditional seventh amendment jury trial rights now extends to the legal portion of a claim for "money damages" under the ADEA and section 16 of the FLSA.

2. *Bona Fide Retirement Plan Escape Clause*. The second technical amendment put into the 1978 amendments attempted to overrule *United Air Lines, Inc. v. McMann*. Congress amended section 4(f)(2) of the 1967 ADEA with respect to bona fide retirement plans by providing that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual."²⁸⁷ The impact of the amendment, however, is limited by a proviso that "grandfathers" involuntary retirement programs created by labor organization collective bargaining efforts before September 1, 1977. These programs may continue until the termination of the current collective bargaining agreement or January 1, 1980, whichever occurs first.²⁸⁸

McMann held that an involuntary retirement program which predated the effective date of the ADEA, and which permitted or required involuntary retirement of participating members before age 65, was immune from the effect of the Act.²⁸⁹ Justice White's concurring opinion limited the decision to the "bona fide" aspect of the United Air Lines retirement program, which he believed had been established by the defendant in the case.²⁹⁰

The conference committee adopted the Senate language for this amendment.²⁹¹ The conference committee report states that

287. 29 U.S.C.A. § 623(f)(2) (West Supp. 1978).

288.

(b) The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act . . . , except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section (6)(d)(4) of the Fair Labor Standards Act of 1938 . . .) and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section . . . shall take effect upon the termination of such agreement, or on January 1, 1980, whichever first occurs.

Id.

289. 434 U.S. at 203.

290. *Id.* at 207-08.

291. H. R. REP. No. 950, 95th Cong., 2d Sess. 7-15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1000, 1001 reveals the following accord:

Conference agreement.

the conference intended to overrule *McMann* on the basis of the *majority* decision.²⁹² Unfortunately, the language approved by both Houses cannot reach the basis of the majority decision in *McMann*, although it clearly overrules Justice White's and Justice Stewart's concurring opinions. The majority in *McMann* relied upon a theory of vesting of interest, in short, a "grandfather clause" argument.²⁹³ This argument can be raised against the present amendment which speaks to present and future events, rather than to plans predating its 1978 adoption. There are, of course, constitutional problems associated with the appropriation of "vested" interests in maintaining involuntary retirement programs.²⁹⁴ Consequently, the Supreme Court, if called upon to construe the present amendment to section 4(f)(2), may conclude this amendment cannot constitutionally reach involuntary retirement programs for persons under age 70 which predate April 8, 1978.

The bona fides of any retirement program remain a live judicial issue. Observing the terms of a bona fide retirement or seniority system may penalize persons within the protected age group in many ways other than forced early retirement. It is theoretically possible to discriminate against persons between the ages of 40 and 70 by authorizing much less comprehensive retirement programs for persons hired between those ages, and to discriminate against older workers in profit-sharing, stock options, bonus plans and the like, without forcing them to accept involuntary retirement. A system of discrimination in employee benefits, coupled with an attractive "voluntary" retirement package could

House recedes to the Senate amendment. The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.

In *McMann v. United Airlines*, 98 S.Ct. 244 (1977) the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

292. *Id.*

293. 434 U.S. at 196-97.

294. Although the "impairment of contract rights" argument carries little weight among modern constitutional law scholars, this argument, rather than the textual interpretation of ADEA's section 4(f) and its legislative history supports Chief Justice Burger's statement that the provisions of section 4(f) are not ambiguous. The pre-1967 retirement plans have "vested rights" because the Constitution forbids impairment of contract rights; thus, involuntary retirement at the company's election in pre-1967 pension programs, being a "contract right," may not be abrogated by the ADEA.

encourage workers, particularly non-management white collar workers, to choose "voluntary" retirement at ages 55 or 60, thus avoiding the humiliation of lower fringe benefits and lower job rating and benefits after 55.

