January, 1986

The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception

Howard C. Eglit, *Chicago-Kent College of Law*

VOLUME 66 NUMBER 2 MARCH 1986

BOSTON UNIVERSITY LAW REVIEW

THE AGE DISCRIMINATION IN EMPLOYMENT ACT'S FORGOTTEN AFFIRMATIVE DEFENSE: THE REASONABLE FACTORS OTHER THAN AGE EXCEPTION†

HOWARD EGLIT*

The Age Discrimination in Employment Act of 1967, as amended (ADEA),[1] has demonstrated remarkable fecundity in recent years as a source both of requests for administrative redress and of litigation. The federal agency charged with enforcement and administration of the Act—the Equal Employment Opportunity Commission (EEOC)[2]—reports that age

---

* J.D. University of Chicago 1967. Professor, Illinois Institute of Technology/ Chicago-Kent College of Law. The author wishes to thank Professors Joan Steinman and Alan Neff for their comments on a draft of this article, and to express appreciation for the support received in the preparation of this article from the Marshall Ewell Research Fund.

[1] 29 U.S.C. §§ 621-634 (1982).

[2] As initially enacted, the ADEA reposed administrative and enforcement authority in the Department of Labor. ADEA, Pub. L. No. 90-202, § 6, 1967 U.S. CODE CONG. & AD. NEWS (81 Stat.) 658, 660. President Carter transferred these functions to the Equal Employment Opportunity Commission (EEOC). Reorganization Plan No. 1 of 1978, 92 Stat. 3781, *reprinted in* 5 U.S.C. app. at 1155 (1982). The transfer took effect as of July 1, 1979. The statute pursuant to which this transfer was made, the Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982), contains a legislative veto provision. *Id.* § 906. In Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), the Supreme Court held such vetoes unconstitutional. Consequently, numerous challenges were made to EEOC enforcement actions by litigants who argued that the EEOC was without authority to enforce the age statute, since the agency derived its authority from a transfer which was invalid because made pursuant to an unconstitutional statute. Similar challenges were made in suits involving the Equal Pay Act, 29 U.S.C. § 206(d) (1982), enforcement authority for which likewise was transferred from the Department of Labor to the EEOC by the same Reorganization Plan. *See* 5 U.S.C. app. at 1155 (1982).

The large majority of courts rejected this argument. *See, e.g.*, Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984); EEOC v. Hernando Bank, 724 F.2d 1188 (5th Cir. 1984). The United States Court of Appeals for the Second Circuit ruled to the contrary, EEOC v. Columbia Broadcasting System, 743 F.2d 969 (2d Cir. 1984), as did a few district courts. Ultimately, the issue was resolved by virtue of enactment of

discrimination administrative complaints constitute the fastest growing category of claims with which it deals.[3] The body of reported cases—litigated primarily, but not exclusively, in federal courts—likewise is burgeoning.[4]

Given the large and still growing number of grievants[5] looking to the

---

a statute specifically authorizing enforcement and administration by the EEOC. Ratification of Reorganization Plans as a Matter of Law, Pub. L. No. 98-532, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2705.

[3] Vihstadt, *Congressional Update*, 5 BIFOCAL 8 (1984). The EEOC's Office of Program Operations reported in its fiscal year 1985 Annual Report that the number of ADEA charges filed with the agency rose from 8,101 in fiscal year 1981 to 11,328 in fiscal year 1984. During the same period complaints filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), which bans discrimination in employment on the bases of race, color, national origin, religion, and sex, and which also is enforced by the EEOC, increased from 44,992 to 47,179. Charges filed under the Equal Pay Act, 29 U.S.C. § 206(d) (1982), which proscribes gender-based compensation discrimination and which likewise is enforced by the EEOC, declined from 673 to 425. Thus, ADEA charges increased in numbers by 40% during a four year span; Title VII charges increased by only 4%. (Concurrent Title VII-ADEA charges increased during that time span from 1,378 to 2,992.)

[4] ADEA § 7(b), 29 U.S.C. § 626(b) (1982), incorporates § 16(b)(2) of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1982) (FLSA), which authorizes suit in "any Federal or State court of competent jurisdiction." *Id.* § 216(b)(2). Likewise, ADEA § 7(c), 29 U.S.C. § 626(c) (1982), directly authorizes private suits (by non-federal employees) with similar language. It is well-established that § 16(b)'s language allows FLSA suits to be brought in both state and federal courts, *see, e.g.*, Freudenberg v. Harvey, 364 F. Supp. 1087, 1090 (E.D. Pa. 1973), and the ADEA's own language likewise has been read as authorizing suit in either forum, *see, e.g.*, Patrowich v. Chemical Bank, 63 N.Y.2d 541, 543, 473 N.E.2d 11, 13, 483 N.Y.S.2d 659, 661 (1984); Eagleburger v. City of Springfield, 677 S.W. 2d. 914, 915 (Mo. Ct. App. 1984).

For a review of virtually all ADEA decisions see generally 1, 2 & 3 H. EGLIT, AGE DISCRIMINATION ch. 16-18 (1982 & 1986 Supp.) [hereinafter cited as EGLIT].

[5] The large majority of ADEA cases are filed by men according to one study which, while probably accurate, was based on a relatively small sampling of cases—just 153. Schuster & Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REL. REV. 64 (1984). The authors report that 80.6% of the claims were filed by men. *Id.* at 68. They also report that 57.4% of the cases were brought by professional or managerial employees. *Id.* They attribute the disproportionate number of male grievants to the likelihood that there simply was no other recourse available, in contrast to the option likely available to aggrieved women employees of looking to Title VII as a source of protection. Insofar as the high level work status statistic is concerned, the authors conclude that this figure is natural, inasmuch as lower ranking grievants likely would have union protection and the remedies available under collective bargaining contracts, whereas managerial employees would not have this alternative to the ADEA. *Id.* at 68-69.

The authors of the study further note that 55% of the actions analyzed were filed by employees between the ages of 50 and 59. As to this statistic, the authors comment:

ADEA as a source of redress, both the statute's proscriptions and the limitations on them are of undeniable importance. This article focuses on one of these limitations—the statutory exception which provides that age differentiations which otherwise would violate the Act will not do so if they are based on "reasonable factors other than age."[6]

The immediate generative force for this effort is the failure of the Supreme Court in *Western Air Lines, Inc. v. Criswell*[7] to resolve one of the issues as to which it had granted certiorari: whether the reasonable factors other than age (RFOA) exception constitutes an affirmative defense.[8] The *Criswell* Court's failure to reach this issue left standing a split among the courts. Two—and possibly three—courts of appeals have interpreted the RFOA provision as an affirmative defense, while four federal appellate courts have embraced a contrary construction.[9]

Notwithstanding the lack both of judicial analysis and scholarly examination,[10] the proper characterization of the RFOA exception is a significant

---

> [This] suggests that the Act is being used most extensively by those employees likely to be in greatest need of its protection: older workers who have reached the end of their career path with a particular organization, who are paid more than younger workers, who would find it difficult to start over in a new job, and who are not yet old enough to qualify for retirement benefits.

Id. at 69.

[6] ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1) (1982), provides: "It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age."

[7] 105 S. Ct. 2743 (1985).

[8] *See id.* at 2749 n.10 ("Because plaintiffs were assigned the burden of proof [on the RFOA issue] we need not consider whether it would have been error to assign it to the defendant.").

[9] *See infra* notes 147-50, 154-55, 157 and accompanying text.

[10] The commentators have offered little. Two sets of joint authors describe the RFOA provision as a defense, yet they cite as representative case law decisions in which the courts either did not address the RFOA exception explicitly, or deemed it not to be an affirmative defense. *See* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION §§ 100.22-.29 (1984 & 1985 Supp.); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 504-07 (2d ed. 1983). Professor Blumrosen apparently recognizes the RFOA exception as constituting an affirmative defense, but argues that it should not be deemed such. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in AGE DISCRIMINATION IN EMPLOYMENT ACT—A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 108 (M. Lake ed. 1982). For further discussion of Professor Blumrosen's position, see *infra* notes 256-59 and accompanying text.

Professor Player has asserted that the RFOA exception should not be deemed to impose a burden of persuasion on the defendant. Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 570, 651-52 n.120 (1983). However, in another article published in 1983 he wrote: "There is little doubt that 'reasonable factors other than

issue. As a general matter, an affirmative defense imposes upon the party invoking it a burden of persuasion,[11] and this general rule presumably pertains to the RFOA exception insofar as it is construed as an affirmative defense. If not read as constituting such a defense, the RFOA provision imposes upon the defendant invoking it[12] only a comparatively easily satisfied burden of production. Given the very different rigor of these burdens, denomination of the RFOA provision may well be outcome-determinative in at least some cases.[13]

---

age should be treated as a defense. It is structurally so arranged in the statute, and other similarly arranged provisions have been treated as defenses." Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is A Transplant Appropriate?*, 14 U. TOL. L. REV. 1261, 1279 (1983). He went on to reason that this defense imposed a burden of persuasion on the defendant. *Id.* at 1279-80; *see also infra* note 268.

[11] *See, e.g.*, NLRB v. Westin Hotel, 758 F.2d 1126, 1129 (6th Cir. 1985); NLRB v. Laborers' Int'l Union, 748 F.2d 1001, 1005 (5th Cir. 1984); *In re* Professional Air Traffic Controllers Org., 724 F.2d 205, 210 n.16 (D.C. Cir. 1984).

[12] Generally, were a defendant to make a counterclaim, a plaintiff might have occasion to interpose an affirmative defense as to that claim. However, by the very wording and purpose of the RFOA provision—excusing the actions of employers, labor organizations, and employment agencies which use age-related criteria—the exception is available only to defendants.

[13] This is strikingly illustrated by Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973). The court asserted that it was the defendant who had "the burden of proving that plaintiff was discharged because of reasonable factors other than age . . . ." *Id.* at 1214. The court extensively reviewed the evidence adduced and concluded that the defendant had failed to satisfy this burden. In a revealing recitation, the court opined:

> While plaintiff did not meet the projections set up for his district, he did do as well as or better than the company as a whole, both in total sales and in regular sales. In the context of a company which was in serious financial difficulty, due largely, no doubt, to factors far removed from and far more basic than the performance of a single district manager, plaintiff's performance, as measured by the objective sales figures, was neither very good nor very bad. The company clearly had a need for a district manager who could break all previous records and generally do an exemplary job. There is no question but that Schulz's performance was not of that caliber. The crucial question in this case, however, is whether defendant has proved that it had cause or reasons other than age for discharging Schulz.

Id. at 1215-16.

Had the defendant only borne a burden of articulating a legitimate, nondiscriminatory reason for its discharge of the plaintiff, the presentation of evidence establishing the undisputed fact that the company was in serious economic straits, combined with the fact that Schulz failed to meet the demands for increased sales which were set in order to help the company pull out of its dire position, clearly would have sufficed. Indeed, inadequate job performance is the common rebuttal—and commonly a successful one—put forth by defendants in ADEA cases. *See, e.g.*, Bohrer v. Hanes Corp., 715 F.2d 213 (5th Cir. 1983) (plaintiff refused to follow company

Individual disputes aside, both polar positions—that the exception does, and that it does not, constitute an affirmative defense—have the potential for larger consequences: the undermining of significant, albeit differing, bodies of ADEA case law which have developed independent of consideration of the RFOA provision. Currently, the defendant in a case based on circumstantial evidence of discriminatory treatment bears only a mild burden of production once the plaintiff proves a prima facie violation. The defendant typically satisfies this burden merely by articulating, without proving, what amounts in substance to a factor other than age as the basis for its challenged decision or action, although in these cases there hardly ever is recognition of the RFOA exception per se. A construction of the RFOA provision as an affirmative defense, entailing a much more stringent burden, has the potential to undermine the large defendant-protective body of cases in which this lesser burden of production has been imposed.

Conversely, there are other ADEA decisions in which defendants also have asserted what are tantamount to generic reasonable factors other than age in attempts to exculpate themselves, but in which a burden of persuasion has been imposed. This has occurred in most of the decisions addressing policies which, while ostensibly age-neutral in their facial terms, have disparate impacts on individuals or groups of a certain age. A burden of persuasion also has been imposed by some courts in discriminatory treatment cases in which the plaintiff has established a prima facie violation by adducing direct evidence of wrongdoing. Finally, a like burden applies at the remedy stage, and possibly even at the liability stage, "in pattern or practice" cases. If the RFOA exception is not read as an affirmative defense, but rather is construed as an exculpatory provision which the defendant can establish successfully by simply shouldering a mild burden of production, these plaintiff-protective bodies of decisions are imperiled.

There is a dilemma here of significant proportions. On the one hand, a reading of the RFOA exception as an affirmative defense undercuts one large body of ADEA rulings. On the other hand, failure to construe the exception as an affirmative defense places other bodies of ADEA decisions in jeopardy. This dilemma has not even been perceived, let alone addressed, by those courts rejecting the affirmative defense construction. And most

---

rules), *cert. denied*, 465 U.S. 1026 (1984); Franklin v. Greenwood Mills Mktg., 33 Fair Empl. Prac. Cas. (BNA) 1847, 1850 (S.D.N.Y. 1983). *See generally* 2 EGLIT, *supra* note 4, § 17.66 (discussing rebuttals to the prima face case). It was the heavy burden borne by the defendant which dictated the contrary conclusion in *Schulz:*

> While the court finds this to be a rather close case, the established rule regarding the burden of proof in discrimination cases requires that judgment be for the plaintiff. Plaintiff established a strong prima facie case of age discrimination. Defendant has failed to carry . . . [its] burden. . . .

Id. at 1216. (Four years after *Schulz* the Court of Appeals for the Fifth Circuit ruled that the RFOA exception did not constitute an affirmative defense in Price v. Maryland Cas. Co., 561 F.2d 609, 612 (5th Cir. 1977)).

courts interpreting the RFOA provision as an affirmative defense likewise have failed to comprehend the difficulty their stance creates; or, if these courts perceived the problem, they certainly did not deal with is satisfactorily.

This article aims to resolve this dilemma. There is a fundamental premise which undergirds this effort: most ADEA courts outside the RFOA context have devised approaches—by way of imposing differing burdens for plaintiffs and defendants in the various types of cases—which are satisfactory. This case law deserves preservation, and the optimum solution should be one which enables such a result to the maximum extent possible. The solution put forth here, grounded on this premise, entails construing the RFOA provision as an affirmative defense in those circumstances in which the defendant already bears a burden of persuasion—situations such as those involving policies having a disparate impact and entailing discriminatory patterns or practices. The RFOA exception should not be read, however, as an affirmative defense in circumstantial evidence discriminatory treatment cases, in which under present law defendants bear only a burden of production.

This bifurcated construction constitutes a principled compromise between two polar positions. It is a compromise which responds, albeit not entirely, to the RFOA provision's placement in the ADEA, to legislative history, and to the press of analogical reasoning, and which expresses respect for agency interpretations. It gives due recognition to the substantive import of the RFOA exception, whose significance up to now has been either ignored or unjustifiably discounted. At the same time, the construction of the exception proposed here does not undercut most non-RFOA case law—an appropriate result, despite the general failure of the courts to take into account the RFOA provision as they have devised doctrine in various ADEA settings.

I. THE ADEA—A BRIEF OVERVIEW

The ADEA addresses discrimination on the basis of age in the work place. Prior to its enactment, there had been only sporadic and ineffectual attention addressed to this issue at the federal level.[14] During consideration of the

[14] Efforts to prohibit arbitrary age discrimination by federal statute date back at least to the 1950's. *See Age Discrimination in Employment: Hearings Before the Subcomm. on Labor, Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 23 (1967) (statement of Sen. Javits). On February 12, 1964, President Johnson issued Exec. Order No. 11141, 3 C.F.R. §§ 117-18 (1964), *reprinted in* 5 U.S.C. § 3301 app. at 401-02 (1977) (entitled "Discrimination on the Basis of Age"). This Order, which remains extant, ostensibly proscribes age discrimination in employment by government contractors. However, the Order provides for no enforcement mechanism, and the regulations which have been issued pursuant to the order, 41 C.F.R. §§ 1-12.1000 to .1003 (1984), do not remedy this. In Kodish v. United Air Lines, 628 F.2d 1301, 1303 (10th Cir. 1980), it was held that a private right of action

Civil Rights Act of 1964[15] proposals were made to include age in the list of prohibited criteria set forth in that Act's employment provision.[16] While Congress rejected these, the 1964 Act did direct the Secretary of Labor to undertake a study to ascertain the nature and extent of age discrimination in employment, and to make recommendations for dealing with the problem if it existed.[17] In 1965 the Secretary reported to the Congress that ageism in the work place indeed was a significant problem, and that federal remedial legislation was needed to combat it.[18] The Secretary was directed by the Fair Labor Standards Amendments of 1966[19] to submit specific legislative recommendations. A draft bill was submitted to the Congress in early 1967, and in the same year the ADEA was considered, passed, and signed into law.

As set forth in the Act's "Statement of Findings and Purpose," the goal of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[20] Age discrimination is condemned across a broad range of actions and decisions: hiring; discharges; decisions regarding compensation, terms, conditions, and privileges of employment; job classifications; job referrals; and exclusion from union membership.[21] The statute today[22] extends—with only a few rela-

---

could not be implied from the Executive Order. For more extended discussion of the Order and the implementing regulations see 1 EGLIT, *supra* note 4, §§ 10.02-.03.

[15] 42 U.S.C. §§ 2000a to 2000h-6 (1982).

[16] An amendment offered by Representative Dowdy was rejected 123-94. 110 CONG. REC. 2596-99 (1964). An amendment offered by Senator Smathers likewise was rejected, by a 63-28 vote. 110 CONG. REC. 9911-13 (1964); 110 CONG. REC. 13490-92 (1964).

[17] Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 1964 U.S. CODE CONG. & AD. NEWS (78 Stat.) 287, 316 (superseded by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 10, 1972 U.S. CODE CONG. & AD. NEWS (86 Stat.) 111, 132).