Congress has done about all it can to override the *McMann* decision by legislative means. It is now up to the federal judiciary to decide whether to defer to legislative interpretation and limit *McMann* to its facts, rather than elevate the case to the "impairment of contract" doctrine of constitutional law.

3. *The "Notice is Jurisdictional" Defense.* Congress also amended section 7 of the ADEA by adding a new subsection (d) relating to the system by which an action is initiated:

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

- (1) within 180 days after the alleged unlawful practice occurred; or
- (2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.²⁹⁵

According to the conference committee report:

This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information . . . to eliminate alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the "charge" requirement will be satisfied by the filing of a written statement which identifies the potential defendant. . . .

The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore *equitable modifications* for failing to file within the time period will be available to plaintiffs under this act.²⁹⁶

295. 29 U.S.C.A. § 626(d) (West Supp. 1978).

296. H. R. REP. No. 950, 95th Cong., 2d Sess. 7-15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1000, 1006.

The conference committee report cites several appellate decisions establishing equitable grounds for relief from the "notice is jurisdictional" defense to liability. The former section 7(d) notice requirement was waived in *Dartt v. Shell Oil Co.*,²⁹⁷ for example, because the defendant had misled the Labor Department enforcement officer and thus Mrs. Dartt, that conciliation was appropriate, without informing Mrs. Dartt that her right to sue depended upon filing appropriate notice within 180 days after termination.²⁹⁸ In *Bonham v. Dresser Industries, Inc.*,²⁹⁹ the plaintiff failed to commence a state process against his employer within the 90 day limit specified by Pennsylvania law, and thus did not comply with section 14(b) of the Act, nor did the plaintiff file a federal notice of intent to sue within 180 days of his last working day, although his last paycheck had been received less than 180 days prior to filing a federal notice of intent to sue.³⁰⁰ The district court dismissed the suit, but the Third Circuit allowed the plaintiff to prove his case, reversing the trial court on the theory that the defendant had not been harmed by not receiving notice of intent to sue, nor had federal conciliation been deterred by the late notice.³⁰¹ *Charlier v. S.C. Johnson & Son, Inc.*,³⁰² excused the plaintiff's late notice of intent to sue because the defendant failed to post the notice of rights required by section 8 of the Act.³⁰³ Similar equitable exceptions to the strict notice doctrine of section 7 of the ADEA had been made in a number of district court cases as well.³⁰⁴ Although the amendment clarifies congressional intent and overrules cases that failed to make equitable exceptions to the "notice is jurisdictional" doctrine, it does not relieve an injured worker from the condition precedent of filing notice of intent to sue within 180 days after discharge with the Equal Employment Opportunity Commission³⁰⁵ before filing a civil action

297. 539 F.2d 1256 (10th Cir. 1976), *aff'd*, 429 U.S. 1089 (1977).

298. *Id.* at 1258, 1260-61.

299. 569 F.2d 187 (3d Cir. 1977).

300. *Id.* at 191.

301. *Id.* at 194.

302. 556 F.2d 761 (5th Cir. 1977).

303. *Id.* at 763.

304. See, e.g., *Paxton v. Lanvin-Charles of the Ritz, Inc.*, 434 F. Supp. 612 (S.D.N.Y. 1977); *Locasio v. Teletype Corp.*, 74 F.R.D. 108 (N.D. Ill. 1977) (notice in class action need be confined to representative party only); *Sartin v. City of Columbus Util. Comm'n*, 421 F. Supp. 393 (N.D. Miss. 1976), *aff'd without opinion*, 573 F.2d 84 (5th Cir. 1978); *Skoglund v. Singer Co.*, 403 F. Supp. 797 (D.N.H. 1975) (failure to post notice waived defendant's ability to rely on plaintiff's failure to file notice of intent to sue with the Labor Department); *Mistretta v. Sandia Corp.*, 12 Fair Empl. Proc. Cas. 1225 (D.N.M. 1975).