[18] *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964 (1965).

[19] Pub. L. No. 89-601, § 606, 1966 U.S. CODE CONG. & AD. NEWS (80 Stat.) 845.

[20] ADEA § 2(b), 29 U.S.C. § 621(b) (1982).

[21] ADEA §§ 4(a)-4(c), 29 U.S.C. §§ 623(a)-623(c) (1982).

[22] The ADEA has been amended on several occasions. In 1974 the Act's coverage was extended to the federal government and to state and local government employers. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 1974 U.S. CODE CONG. & AD. NEWS (88 Stat.) 55, 78-79 (codified as amended at 29 U.S.C. § 630(b) (1982)).

In 1978 the statute was amended in a number of respects. Most notably, the amendments (1) raised the age cap from 65 to 70 for most non-federal employees; (2) removed the age cap entirely for federal employees; (3) established a statutory

tively minor exceptions—to persons in non-federal employment between the ages of forty and seventy.[23] Federal employees receive even greater protection, since they are not subject to an age ceiling upon reaching age forty and so are permanently protected by the Act[24] unless some other federal statute imposes an age limit which supersedes the protection of the ADEA.[25] Employers,[26] labor organizations,[27] and employment agencies[28] must abide

---

guarantee of jury trials; (4) changed the nomenclature regarding filings with the EEOC; and (5) barred involuntary retirement prior to age 70, even if an employer sought to justify such retirement under the bona fide benefit plan exception set forth in ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982). Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 1978 U.S. CODE CONG. & AD. NEWS (92 Stat.) 189 (codified at 29 U.S.C. §§ 631, 633a, 626, 623(f)(2) (1982)).

In 1982 the Act was further amended regarding employers' obligations to extend health benefits to employees between 65 and 69. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 116(a), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 353 (codified at 29 U.S.C. § 623(g) (1982)). In 1984 the Act was amended so as to extend coverage in some instances to employees working abroad. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1792 (codified at 29 U.S.C. §§ 623(f)(1), 623(h) and 630(f) (1982)). In the same year § 4(g) of the ADEA was amended so as to extend health insurance coverage to the spouses of employees between the ages of 65 and 69. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2301(b)(1), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1063. Most recently, the health insurance provision was amended once again so as to impose upon employers the obligation to extend health insurance coverage plans to employees and spouses age 70 and over. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b)(1), 1985 U.S. CODE CONG. & AD. NEWS (100 Stat.) 171.

[23] *See* ADEA § 12(c), 29 U.S.C. § 631(c) (1982) (certain executives and policymakers are subject to mandatory retirement at age 65). *See generally* 1 EGLIT, *supra* note 4, § 16.06. *See also* ADEA § 11(f), 29 U.S.C. § 630(f) (1982) (elected officials and their personal staff and appointees are excluded from protection). There was a temporary exemption allowing the involuntary retirement of tenured college faculty upon their attaining age 65, but that provision, codified at ADEA § 12(d), 29 U.S.C. § 631(d) (1982), expired on July 1, 1982. (As this article went to press, Congress—on October 17, 1986—removed the age seventy ceiling, subject to a few exceptions.)

[24] ADEA § 15, 29 U.S.C. § 633a (1982).

[25] *See, e.g.*, 5 U.S.C. § 8335(b) (1982) (imposing mandatory retirement at age 55 on certain federal law officers and firefighters).

[26] The term "employer" is defined in ADEA § 11(b), 29 U.S.C. § 630(b) (1982): "[A] person engaged in an industry affecting commerce who has twenty or more employees . . . .". *See generally* 2 EGLIT, *supra* note 4, § 16.07. The prohibitions applicable to employers are set forth in ADEA §§ 4(a), 4(d), 4(e), 4(g), 29 U.S.C. §§ 623(a), 623(d), 623(e), 623(g) (1982).

[27] The term "labor organization" is defined in ADEA § 11(d), 29 U.S.C. § 630(d) (1982), and the criteria which apply in order for a labor organization to fall within the ambit of the ADEA are set forth in ADEA § 11(e), 29 U.S.C. § 630(e) (1982). *See*

by the Act's demands, provided they meet the prescribed qualifying criteria—such as the requirement that an employer, to be covered, must have at least twenty employees for twenty or more weeks of the year.[29] By virtue of a 1974 amendment to the statute,[30] state and local government employers fall within the Act's purview.[31]

Notwithstanding the ostensible breadth of the ADEA, covering employment decisions ranging from hiring to retiring, the statute does not outlaw all consideration of age and age-related criteria. Quite the contrary. The legislative language condemns only discrimination which is "arbitrary."[32] Moreover, three of the statutory exceptions contained in the ADEA,[33] and a

---

generally 2 EGLIT, *supra* note 4, § 16.13. The prohibitions imposed on labor organizations are established by ADEA §§ 4(c)–4(e), 29 U.S.C. § 623(c)–623(e) (1982).

[28] The term "employment agency" is defined in ADEA § 11(c), 29 U.S.C. § 630(c) (1982). *See generally* 2 EGLIT, *supra* note 4, § 16.14. The prohibitions imposed on employment agencies are set forth in ADEA §§ 4(b), 4(d), 4(e), 29 U.S.C. §§ 623(b), 623(d), 623(e) (1982).

[29] ADEA § 11(b), 29 U.S.C. § 630(b) (1982).

[30] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 1974 U.S. CODE CONG. & AD. NEWS (88 Stat.) 74, 78.

[31] *See* ADEA § 11(b), 29 U.S.C. § 630(b) (1982). The constitutionality of this extension to state and local governments was called into question in a considerable number of cases, with most lower courts holding that the amendment was a valid exercise of Congress' authority under the commerce clause, U.S. CONST. art. I, § 8, cl. 3. *See generally* 2 EGLIT, *supra* note 4, § 16.11 (discussing ADEA's applicability to state and local governments). Ultimately, the Supreme Court resolved the issue, holding that "[t]he extension of the ADEA to cover state and local governments . . . was a valid exercise of Congress' powers under the Commerce Clause." EEOC v. Wyoming, 460 U.S. 226, 243 (1983). A large number of courts have also upheld the ADEA's extension to state and local employers as a valid exercise of Congress' enforcement authority under § 5 of the fourteenth amendment. *See, e.g.*, Heiar v. Crawford County, 746 F.2d 1190, 1194 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3500 (1985); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 700 (1st Cir. 1983); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977). The *Wyoming* Court did not decide this question, although it did assert that such an exercise could be valid without Congress explicitly invoking § 5 when enacting legislation pursuant to this provision. 460 U.S. at 243 n.18.

[32] Arbitrariness is referred to no less than three times in the Act's Statement of Findings and Purposes. ADEA §§ 2(a)(2), (4), 2(b), 29 U.S.C. §§ 621(a)(2), 621(a)(4), 621(b) (1982).

[33] ADEA § 4(f), 29 U.S.C. § 623(f) (1982), provides in relevant part:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .

fourth incorporated into it from another statute,[34] legitimize uses of age in some non-federal employment contexts[35] which, but for these exceptions, would run afoul of the Act's proscriptions.[36] These provisions thus make clear that in some circumstances age distinctions indeed are legally tolerable.[37]

---

(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 require or permit the involuntary retirement of any individual . . . [between the ages of 40 and 70] because of the age of such individual. . . .

Subsection (2) actually contains two distinct exceptions—one concerning seniority systems, the other involving benefit plans.

[34] ADEA § 7(e), 29 U.S.C. § 626(e), incorporates § 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259 (1982), which creates a statutory defense whereby an employer can escape liability by proving that its alleged wrongful conduct was done in good faith conformity with, and in reliance on, a written administrative regulation, order, ruling, approval, or interpretation of the EEOC, or an administrative practice or enforcement policy of the agency. *See generally* 2 EGLIT, *supra* note 4, § 16.47.

[35] ADEA § 15, 29 U.S.C. § 633a (1982), sets up a separate and distinct scheme for federal government employees. ADEA § 15(f), 29 U.S.C. § 633a(f) (1982), establishes that the other provisions of the ADEA do not apply to these employees. ADEA § 15(b), 29 U.S.C. § 633a(b) (1982), authorizes the establishment of bona fide occupational qualifications, provided such qualifications are approved by the EEOC. This caveat parallels the bona fide occupational qualification exception set forth in ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1) (1982), set forth *supra* note 33. Section 15 contains no RFOA provision.

[36] There also is an administrative exemption promulgated first by the Secretary of Labor when he administered the ADEA, and since maintained by the EEOC, whereby bona fide apprenticeship programs are relieved from adherence with the ADEA's prohibitions. 29 C.F.R. § 1625.13 (1985). This exemption was ruled unlawful in Quinn v. N.Y.S. Elec. & Gas Corp., 596 F. Supp. 655, 664 (N.D.N.Y. 1983). Subsequent to *Quinn*, the EEOC proposed rescinding the exemption. 50 Fed. Reg. 17857 (Apr. 29, 1985). However, as of October 15, 1986, no final action had been taken regarding this proposal.

[37] Throughout age discrimination law—whether the context of legal analysis is the equal protection clause of the fourteenth amendment, statutes such as the Age Discrimination Act of 1975, as amended, 42 U.S.C. §§ 6101-6107 (1982), or the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1982)—the difficult task is distinguishing between acceptable age distinctions and unacceptable age discrimination. *See* Eglit, *Age and the Law*, in HANDBOOK OF AGING AND THE SOCIAL SCIENCES 528 (R. Binstock & E. Shanas 2d ed. 1985). As to constitutional analysis regarding ageism see Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859 (1981). As to the Age Discrimination Act of 1975, see 57 CHI.-KENT L. REV. 805-1116 (1981) (containing a number of papers generated for the National Conference on Constitutional and Legal Issues Relating to Age Discrimination and the Age Discrimination Act). *See also* 1 EGLIT, *supra* note 4, at ch. 5-6 (regarding the history and enforcement of the Age Discrimination Act of 1975); Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979) (focusing on the conflict between

II. ESTABLISHING A VIOLATON OF THE ADEA

Case law has prescribed alternative routes for establishing a violation of the ADEA. In most cases the plaintiff must prove discriminatory motivation, or animus, by the defendant. Such proof of motivation is essential to successfully establishing claims alleging discriminatory treatment, whether such treatment takes the form of individualized infliction of injury, or is manifested as systemic wrongdoing against numerous members of the protected age group. Adequate proof of motivation requires that age must have been a determining factor in the challenged decision or practice.[38] In other words, a violation cannot be established unless it can be proven that "but for" the age factor, the same decision would not have been made.[39] Age need not have been the sole determining factor; indeed, there may have been several considerations involved in the employer's decision to hire or fire an individual.[40] So long as age was one of them, however, and so long as it was a determinative one, the ADEA's ban on discrimination will be deemed to have been violated.[41]

---

the social choice criteria used in decisionmaking and the moral and legal restraints imposed by antidiscrimination law). As to the Equal Credit Opportunity Act, see 1 EGLIT, *supra* note 4, at ch. 12.

[38] *See, e.g.*, Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1180 (6th Cir. 1983); Golomb v. Prudential Ins. Co., 688 F.2d 547, 551 (7th Cir. 1982); Tribble v. Westinghouse Elec. Corp., 699 F.2d 1193, 1196 (8th Cir. 1982), *cert. denied,* 460 U.S. 1080 (1983); *see also* 2 EGLIT, *supra* note 4, § 17.69.

[39] *See, e.g.*, Fink v. Western Elec. Co., 708 F.2d 909, 919 (4th Cir. 1983); Pena v. Brattleboro Retreat, 702 F.2d 322, 323 (2d Cir. 1983); Cline v. Roadway Express, Inc., 689 F.2d 481, 485 (4th Cir. 1982).

[40] *See, e.g.*, Perrell v. FinanceAmerica Corp., 726 F.2d 654, 656 (10th Cir. 1984); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 82 (2d Cir. 1983); Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C. Cir. 1980); Smithers v. Bailar, 629 F.2d 892, 898 (3d Cir. 1980).

[41] *See, e.g.*, Parcinski v. Outlet Co., 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied,* 459 U.S. 1103 (1983); Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1315 (9th Cir. 1982), *cert. denied,* 459 U.S. 859 (1983).

In Golomb v. Prudential Ins. Co., 688 F.2d 547 (7th Cir. 1982), the court noted that there was some confusion generated by courts which spoke of age as *the* determining factor, and thereby suggested that a plaintiff bore the burden of proving that age was the sole determinative factor in the employer's decision. *Id.* at 552 n.2. Accordingly, the *Golomb* court urged that in the future jury instructions and opinions should expressly use the phrase "a determining factor," so as to preclude any erroneous implications. *Id.* The court in Cuddy v. Carmen, 694 F.2d 853 (D.C. Cir. 1982), similarly expressed concern that the use of the word *the* improperly implied that age had to be the sole factor. *Id.* at 857-58 n.22. In Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980), the court rejected the contention that the trial court had erred in labeling age as *the* determinative factor rather than *a* determinative factor. However, the case had been tried by a judge, rather than a jury, and the Third Circuit court acknowl-

Motivation is not an element of claims flowing from ostensibly age-neutral policies or practices which have an allegedly disparate, or discriminatory, impact upon members of the ADEA-protected group.[42] Thus, an employer, employment agency, or labor organization may act with no ageist animus whatsoever, and yet still run afoul of the ADEA in this type of case.

The defendant's burden will vary depending upon the nature of the plaintiff's prima facie case. It is at this juncture—that of fashioning the defendant's task—that the RFOA exception becomes pertinent. A review of the various ways in which burdens generally are defined and allocated under the ADEA is essential to an understanding of the exception's significance.

A. *Discriminatory Treatment: The* McDonnell Douglas-Burdine *Paradigm*

Most ADEA cases involve allegations of discriminatory treatment: plaintiffs claim that because of their age they were intentionally disadvantaged. Most commonly the plaintiff's case, in which he or she must establish discriminatory animus or motive on the defendant's part, will be grounded on circumstantial evidence. In establishing a framework for determining how a plaintiff can succeed in making out a prima facie case of this type, ADEA courts almost uniformly have looked to case law developed under Title VII of the Civil Rights Act of 1964.[43] This is understandable since, as the Supreme Court has noted, the "prohibitions of the ADEA were derived *in haec verba* from Title VII."[44]

Two Title VII rulings by the Supreme Court have set the pattern for the ADEA. In *McDonnell Douglas Corp. v. Green*[45] the Court devised a formula for the establishment, in denial of hiring settings, of a prima facie discriminatory treatment case. The plaintiff must prove by a preponderance of the evidence that he or she is a member of the protected class; that he or she applied[46] and was qualified[47] for the job in question; that despite being

---

edged that precision of language would be more important in a jury trial. *Id.* at 897. The court determined upon review that, disputes about language aside, the trial court had applied the proper legal analysis. *Id.* at 897-98.

[42] *Cf.* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (under Title VII "[p]roof of discriminatory motive . . . is not required under a disparate-impact theory.").

[43] 42 U.S.C. §§ 2000e to 2000e-17 (1982).

[44] Lorillard v. Pons, 434 U.S. 575, 584 (1978). Numerous ADEA courts have looked to Title VII precedents as being of special guidance. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58 (1979); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

[45] 411 U.S. 792 (1973).

[46] The question of whether an actual application is required can generate difficulties. It has been stated that if in fact no adequate application was made, the plaintiff will not be able to establish a prima facie case. *See, e.g.*, DeHues v. Western Elec. Co., 710 F.2d 1344, 1348 (8th Cir. 1983); Reilly v. Friedman's Express Co., Inc., 556

qualified, he or she was rejected; and that the employer, after rejecting the applicant, continued to hold the job open and to seek other applicants with like qualifications.[48] Notwithstanding that the *McDonnell Douglas* paradigm originated in a hiring case, it clearly is not confined to that context. It has been adapted and applied to numerous other types of employment decisions, such as discharges[49] and denials of promotions.[50] Moreover, whatever the context, the *McDonnell Douglas* formula serves as a guide, rather than a rigid formulation into which every hiring case must be fit.[51] Thus, prima facie cases based on circumstantial evidence may be established—although they rarely are—absent observance of each of the elements of the *McDonnell Douglas* formula.[52]

F. Supp. 618 (M.D. Pa. 1983). However, this position—set forth in relatively clear-cut factual settings—would appear to be too simplistic to be suitable for broad generalizing. An employee, for example, may have been deterred from applying for a job by virtue of her awareness of the employer's reputation for engaging in discriminatory practices. To hold the individual to the requirement of an actual application in this situation would be to reward particularly blatant instances of discrimination, a perverse result not to be tolerated. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977). The application requirement also fails to protect the employee who may not even have been aware that there was a better job for which she could have applied. *See, e.g.,* Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1134 (11th Cir. 1984).

[47] *See, e.g.,* Limongelli v. Postmaster General, 707 F.2d 368, 372-73 (9th Cir. 1983); Pace v. Southern Ry. System, 701 F.2d 1383, 1386 n.7 (11th Cir.), *cert. denied,* 464 U.S. 1018 (1983); Trinidad v. Pan Am. World Airways, 573 F.2d 983, 984 (1st Cir. 1978). However, in order to establish the prima facie case the plaintiff need not establish that he or she was more qualified than, or even as qualified as, the person actually hired. *See, e.g.,* Bell v. Bolger, 708 F.2d 1312, 1316-17 (8th Cir. 1983); Garner v. Boorstin, 690 F.2d 1034, 1037 n.5 (D.C. Cir. 1982); Aikens v. U.S. Postal Serv. Bd. of Govs., 665 F.2d 1057, 1059 (D.C. Cir. 1981), *vacated on other grounds,* 453 U.S. 902 (1982). Of course, the defendant can successfully rebut the discrimination claim by showing that a more qualified person was hired. *See, e.g.,* Sales v. United States Dept. of Justice, 549 F. Supp. 1176, 1184-85 (D.D.C. 1982), *aff'd mem.,* 717 F.2d 1480 (D.C. Cir. 1983); Bilotti v. Franklin Mint, 27 Fair Empl. Prac. Cas. (BNA) 1031, 1036 (E.D. Pa. 1981).