305. By the terms of President Carter's Executive Reorganization Plan No. 1, section 2, 43 Fed. Reg. 19,807 (1978), all enforcement functions of the Wage-Hour Division and

within the FLSA statute of limitations.

4. *Unremedied Technical Defects in the ADEA.* The 1978 amendments did not address a surprising number of well-known technical defects in the ADEA. First, the dispute raised by *Rogers v. Exxon Research & Engineering Co.*,³⁰⁶ *Bertrand v. Orkin Exterminating Co.*,³⁰⁷ and *Sant v. Mack Trucks, Inc.*,³⁰⁸ over whether a violation of the ADEA creates a tort for which all damages reasonably foreseeable, including pain, suffering and mental distress, are otherwise compensable was simply left to the judiciary to work out. Congress indicated no approval or disapproval of the varying approaches taken on this crucial issue. Second, Congress made no attempt to deal with the bona fide occupational qualification defense to liability under the ADEA, although the Senate draft of the 1978 amendments included a clarifying provision on this problem. This leaves *Houghton v. McDonnell-Douglas Corp.*³⁰⁹ in conflict with the earlier decisions in *Hodgson v. Greyhound Lines, Inc.*³¹⁰ and *Usery v. Tamiami Trail Tours, Inc.*³¹¹ *Hodgson* held age constituted a bona fide occupational qualification for interstate bus drivers, and allowed the company to limit hiring to persons under age 35, when a scintilla of evidence justified the conclusion that older drivers have slower reflexes and tire more easily.³¹² *Tamiami Trail Tours* accepted the argument that if it were impossible or highly impractical to deal with young and old workers on an individualized basis, age discrimination based on a general rule of thumb relative to driver safety and fatigue would be lawful.³¹³ *Houghton*, on the other hand, dealing with the safety and health requirements for aviation test pilots, concluded that the burden of proof lay with the defendant to establish a bona fide occupational qualification defense by a preponderance of the evidence, without the crutches used in *Greyhound Lines* and *Tamiami Trail Tours*.³¹⁴ In short, *Houghton* required that a

the Secretary of Labor have been transferred to the Equal Employment Opportunity Commission.

306. 404 F. Supp. 324 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

307. 419 F. Supp. 1123 (N.D. Ill. 1976).

308. 424 F. Supp. 621 (N.D. Cal. 1976).

309. 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

310. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

311. 531 F.2d 224 (5th Cir. 1976).

312. 499 F.2d at 865.

313. 531 F.2d at 238.

314. The district court had made two findings which accorded with *Greyhound Lines* and *Tamiami Trail Tours*:

(1) That functional age, as distinguished from chronological age, cannot be

defendant using the bona fide occupational qualification defense make an affirmative showing that the particular individual who was retired or dismissed on account of age was actually barred by reason of his personal aging process from performing his work.³¹⁵ Congress, by refusing to redefine the bona fide occupational qualification defense, permits this dichotomy to stand without rectification.

Third, the 1978 amendments have not resolved the confusion created by judicial construction of the provisions of section 14(b) of the ADEA, which preclude federal suit until 60 days after any state anti-age discrimination enforcement agency having jurisdiction has received notice of intent to sue. As of this writing, the judicial custom has been to classify each state into "deferral" or "non-deferral" status, depending upon the type of anti-age discrimination law the state has on its books.³¹⁶ In some jurisdictions, the same district court, sitting in a different division, has made contradictory interpretations of state anti-age discrimination laws requiring deferral in one case, and not another.³¹⁷ If

determined with sufficient reliability to meet the special safety demands which are imposed on McDonnell-Douglas;

(2) In the absence of a comprehensive test by which an individual's functional age might be determined, there is no alternative to establishing an arbitrary age limit.

413 F. Supp. at 1236.

315. 553 F.2d at 656.

316. See, e.g., *Evans v. Oscar Mayer & Co.*, 17 Empl. Prac. Guide 6246 (8th Cir. 1978) (Iowa is a deferral state); *Lugo Garces v. Sanger Int'l Corp.*, 534 F.2d 987 (1st Cir. 1978) (Puerto Rico is a non-deferral jurisdiction, having no administrative agency charged with enforcement of age discrimination laws); *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976) (Illinois is a non-deferral state because no agency enforces state anti-age discrimination act).

317. Consider the plight of lawyers in the Eastern District of Michigan. In *Nickell v. Shatterproof Glass Corp.*, 424 F. Supp. 884 (E.D. Mich. 1976), one district judge held that failure to file notice with the Michigan Human Rights Commission within the prescribed 90 day period after dismissal did not bar a federal ADEA lawsuit. This decision conflicted with earlier decisions by the same district, which held that filing a complaint with the Human Rights Commission was a condition precedent to an ADEA action in federal court. *Magalotti v. Ford Motor Co.*, 418 F. Supp. 430 (E.D. Mich. 1976); *Gabriele v. Chrysler Corp.*, 416 F. Supp. 143 (E.D. Mich. 1976); *Vaghn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich. 1974).

Much the same confusion has existed throughout the Third Circuit for the past five years. In 1974, *Goger v. H.K. Porter Co.*, 492 F.2d 13 (3rd Cir. 1974) held that failure to file a complaint before the relevant New Jersey agency responsible for enforcing state anti-age discrimination laws was a bar to suit unless relieved by some equity. This was followed in *Sutherland v. SKF Industries, Inc.*, 419 F. Supp. 610 (E.D. Pa. 1976) which upon equitable grounds, however, excused the plaintiff's failure to file a complaint with the Pennsylvania Human Relations Commission within 90 days after discharge for age discrimination. *Smith v. Joseph Schlitz Brewing Co.*, 419 F. Supp. 770 (D.N.J. 1976) adhered to this condition precedent doctrine. It is not clear whether the court in *McCracken v.*

deferral to a state anti-age discrimination enforcement agency is required as condition precedent to bringing a federal ADEA claim, then a suit may be dismissed for failure to follow state administrative procedures; if deferral is not a condition precedent, it is simply the aggrieved party's option to choose state procedure over federal procedure, and no bar to suit. This last result seems to be the only fair result, but the ambiguities of section 14(b) allow judges to reach opposite conclusions about deferral to state agencies.

Fourth, Congress failed to rectify the confusion surrounding ADEA class action suits created by conflicting lower court holdings on the applicability of section 16 of the FLSA to class actions.³¹⁸ If section 16 applies to ADEA suits, no person may be a party plaintiff unless he or she consents to inclusion in the suit, in contradistinction to the provisions of Rule 23 of the Federal Rules of Civil Procedure, which requires constitutionally effective notice to parties and gives class plaintiffs the option to self-select out of the suit.³¹⁹ Worse still, some courts have insisted that no person can be a class plaintiff in an ADEA action unless that person has filed a notice of intent to sue within 180 days of dismissal.³²⁰ If Congress expects private individuals to be the pri-

Shenango, Inc., 440 F. Supp. 1163 (W.D. Pa. 1977) adhered to *Goger*, or adopted a rule which waived filing with the state as condition precedent to suit. But in *Marshall v. Chamberlain Mfg. Corp.*, 443 F. Supp. 159 (M.D. Pa. 1977), the court held that the Secretary of Labor had to defer to State Human Relations Commission conciliation before filing suit on behalf of aggrieved workers. This holding clearly went beyond *Goger's* rule. Finally, in *Holliday v. Ketcham, MacLeod & Grove, Inc.*, 17 Empl. Prac. Dec. 6313 (3rd Cir. 1978), the Third Circuit reversed *Goger* and concluded that filing a complaint with state agencies was an alternative to federal litigation, and not condition precedent to suit. Since *Goger* is the leading case courts outside the Third Circuit have relied on in adopting the condition precedent doctrine, its reversal may end the silly results reached in the Eastern District of Michigan.