[48] *McDonnell Douglas,* 411 U.S. at 802.

[49] *See, e.g.,* Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981); Bobbit v. PBA, Inc., 31 Fair Empl. Prac. Cas. (BNA) 366 (D. Minn. 1983). *See generally,* 2 EGLIT *supra* note 4, § 17.57 (discussing the *McDonnell Douglas* formula to establish a prima facie case).

[50] *See, e.g.,* Bell v. Bolger, 708 F.2d 1312, 1316-17 (8th Cir. 1983); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983); Cope v. McPherson, 594 F. Supp. 171, 173 (D.D.C. 1984).

[51] *McDonnell Douglas,* 411 U.S. at 802 n.13.

[52] For example, the use of irregular promotion procedures may support an inference of discrimination. *See* Walker v. Pettit Construction Corp., 605 F.2d 128, 131

No matter what the context, the *McDonnell Douglas* formulation, if satisfied, creates a presumption of discrimination, based on a common sense understanding of the work place:

> [The prima facie] case raises an inference of discrimination . . . because we presume . . . [the challenged acts,] if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant [or disadvantaging an employee] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.[53]

(4th Cir.), *modified on other grounds sub nom.* Frith v. Eastern Air Lines, Inc., 611 F.2d 950 (4th Cir. 1979); Grecco v. Spang & Co., 527 F. Supp. 978, 981 (W.D. Pa. 1981). Collection of data regarding employees' birth dates—while not per se unlawful—also may be probative of discriminatory intent. *See* Herman v. National Broadcasting Co., 744 F.2d 604, 609 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 1393 (1985).

Many ADEA discharge cases arise out of reductions in the work force. The *McDonnell Douglas* formula is inapplicable in this context, since a reduction necessarily precludes the addition of employees and consequently there will be neither a position open nor a replacement employee to which the aggrieved dischargee can point. In reduction in force cases, accordingly, a somewhat different prima facie case prescription has been endorsed by a number of courts: the plaintiff must show that he or she was within the protected age group; was qualified, yet was discharged; and that there is evidence from which the factfinder may reasonably conclude that the employer consciously took age into account in deciding to terminate the plaintiff. *See, e.g.,* Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321 (11th Cir. 1982); Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); Franci v. Avco Corp., Avco Lycoming Div., 538 F. Supp. 250, 256 (D. Conn. 1982). Some courts have imposed a lesser burden. *See, e.g.,* Massarsky v. General Motors Corp., 706 F.2d 111, 118 (3d Cir.) *cert. denied,* 464 U.S. 937 (1983). *See generally* 2 EGLIT, *supra* note 4, § 17.61.

Even in situations not involving reductions in force, there is some case law suggesting that a discharged plaintiff need not establish that she was replaced, or even that the employer held the job open and looked for someone to fill it. These cases hold, state or imply that a plaintiff can establish a prima facie case merely by showing that other younger employees performing similar tasks at a similar level of competence were retained, while the plaintiff was not. *See, e.g.,* Syvock v. Milwaukee Boiler Mfg., 665 F.2d 149, 152-54 (7th Cir. 1981); Pirone v. Home Ins. Co., 559 F. Supp. 306 (S.D.N.Y. 1983); Kahn v. Pepsi Cola Bottling Group, 547 F. Supp. 736 (E.D.N.Y. 1982); Goff v. Eastern Associated Coal Corp., 29 Fair Empl. Prac. Cas. (BNA) 1831, 1835 (S.D.W. Va. 1981), *aff'd mem.,* 679 F.2d 881 (4th Cir. 1982). *See generally* 2 EGLIT, *supra* note 4, § 17.60A.

[53] Furnco Construction v. Waters, 438 U.S. 567, 577 (1978) (emphasis in original) (citations omitted).

In *Texas Department of Community Affairs v. Burdine*[54] the Court clarified *McDonnell Douglas* and post-*McDonnell Douglas*[55] case law regarding the burden borne by the defendant once the plaintiff succeeds in establishing a prima facie circumstantial evidence case by use of the *McDonnell Douglas* paradigm. To rebut the plaintiff's case, the defendant need only articulate "a legitimate, nondiscriminatory reason"[56] for its action or decision.[57] The burden borne by the defendant is that of production; the burden of persuasion remains at all times on the plaintiff.[58] If the defendant produces evidence of a legitimate, nondiscriminatory explanation for its action, the presumption of discrimination is overcome.[59] The plaintiff will lose unless he or she can then prove—by a preponderance of the evidence—that the defendant's justification is pretextual.[60] The plaintiff can do this "either directly by persuading the court that a discriminatory reason more likely motivated the employer or by showing that the employer's proffered evidence is unworthy of credence."[61]

Every court of appeals save that of the Sixth Circuit[62] has applied the

[54] 450 U.S. 248 (1981).

[55] *McDonnell Douglas* was ambiguous regarding whether the defendant had only a burden of producing evidence or also had the burden of proving by a preponderance of the evidence its legitimate nondiscriminatory reason: the Court referred to the defendant's burden "to articulate some legitimate, nondiscriminatory reason," 411 U.S. at 802, and also to the defendant's "burden of proof." *Id.* at 803. Subsequently, in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the Court characterized the defendant's burden as that of "proving that he based his employment decision on a legitimate consideration . . . ." But, in Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978), the Court held that the defendant was not required to prove the absence of discriminatory motive. *Id.* at 25. Thus, prior to *Burdine* there was considerable confusion as to just what the defendant's burden was.

[56] *Burdine,* 450 U.S. at 254.

[57] *Id.*

[58] *Id.* at 256.

[59] *Id.* at 255. The Court explained:

> A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.

Id. at 255 n.10.

[60] *Burdine,* 450 U.S. at 256.

[61] *Id.*

[62] The Sixth Circuit Court of Appeals has expressed concern about the effect of *McDonnell Douglas* on jury trials, and also has reasoned that the replacement of a discharged older worker by a younger worker is so natural that it does not support an inference of discrimination. Accordingly, the court has refused to apply *McDonnell Douglas* to ADEA cases as a matter of course. *See, e.g.,* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 74 (6th Cir. 1982); Laugesen v. Anaconda Co., 510 F.2d 307, 312-13 (6th Cir. 1975).

McDonnell Douglas formulation without caveat to ADEA circumstantial evidence cases.[63] Furthermore, every appellate court, including that of the Sixth Circuit, has embraced the *Burdine* formulation as applicable in the ADEA context.[64] Typically, it is a factor other than age—such as the plaintiff's poor performance or lack of requisite skills—to which the defendant points in meeting this burden of showing a nondiscriminatory reason for its action.

B. *Discriminatory Treatment: Direct Evidence Cases*

On rare occasions a plaintiff may be able to point to direct evidence of discriminatory treatment, such as a formal, written policy which is facially discriminatory,[65] or minutes of meetings at which a discriminatory policy was discussed,[66] or ageist statements made by the defendant.[67] The Supreme Court recently ruled in *Trans World Airlines, Inc. v. Thurston*,[68] an ADEA case, that the *McDonnell Douglas* formula—which generates an inference of discrimination in the absence of direct evidence of bias—is inapplicable in such direct evidence cases.[69] Presumably, this rejection of

[63] *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1014-19 (1st Cir. 1979); Goodman v. Heublein, Inc., 645 F.2d 127, 130 (2d Cir. 1981); Smithers v. Bailar, 629 F.2d 892, 894-95 (3d Cir. 1980); Lovelace v. Sherwin Williams Co., 681 F.2d 230, 244 (4th Cir. 1982); Reeves v. General Foods Corp., 682 F.2d 515, 520 (5th Cir. 1982); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1217-20 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 289-91 (8th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); Schwager v. Sun Oil Co., 591 F.2d 58, 60-61 (10th Cir. 1979); Anderson v. Savage Labs, 675 F.2d 1221, 1221-24 (11th Cir. 1982); Cuddy v. Carmen, 694 F.2d 853, 856-59 (D.C. Cir. 1982).

[64] *See* Riley v. University of Lowell, 651 F.2d 822, 824 (1st Cir. 1981); Pena v. Brattleboro Retreat, 702 F.2d 322, 324 (2d Cir. 1983); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395-96 (3d Cir.), *cert. denied*, 105 S. Ct. 592 (1984); EEOC v. Western Elec. Co., 713 F.2d 1011, 1014 (4th Cir. 1983); Reeves v. General Foods Corp., 682 F.2d 515, 520-24 (5th Cir. 1982); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1180 (6th Cir. 1983); Golomb v. Prudential Ins. Co., 688 F.2d 547, 551 (7th Cir. 1982); Bell v. Bolger, 708 F.2d 1312, 1316-18 (8th Cir. 1983); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983); EEOC v. University of Okla., 774 F.2d 999, 1002 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1637 (1986); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982); Cuddy v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982).