318. See *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1978) (ADEA class action governed by FED. R. Civ. P. not by section 16 of FLSA); *Pandis v. Sikorsky Aircraft Div. of U.T.C.*, 431 F. Supp. 793 (D. Conn. 1977). (notice by representative of class to Labor Department sufficient compliance with section 7(d) ADEA to permit class action). *Accord*, *Locasio v. Teletype Corp.*, 16 Fair Empl. Prac. Cas. 471 (N.D. Ill. 1977); *Cavanaugh v. Texas Instruments, Inc.*, 16 Fair Empl. Prac. Cas. 463 (S.D. Tex. 1977); *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976). But see *Wagner v. Leow's Theatres, Inc.* 16 Fair Empl. Prac. Cas. 334 (M.D.N.C. 1977) (all members of class must consent to suit and give notice to Labor Department to maintain class suit); *Naton v. Bank of California*, 72 F.R.D. 550 (N.D. Cal. 1976); *LaChapelle v. Owens-Illinois, Inc.*, 64 F.R.D. 96 (N.D. Ga. 1974); *Gebhare v. GAF Corp.*, 59 F.R.D. 504 (D.D.C. 1973).

319. FED. R. Civ. P. 23 provides that notice to parties constituting the representative class shall be made by order of the court so as to ensure each party a reasonable opportunity to opt out of the class action.

320. *Hayes v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.D.C. 1973). But see *Burgette v. Cudahy Co.*, 361 F. Supp. 617 (D. Kan. 1973) which reached an opposite, and the correct conclusion.

mary means of enforcement of the ADEA by relevant civil process, Congress should ensure that ADEA class actions against corporate offenders are easily maintainable and readily accessible to injured parties, even though some injured parties have not complied with the "notice as condition precedent to suit" doctrine for an individual civil action. By its silence on the class action issue, Congress allows the judiciary to dismiss class actions in ADEA enforcement proceedings as if they were wage-hour claims for unpaid minimum wages.

Fifth, Congress has not really clarified the relationship between the ADEA and other civil rights legislation. It still is not at all clear whether upon proof of a *prima facie* case, the plaintiff in an ADEA case shifts the burdens of production and proof to the defendant,³²¹ as in a typical Title V or Title VII Civil Rights Act suit. Circuit court cases go both ways. The Fifth Circuit has followed the normal Title VII approach to this issue, and requires the defendant to carry the burden of persuasion after the plaintiff has made out a *prima facie* case.³²² The Sixth Circuit adopted a different, somewhat more plaintiff-oriented rule in *Laugesen v. Anaconda Co.*,³²³ which stated that a verdict could not be directed for the defendant in an ADEA suit if there was any scintilla of evidence that age was a factor in dismissal or retirement.³²⁴ The remaining circuits have not dealt with this issue. As a result, the presumption must be that outside the Fifth and Sixth Circuits, an ADEA case is an ordinary civil suit, in which the plaintiff maintains the burden of proof during the entire trial. If a plaintiff makes out a *prima facie* case, the defendant may prevail by simply proposing some evidence, however slender, to contradict the plaintiff's case. The usual civil action rule is very defendant-oriented, and thus leads easily to directed verdicts for the defendant. Congress again has left this crucial area to the courts to use as a football to get rid of cases whenever possible.

To summarize, then: the 1978 ADEA amendments attempted to cure three of seven major technical defects in the Act, two of which are major constitutional issues. Regarding jury trial rights, Congress has informed the courts that it intends the full range of seventh amendment jury trial rights to extend to ADEA litigants. Congress also instructed the courts, particularly the Supreme Court, that there were to be no legislatively-induced

321. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

322. *Wilson v. Sealtest Food Div. of Kraftco Corps.*, 501 F.2d 84 (5th Cir. 1974).

323. 510 F.2d 307 (6th Cir. 1975).

324. *Id.* at 317.

"grandfather clauses" in section 4(f) of the ADEA for pre-1968 retirement programs. How far Congress can go to override the Supreme Court's *McMann* decision, however, remains unclear. Finally, Congress did clarify the "notice is jurisdictional" defense by requiring the courts to allow equitable exceptions to the usual rule that a prospective ADEA litigant must notify the Equal Employment Opportunity Commission within 180 days after dismissal of his or her intention to sue a former employer. These technical changes were minimal. Congress did not deal with whether the ADEA created a new tort, whether the bona fide occupational qualification defense could be maintained without showing an individual was personally unable by reason of his or her own aging process to continue to work, or whether an ADEA class action is subject to the restrictive class action provisions of the Fair Labor Standards Act. In fact, Congress also has yet to identify what constitutes a cause of action or the elements of a justifiable claim under the ADEA, and who has the burden of proof on the material issues alleged in an ADEA complaint.

C. *The Substantive Changes in the ADEA*

Congress did alter the substantive structure of the ADEA in two highly significant ways. First, Congress raised the mandatory retirement limit for non-federal employees from age 65 to 70. Second, Congress abolished mandatory retirement for federal employees. Both substantive changes clearly will alter the character of American life, and may reverse the present trend to an increased dependency ratio in this nation. In short, both changes reflect a congressional intention to increase productivity in the American labor force.

1. *Raising Mandatory Retirement to Age 70.* Technically, Congress eliminated the ancient limit of mandatory retirement at age 65 by amending section 12(a) of the ADEA to provide that "the prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age."³²⁵ This general elimination of Bismarck's Prussian social security and retirement age from American law, however, is subject to two qualifications, both thoroughly discussed in committee and on the floor of both Houses. The first denies the benefits of the new upper age limit to highly compensated corporate employees:

Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age

325. 29 U.S.C.A. § 631(a) (West Supp. 1978).

but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$27,000.³²⁶

The style and flavor of this proviso is that of Internal Revenue Code draft-personship. The congressional purpose in adding this proviso, according to the Senate Report on the Senate Amendment, was to permit employers to replace key executives to provide promotional opportunities for younger executives in business. This proviso was the brain child of Senator Claiborne Pell of Rhode Island,³²⁷ who further explained his position during floor debate:

In my view, an exemption for high level executives is wise and necessary. Large corporations depend upon a regular and predictable turnover in high level personnel to assure themselves of a constant replenishment of new ideas and perspectives at the topmost levels of corporate decision making.

An automatic retirement age for top level personnel is recognized and widely used as an effective and proven element in this transmission process. The executive exemption contained in this bill permits this automatic retirement policy, beginning no lower than age 65, to remain in effect.

. . . Estimates I have received from large corporations indicate that each age 65 high level management retirement creates between five and eight middle level management promotions. These promotions are necessary to keep good, talented personnel with a large corporation.

A logjam in executive retirement also harms the affirmative action plans which these corporations have placed in effect.³²⁸

Senator Pell claimed the proviso affected less than .4% of all corporate management retirements, and imposed no substantial economic hardship on individual top managers affected by the proviso.³²⁹ Whether this exception is socially useful is fairly debatable, but it does little harm to the impact of the 1978 amendments.

326. *Id.* § 631(c).

327. S. REP. NO. 493, 95th Cong., 2d Sess. 7, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 982.

328. 123 CONG. REC. S17,289 (daily ed. Oct. 19, 1977) (remarks of Sen. Pell).

329. *Id.* at S17,289-90. Pell claimed only 464 out of 11,000 executives would be affected by this proviso. There seems to be very little social utility behind this exception, except the placating of an interest group that could block passage of the bill itself.