[65] *See* Hodgson v. Poole Truck Line, Inc., 4 Fair Empl. Prac. Cas. (BNA) 265, 266 (S.D. Ala. 1972).

[66] *See* Polstorff v. Fletcher, 452 F. Supp. 17, 22-23 (N.D. Ala. 1978).

[67] *See* Herman v. National Broadcasting Co., 744 F.2d 604, 609-10 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1393 (1985); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 78 (2d Cir. 1983); Cline v. Roadway Express, Inc., 689 F.2d 481, 485 (4th Cir. 1982).

[68] 105 S. Ct. 613, 622 (1985).

[69] *Id.* at 622; *accord* EEOC v. Wyoming Retirement System, 771 F.2d 1425, 1430 (10th Cir. 1985); Grohs v. Gold Bond Bldg. Prods., 627 F. Supp. 1555, 1558 (N.D. Ill. 1986).

McDonnell Douglas carries over to *Burdine*, inasmuch as the two decisions jointly deal with inferences of discrimination drawn from circumstantial evidence.[70]

Prior to *Thurston*, the Court of Appeals for the Eleventh Circuit in *Buckley v. Hospital Corp. of America*[71] already had taken the position that where a prima facie ADEA violation is proven by direct evidence, the defendant must shoulder a burden of persuasion, rather than just one of production, when rebutting the plaintiff's case.[72] This position, while still primarily confined to the Eleventh Circuit, should gain greater acceptance now that *Thurston* has made clear the inapplicability of the *McDonnell Douglas-Burdine* paradigm.[73] In a direct evidence case, as the *Buckley* court reasoned, the plaintiff's claim rests on far more than just a mere inference of bias. The direct evidence, if believed, proves the ultimate issue of discrimination and so the defendant, according to *Buckley*, cannot rebut simply by articulating, in line with *Burdine*, a legitimate nondiscriminatory reason for its decision. Rather, "defendant can rebut only by *proving* by a preponderance of the evidence that the same decision would have been reached even absent the presence of . . . [the age] factor."[74] In other words, the defendant

---

[70] The conclusion that *Thurston* renders *Burdine* inapplicable in direct evidence cases is buttressed by the fact that the *McDonnell Douglas* Court originally articulated the very formulation of the defendant's burden which subsequently was reiterated in *Burdine*. *See supra* note 55.

[71] 758 F.2d 1525 (11th Cir. 1985).

[72] *Id.* at 1529-30 (quoting Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982)).

[73] Of course, *Thurston*, while rejecting *McDonnell Douglas* in direct evidence cases, does not mandate that defendants in such cases bear a burden of proof once the prima facie case is proven.

[74] 758 F.2d at 1529-30 (quoting Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982)) (emphasis added); *accord* Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799 (11th Cir. 1985); *cf.* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977) (in this constitutionally based challenge to employment termination, employer could avoid liability by showing by a preponderance of the evidence that it would have reached the same decision as to reemployment even absent the constitutionally protected employee behavior); Ramirez v. Sloss, 615 F.2d 163, 168 (5th Cir. 1980) (in this Title VII suit the court ruled that once the plaintiff establishes a prima facie case, the employer can rebut the presumption by proving a valid nondiscriminatory reason for the termination).

One court has distinguished between types of direct evidence in fashioning the burden of proof. In Zebedeo v. Martin E. Segal Co., 582 F. Supp. 1394 (D. Conn. 1984), an ADEA case, the court distinguished direct evidence which merely gave rise to an inference supporting a prima facie case from direct testimony that the defendants had acted with discriminatory motivation—*e.g.*, "direct evidence which is so powerful that it leapfrogs all three components of the *McDonnell Douglas* test . . . ." *Id.* at 1412 n.7. The *Zebedeo* court took the position that less compelling direct evidence would not justify shifting the burden of persuasion to the defendant.

must prove that its challenged action or decision can be justified on the basis of some factor other than age.[75]

C. *Systemic Discriminatory Treatment*

Sometimes an employer will engage in a pattern or practice of discriminatory treatment, perpetrating repeated wrongful acts against members of a protected group. Under Title VII this type of wrongdoing can be addressed in class action suits maintained pursuant to Federal Rule of Civil Procedure 23,[76] whereby named plaintiffs sue on behalf of themselves and other unnamed plaintiffs. In addition, Title VII authorizes the EEOC to maintain pattern or practice suits, which are effectively the government analogue of private class actions.[77]

In contrast, an ADEA plaintiff may not maintain a Rule 23 class action.[78] Nor does the ADEA authorize pattern or practice suits. Even so, ADEA suits involving more than just one aggrieved employee or job applicant certainly are feasible, and often have been maintained. Such multi-party

---

[75] Some ADEA courts, while not embracing a total shift in burdens in direct evidence cases, have at least somewhat altered the relative postures of the plaintiff and defendant. In Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2d Cir. 1983), the court contrasted the plaintiff's typical burden in a circumstantial evidence case to establish his or her satisfactory performance, with the lesser burden the court fashioned for application in the direct evidence situation. The court stated:

> Because Hagelthorn was relying on . . . direct evidence, and not merely trying to create an inference of an illegitimate reason by eliminating "all legitimate reasons . . . as possible reasons for the employer's action," . . . he was not required to eliminate altogether the possibility that Kennecott regarded his performance as below its legitimate expectations. *Cf. Loeb v. Textron*, 600 F.2d [1003,] at 1014 [1st Cir. 1979] (requiring such proof when evidence of discrimination was circumstantial).

710 F.2d at 81. *See also* Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1432 (4th Cir. 1985) (when the plaintiff makes out prima facie case based on direct evidence, "the plaintiff has no need to prove independently that the defendant's articulated reasons for a discharge were 'pretextual.' " (quoting from Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1113 & n.2 (4th Cir. 1981)); EEOC v. Borden's Inc., 724 F.2d 1390, 1393-94 (9th Cir. 1984) (defendant cannot satisfy its burden simply by articulating legitimate, nondiscriminatory reason where a policy on its face treats older workers adversely).

Several Title VII courts have managed to avoid directly confronting the issue by concluding that the evidence put forth by the plaintiff to establish a prima facie case was not direct evidence. *See, e.g.*, Craft v. Metromedia; Inc., 766 F.2d 1205, 1211 (8th Cir. 1985); Friends v. Coca-Cola Bottling Co. of Mid-America, 759 F.2d 813, 814 (10th Cir. 1985); Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 69 n.6 (1st Cir. 1984); Clay v. Hyatt Regency Hotel, 724 F.2d 721, 724 (8th Cir. 1985).

[76] FED. R. CIV. P. 23.

[77] 42 U.S.C. § 2000e-6 (1982).

[78] *See, e.g.*, LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975). *See generally* 2 EGLIT, *supra* note 4, § 17.32.

representative actions can be pursued by virtue of the opt-in mechanism contained in section 16(b) of the Fair Labor Standards Act (FLSA), which is incorporated into the ADEA.[79] In such an action one or more named plaintiffs initially file suit, and additional individuals subsequently can join by affirmatively notifying the court that they consent to the maintenance of suit on their behalf.[80] Opt-in actions aside, a few ADEA courts have approved the pattern or practice approach, even though the ADEA lacks the explicit authorization for such actions which exists in Title VII.[81]

The key pattern or practice precedent, devised in the context of construing Title VII, is *International Brotherhood of Teamsters v. United States*.[82] The principles enunciated in that decision should carry over into ADEA pattern or practice situations. The *Teamsters* Court ruled that the plaintiff must establish by a preponderance of the evidence that discrimination is the defendant's "standard operating procedure—the regular rather than the unusual practice."[83] Once the plaintiff proves a prima facie case—typically by statistical evidence, supplemented by examples of specific discriminatory treatment—the burden shifts to the defendant to demonstrate that the plaintiff's proof is inaccurate or insignificant.[84]

Whether this burden is equivalent to, or different from, the burden flowing from *Burdine* is a matter of dispute. Some courts have concluded that the burden is the same and that the defendant need only articulate a legitimate nondiscriminatory reason for its challenged action.[85] Others have ruled that *Burdine* is applicable only to individual claims of disparate treatment and so have viewed *Teamsters* as imposing a different, more rigorous, burden on defendants in pattern or practice situations. For example, in *Boykin v. Georgia-Pacific Corp.*[86] the court had no doubt that "the burdens of proof and production set out in *Burdine* apply only to *individual* disparate treatment cases."[87] Consequently, in class-wide discrimination situations, which

---

[79] ADEA § 7(b), 29 U.S.C. § 626(b) (1982), incorporates § 16(b), 29 U.S.C. § 216(b) (1982), of the FLSA. *See generally* 2 EGLIT, *supra* note 4, §§ 17.33-.38.

[80] *See* 2 EGLIT, *supra* note 4, § 17.36.

[81] *See, e.g.*, EEOC v. Western Elec. Co., 713 F.2d 1011, 1017-19 (4th Cir. 1983); EEOC v. Sandia Corp., 639 F.2d 600, 623 (10th Cir. 1980); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); EEOC v. Goodyear Tire & Rubber Co., 22 Fair Empl. Prac. Cas. (BNA) 775, 785 (W.D. Tenn. 1980).