The second proviso, however, strikes more deeply into the ranks of middle-class America. Congress also extended the status quo for college, university, and professional school educators until 1982. As originally drafted, college, university, and professional school educators as well as grade and secondary school teachers would be "grandfathered" into mandatory retirement at age 65 indefinitely.³³⁰ The review of this proviso in conference committee produced abolition of the proviso applying to elementary and secondary teachers, and a limitation on the mandatory retirement restriction on collegiate faculty to a period expiring in 1982.³³¹ In floor debate both provisos were challenged as arbitrary and unreasonable, and therefore contrary to the due process clause of the fifth amendment.³³² The original version of H.R. 5383 contained neither proviso.³³³

The best that can be said for the tenured faculty proviso is that it permitted the passage of the 1978 ADEA amendments. It lacks even a fairly debatable rational purpose and is an arbitrary, unreasonable, and totally capricious classification. The same may be said for the business executive proviso. Ostensibly, each proviso was to ensure the promotion of younger men and women within bureaucratic organizations.³³⁴ No advocates of either mea-

330. S. REP. NO. 493, 95th Cong., 2d Sess. 7, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 984. 123 CONG. REC. S17,272 (daily ed. Oct. 19, 1977) contained the original version of the Senate amendment, reading as follows:

(c) Nothing in this Act shall be construed to prohibit compulsory retirement of employees who have attained 65 years of age but not 70 years of age, and who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher learning as defined by section 1201(a) of the Higher Education Act of 1965.

(d) Nothing in this Act shall be construed to prohibit compulsory retirement of teachers who have attained 65 years of age but not 70 years of age, and who are serving under a contract of unlimited tenure in a local education agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965, of a State, if State law in effect at the date of enactment of the Age Discrimination in Employment Act Amendments of 1977 provides for such retirement.

331. 29 U.S.C.A. § 631(d) (West Supp. 1978).

332. 123 CONG. REC. S17,284 (daily ed. Oct. 19, 1977) (remarks of Sen. Church), and S17,285-86 (reprint of New York Times article, "The Senate and Ageism," of October 9, 1977).

333. *Id.* at H9967-68 (daily ed. Sept. 23, 1977).

334. *Id.* at S17,283, S17,287, S17,290 (daily ed. Oct. 19, 1977) (remarks of Senators Hayakawa, Chafee, Moynihan). The principal reason these Senators supported the proviso had to do with the "threat" to higher education imposed by retaining senior tenured faculty after 65. Sen. Moynihan, in summing up the affirmative said:

American colleges and universities underwent a great expansion in the course of the 1950's and 1960's, they hired a large number of faculty members who acquired tenure and who are now on the verge of retirement.

sure offered statistical confirmation of this objective, although Senator Pell produced a chart showing the low impact of the key executives proviso.³³⁵ If the provisos are accorded the kind of strict scrutiny testing which all offensive classifications in terms of race, national origin, sex or religion are generally given by courts, they will probably be held unconstitutional.

2. *Removing the Age Ceiling for Federal Employees.* Representative Pepper has been waging a one-person campaign to abrogate the concept of mandatory retirement for at least a decade. During House debate on the 1978 ADEA amendments, Representative Pepper expressed strong approval of the experimental lifting of mandatory retirement for federal employees.³³⁶ The purpose behind the amendment to section 15 of the ADEA is precisely to experiment, with one considerable block of employees, with the abolition of mandatory retirement. This may be justifiable as an experimental measure, because it is tied to the Secretary of Labor's duty to report within 2 years both on the effectiveness of the 1978 amendments,³³⁷ and/or the feasibility of total abolition of mandatory retirement.

To curb the present high cost of social security contributions, Congress has elected to limit the growing dependency ratio by encouraging older workers to remain at work. In the case of federal workers, whose retirement age had been 70 for a number of years, this provides an opportunity to develop data on the impact

Their prospect of retiring comes at a time when there is very little prospect for an increase in university and college enrollment, such that there is no increase in the demand for teachers at them, such that to an extraordinary degree, few new faculty are going to be hired as old faculty retire.