[82] 431 U.S. 324 (1977).

[83] *Id.* at 336.

[84] *Id.* at 360.

[85] *See, e.g.*, Croker v. Boeing Co., 662 F.2d 975, 990 (3d Cir. 1981) (en banc); Piva v. Xerox Corp., 654 F.2d 591, 594 (9th Cir. 1981).

[86] 706 F.2d 1384 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

[87] *Id.* at 1393; *accord* Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 818 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); Chang v. University of Rhode Island, 40 Fair Empl. Prac. Cas. (BNA) 3 (D.R.I. 1985); *see also* Coates v. Johnson & Johnson, 756 F.2d 524, 532-33 (7th Cir. 1985) (evidence fulfilling *McDonnell Douglas-Burdine* formula differs from that which will fulfill a class action claim); B. SCHLEI & B.

typically are grounded in statistical evidence, the defendant "must either show flaws in the plaintiffs' statistics or provide a nondiscriminatory explanation."[88]

If the defendant fails to adequately rebut the plaintiff's case at the liability stage, an inference arises that every employment decision made by the employer was undertaken in pursuance of the discriminatory practice or policy. Thus, insofar as individual relief for each victim of that practice or policy is concerned, the employer bears a burden of persuasion to prove that the specific individual is not entitled to relief because the same decision would have been made absent the unlawful consideration of the claimant's age.[89] This "same decision" burden—amounting to identifying some factor other than age to explain the employer's adverse action, like in the direct evidence cases—follows from the fact that the employer is now identified as "a proved wrongdoer"[90] by virtue of the plaintiff's establishment of a discriminatory general practice or pattern. There is no longer merely just an inference of wrongdoing; illegality is a proven fact, and so the mild burden imposed by *Burdine* is no longer appropriate.[91]

GROSSMAN, *supra* note 10, at 1288-89 (discussing theories behind allocation of proof requirements).

[88] 706 F.2d at 1393. It is not entirely clear how providing a "nondiscriminatory explanation" differs from what is required by *Burdine*. The *Boykin* court observed that "general assertions of good faith or of hiring only the best applicants" will not satisfy the defendant's burden. *Id.* But, even under *Burdine* the defendant "must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." 450 U.S. at 255. The defendant's reasons must result in framing "the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56. Thus, it is possible that even under *Burdine* the general assertions to which the *Boykin* court adverted would not suffice. Still and all, the *Boykin* court certainly saw a difference between what it was calling for and what *Burdine* calls for.

[89] *See, e.g.*, Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 470 (8th Cir. 1984).

[90] International Brotherhood of Teamsters v. United States, 431 U.S. 324, 359-60 n.45 (1977) (describing the situation in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)).

[91] This framing of the burdens, whereby a proven wrongdoer may avoid a relief order provided it can prove that the same decision would have been made even absent discrimination, is not limited just to class action and pattern or practice suits. *See, e.g.*, Smallwood v. United Air Lines, 728 F.2d 614, 623 (4th Cir.), *cert. denied*, 105 S. Ct. 120 (1984); Murnane v. American Airlines, 667 F.2d 98, 102 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); Rodriguez v. Taylor, 569 F.2d 1231, 1240 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *cf.* NLRB v. Transp. Management Corp., 462 U.S. 393, 403 (1983) (under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1982), employer must prove employee would have been fired for permissible reasons even if not involved in protected activity); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1974) (employer must show dismissal would

D. *Disparate Impact Analysis*

There is still another way in which a grievant may establish a violation of the ADEA. This, too, is derived from Title VII case law and pertains when a policy or practice, while on its face age-neutral, has a disproportionately adverse effect on an age-defined group. Suppose, for example, an employer requires that all job applicants be able to lift one hundred pounds of dead weight. Suppose, further, that whereas seventy-five percent of persons under the age of forty have no trouble meeting this requirement, only twenty-five percent of persons over the age of sixty can do so. This is a policy which on its face makes no mention of age, but which nonetheless works to disqualify a much higher percentage of older persons than younger applicants.

In *Griggs v. Duke Power Co.*[92] the Supreme Court held that neutral policies with adverse impacts could run afoul of Title VII, regardless of the absence of discriminatory intent. The plaintiff's task in making out a prima facie case is to show, typically by way of statistics, a disparate impact upon the protected group. Once the plaintiff does so, the defendant bears the heavy burden of justifying its policy or practice on the ground of job-relatedness or business necessity. Most rulings, including a pre-*Burdine* Supreme Court decision, enunciate the view that this burden is one of persuasion.[93] There is less uniformity regarding the characterization of what the defendant must establish.[94] Judicial positions range from requiring the defendant to

---

have occurred regardless of the constitutionally protected conduct); Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981) (employer must show in Title VII case that applicant would have been rejected even absent racial discrimination).

[92] 401 U.S. 424, 432 (1971).

[93] In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court subscribed to the burden of persuasion position by referring to the employer's task as being that of proving job-relatedness. *Id.* at 329; *accord* Harless v. Duck, 619 F.2d 611, 616 n.6 (6th Cir. 1980); EEOC v. Navajo Refining Co., 593 F.2d 988, 990 (10th Cir. 1979); Vulcan Soc'y of N.Y.C. Fire Dept. v. Civil Serv. Comm'n, 490 F.2d 387, 393 (2d Cir. 1973). Since the *Burdine* decision the position has been taken by some courts that the defendant—even in an impact case, which *Burdine* was not—does not bear a burden of persuasion. *See, e.g.*, Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) (en banc). However, most post-*Burdine* courts maintain that the defendant in a disparate impact case bears a burden of persuasion. *See, e.g.*, Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 572 (4th Cir. 1985); Walker v. Jefferson County Home, 726 F.2d 1554, 1558 (11th Cir. 1984); Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982); Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 752-53 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). In *Johnson* the court noted that post-*Burdine* rulings in the Second and Tenth Circuits had not altered the two pre-*Burdine* rulings—*Vulcan Soc'y* and *EEOC v. Navajo Refining Co. Johnson*, 657 F.2d at 753 n.3.

[94] The Supreme Court has helped to generate this confusion by putting forth a variety of formulae or phrases. In *Griggs* the Court identified "[t]he touchstone . . . [as being] business necessity," with the burden being on the employer to show that

prove that its practice is "essential [and] the purpose compelling,"[95] to much lighter demands.[96]

If the defendant fails to carry its burden, it will be held liable. And, even if the defendant does establish a business necessity or job-relatedness justification, it will not avoid liability if the plaintiff can show that there is a less discriminatory alternative available which would enable the defendant to achieve its business need with less adverse impact upon the protected group.[97]

Justice Rehnquist[98] and some commentators[99] have disputed the application of Title VII discriminatory impact doctrine in ADEA cases. But every

---

the challenged job requirement has a "manifest relationship to the employment in question." 401 U.S. at 431-32. The Court also used the term "job related." *Id.* at 436. Ultimately, it concluded that the requirements at issue in that case did not bear "a demonstrable relationship to successful performance of the jobs for which . . . [they were used]." *Id.* at 432. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court stated that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance," *id.* at 332 n.14, and used the phrases "essential to effective job performance," and "essential to good job performance." *Id.* at 331. In New York Transit Auth. v. Beazer, 440 U.S. 568 (1979), the Court seemed to opt for a less rigorous burden, upholding a challenged rule because the defendant's employment goals were "significantly served by—even, if they . . . [did] not require" the rule. *Id.* at 587 n.31. *See* Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), regarding the variety of formulae which might be used. *See generally* B. SCHLEI & B. GROSSMAN, *supra* note 10, at 1328-30 (2d ed. 1983).

[95] Williams v. Colorado Springs School Dist., 641 F.2d 835, 842 (10th Cir. 1981).

[96] *See* Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972).

[97] In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court indicated in a Title VII case that if a plaintiff showed that other selection devices would satisfy the employer's needs with less of a disparate impact, that showing by the plaintiff would constitute evidence that the employer was using the challenged device as a pretext for discrimination. *Id.* at 425. Lower ADEA courts have seconded this analysis. *See, e.g.*, Western Airlines, Inc. v. Criswell, 709 F.2d 544, 554 (9th Cir. 1983), *aff'd on other grounds*, 105 S. Ct. 2743 (1985); United Indep. Flight Officers, Inc. v. United Air Lines, 572 F. Supp. 1494, 1505 (N.D. Ill. 1983); Popko v. City of Clairton, 570 F. Supp. 446, 451 (W.D. Pa. 1983); EEOC v. City of New Castle, 32 Fair Empl. Prac. Cas. (BNA) 1409, 1412-13 (W.D. Pa. 1983), *aff'd mem.*, 740 F.2d 956 (3d Cir. 1984). However, in New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979), the Court indicated that a claim of pretext must be supported by evidence of intentional discrimination.

[98] Markham v. Geller, 451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting from denial of certiorari).