During this period, we are going to be awarding some 35,000 doctoral degrees each year. During that period the 3,000 colleges and universities in the country are expected to hire some 3,700 faculty members. In round terms, one Ph.D. in nine can expect a position in a university. In round terms, each university or college will be adding one tenured member a year to its faculty.

The system of tenure which evolved in American universities evolved not as a retirement policy but as a system of doing two things: one, protecting faculty against the changing political and intellectual fashions of the time, and, two, insuring sufficient periods in which work requiring a long gestation could be done. It is an intellectual policy. It is an academic policy. It has to do with creativity and productivity and scholarship.

Id. at S17,290 (daily ed. Oct. 19, 1977) (remarks of Sen. Moynihan).

335. See note 329 *supra*.

336. Rep. Pepper estimated that raising the mandatory retirement age to 70 would relieve the social security system of between \$600,000,000 and \$700,000,000 each year in benefits presently paid out. 123 CONG. REC. H9352 (daily ed. Sept. 13, 1977).

337. 29 U.S.C.A. § 624(a)(1) (West Supp. 1978).

of self-selected retirement as the primary means of ending a working career. If the data produced by one or two years operation of this system should disclose a significant working constituency after age 70 in the federal service, then some meaningful data about the economic impact of ending mandatory retirement can be generated. The suggestion is that mandatory retirement really helps no particular special interest group, nor serves any rational social need.

V. CONCLUSION

Congress did not attempt to revise thoroughly the administrative and judicial mechanics of the ADEA in its 1978 amendments. It was much more interested in experimenting with raising the age for, or abolishing entirely, mandatory retirement. As a result, the creaking enforcement machinery of the original ADEA must be endured for another season. Whether transferring ADEA enforcement from the Wage-Hour Division to the EEOC will mean anything in terms of increased effectiveness in conciliation and mediation of age discrimination cases remains to be seen. The cumbersome deferral to state agencies and the equally cumbersome dual system of toothless agency conciliation followed by "private attorney general" ADEA litigation will endure for at least another Congress.

Congress, meanwhile, dealt a potential deathblow to the concept of mandatory retirement by exempting most federal employees from any enforced retirement on account of age. This may provide useful data to Congress in considering whether to extend this freedom to work to all older American workers. Because no human or economic justification for mandatory retirement at age 65 or at age 70 exists, Congress may be willing to permit the concept of agism in employment to die a well-deserved death. Congressional concessions, however, to hysterical special interest groups, who feared upsetting the status quo by raising the retirement age for executives and college teachers to 70, produced two provisos to section 12 of the ADEA which are probably arbitrary and unreasonable, and therefore beyond the allowable scope of legislative discretion. Although the proviso for key executives affects only a small number of highly paid persons, the college teacher proviso hits hard at a substantial group of older Americans without retirement packages of substantial size. The only saving grace is the expiration of the college professor proviso in 1982.

Age discrimination in employment and in American life will

not be solved overnight by congressional fiat. To effect significant changes in the behavior of American employers, which behavior has not changed much since the adoption of the original 1967 ADEA, some responsible party must execute the congressional intent by vigorous enforcement of the ADEA.³³⁸ The latest buck-passing operation which relegates ADEA enforcement to the hotchpot of the EEOC probably will mean that the overworked, underpaid EEOC staff will be forced to choose between enforcement of Titles V through IX of the Civil Rights Act and the ADEA. The chances are that without additional manpower and appropriations for ADEA enforcement, the Act will receive worse treatment in EEOC hands than it did at the hands of the Wage-Hour Division. Age discrimination in employment is too widespread an American evil to dismiss as an adjunct of some other program's funding. It deserves legislative support by means of an efficient enforcement program modeled after known, efficient administrative processes.

338. For a different enforcement scheme modeled after the NLRB and other single member adjudicative systems conforming to the Administrative Procedure Act, see Reed, *supra* note 162, at 796-98.