[99] *See* Blumrosen, *supra* note 10; Player, *supra* note 10 (both articles); Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 EMPL. REL. L.J. 437 (Winter 1984-85); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982). *Contra* Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984).

court of appeals to address the matter,[100] as well as several district courts in jurisdictions in which the appellate courts have not yet spoken,[101] has deemed this approach to establishing liability properly applicable under the ADEA.

III. Invoking a Statutory Exception

The plaintiff's establishment of a prima facie case will not necessarily force the defendant to respond according to one of the formulae thus far set forth. The defendant instead may invoke a statutory affirmative defense.[102] For example, suppose a plaintiff—adhering to the *McDonnell Douglas* paradigm—proves that he applied for a certain job, was qualified for it, was rejected, and the defendant hired someone outside the protected class. The defendant may articulate what it deems to be a legitimate, nondiscriminatory explanation for its refusal to hire the plaintiff, in line with the burden prescribed by *Burdine*. Alternatively, the defendant may seek to prove the applicability of an affirmative defense, such as the bona fide

---

[100] *See, e.g.*, Monroe v. United Air Lines, 736 F.2d 394, 404 n.3 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 983 (1985); Heward v. Western Elec., 35 Fair Empl. Prac. Cas. (BNA) 807, 811 (10th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321-22 (11th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531 n.1 (9th Cir. 1981); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); Laugesen v. Anaconda Co., 510 F.2d 307, 315 (6th Cir. 1975). In Massarsky v. General Motors Corp., 706 F.2d 111, 120 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983), the court assumed without deciding that disparate impact analysis was applicable to ADEA claims. Subsequently, in Lusardi v. Xerox Corp., 99 F.R.D. 89, 90 n.1 (D.N.J. 1983), *appeal dismissed on other grounds*, 747 F.2d 174 (3d Cir. 1984), the court expressed the view that the question was an open one in the Third Circuit.

[101] *See, e.g.*, Nicholson v. Western Elec. Co., 555 F. Supp. 3 (M.D.N.C. 1982), *aff'd mem.*, 701 F.2d 167 (4th Cir. 1983); Eason v. National Highway Traffic Safety Admin., 512 F. Supp. 1199 (D.D.C. 1981), *aff'd mem.*, 31 Fair Empl. Prac. Cas. (BNA) 1520 (D.C. Cir. 1983); Grecco v. Spang & Co., 527 F. Supp. 978, 980 (W.D. Pa. 1981).

[102] Of course, a defendant also may respond to a suit by arguing that the plaintiff has failed to satisfy one or more of the ADEA's procedural provisions, such as the requirement that a charge of unlawful discrimination be filed with the EEOC within either 180 or 300 days after the alleged unlawful discrimination. ADEA § 7(d), 29 U.S.C. § 626(d) (1982). *See generally* 2 Eglit, *supra* note 4, §§ 17.04-17.14. The defendant also may contend that the substantive requirements of the Act have not been satisfied. For example, the defendant employer may not have the 20 employees required by ADEA § 11(b), 29 U.S.C. § 630(b) (1982). *See, e.g.*, Zimmerman v. North American Signal Corp., 704 F.2d 347 (7th Cir. 1983). Or the plaintiff may have been a high level policy-making officer, whose protection from retirement ends at age 65 provided certain statutory criteria are met. *See, e.g.*, Whittlesey v. Union Carbide Corp., 742 F.2d 724 (2d Cir. 1984).

occupational qualification (BFOQ) defense:[103] the defendant acknowledges that it rejected the plaintiff and admits to utilizing an age cut-off policy, but contends that the policy, and consequent rejection, are justifiable because age is a BFOQ for the job in question.

Similarly, a defendant could respond to a prima facie case—whether established in terms of *McDonnell Douglas,* direct evidence, evidence establishing a pattern or practice of discriminatory treatment, or statistics or other data revealing disparate impact—by endeavoring to prove the applicability of the bona fide benefit plan[104] or the bona fide seniority plan provisions.[105] Still another affirmative defense which may be invoked by the defendant is the good faith provision incorporated into the ADEA: an employer which perpetrated a violation will be held harmless if it in good faith had relied upon an EEOC regulation, interpretation, or practice as the basis for its action.[106] An employer that is a foreign entity, not controlled by an American employer, also is exempted from liability.[107] Each of these defenses is a narrow one, confined to a relatively limited set of circumstances. For example, in addressing the BFOQ exception, the Court in *Western Air Lines, Inc. v. Criswell*[108] asserted: "The restrictive language of the statute, and the

---

[103] ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1) (1982). Numerous courts have recognized the BFOQ provision as an affirmative defense. *See, e.g.,* Hoefelman v. Conservation Comm'n, 718 F.2d 281, 283 (8th Cir. 1983); EEOC v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1983). *See generally* 2 EGLIT, *supra* note 4, § 16.25.

[104] ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982). Numerous courts have characterized this exception as an affirmative defense. *See, e.g.,* EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982); Sexton v. Beatrice Foods Co., 630 F.2d 478, 486 (7th Cir. 1980); EEOC v. Eastern Airlines, 27 Fair Empl. Prac. Cas. (BNA) 1686, 1687-88 (5th Cir. 1981), *cert. denied,* 454 U.S. 818 (1981).

[105] ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982). Case law addressing this exception is limited. *See* 2 EGLIT, *supra* note 4, § 16.44. In dictum the court in EEOC v. Liggett & Meyers, Inc., 29 Fair Empl. Prac. Cas. (BNA) 1611, 1643 (E.D.N.C. 1982), identified this provision as an affirmative defense. Despite the dearth of case law there is no basis for reading the exception otherwise.

[106] ADEA § 7(e), 29 U.S.C. § 626(e) (1982), incorporates § 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 (1982), which creates the defense discussed here:

> [N]o employer shall be subjected to any liability . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the . . . [EEOC], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. . . .

29 U.S.C. § 259(a) (1982). *See generally* 2 EGLIT, *supra* note 4, § 16.47 (analyzing case law construing this provision).

[107] Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1792 (codified at 29 U.S.C. § 623(h)(2) (1982)).

[108] 105 S. Ct. 2743 (1985).

consistent interpretation of the administrative agencies charged with enforcing the statute convince us that . . . the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA."[109]

Another statutory exception provides that "[i]t shall not be unlawful for an employer, employment agency, or labor organization . . . to discharge or otherwise discipline an individual for good cause."[110] This provision has received little careful scrutiny and there is some dispute—albeit hardly carefully considered—as to whether or not this provision constitutes an affirmative defense.[111] It is probably safe to say that this exception was, and remains, unnecessary. Congress certainly never could have intended, even absent this exception, to force employers to tolerate employees guilty of actions which typically would justify termination for cause. The good cause exception constitutes at most a form of statutory insurance—assuring any doubters that indeed the ADEA does not constitute an impediment to discharge based on cause. In any event, it seems proper to regard good cause simply as one particular subspecies of reasonable factors other than age. Thus, the provision actually is redundant, given the presence in the ADEA of the statutory exception authorizing differentiations among employees and job applicants based on reasonable factors other than age.[112]

---

[109] *Id.* at 2751 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1977)).

[110] ADEA § 4(f)(3), 29 U.S.C. § 623(f)(3) (1982).

[111] The chief case—Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978)—is no more insightful in asserting a negative position on this question than it is regarding the RFOA exception, *see infra* notes 166-69 and accompanying text. Other Fifth Circuit rulings are consistent with the *Marshall* panel's decision. *See* Bohrer v. Hanes Corp., 715 F.2d 213, 218 (5th Cir. 1983), *cert. denied,* 465 U.S. 1026 (1984); Smith v. Farah Mfg., 650 F.2d 64, 67 (5th Cir. 1981); *accord* Bell v. Gas Service Co., 778 F.2d 512 (8th Cir. 1985). There are a few courts which have indicated that the good cause exception is an affirmative defense. *See, e.g.,* Havelick v. Julius Wile Sons & Co., 445 F. Supp. 919, 927 (S.D.N.Y. 1978); EEOC v. Liggett & Meyers, Inc., 29 Fair Empl. Prac. Cas. (BNA) 1611, 1643 (E.D.N.C. 1982) (dictum); *see also* Sutton v. Atlantic Richfield Co., 646 F.2d 407, 412 n.6 (9th Cir. 1981) (referring to the district court's decision to that effect, but abjuring deciding the question at the appellate level).

[112] Because the good cause defense is simply one particular type of reasonable factor other than age, the ensuing analysis—which identifies the RFOA exception as an affirmative defense in some, but not all, settings—should equally apply to the good cause provision. This is so even though not all the arguments which support reading the RFOA provision as an affirmative defense apply equally to the good cause exception. More specifically, comparability of language supports the conclusion that the RFOA provision is related to one of the affirmative defenses embodied in the Equal Pay Act, 29 U.S.C. § 206(d) (1982). *See infra* notes 195-202 and accompanying text. The good cause exception, however, does not have an analogue in the Equal Pay Act. And, unlike the RFOA provision, the good cause provision is not situated in

This RFOA exception is, by virtue of its broad language, potentially the most wide ranging statutory exception available to ADEA defendants. The courts are divided as to its proper characterization. Some regard it as an affirmative defense, with the consequence that a burden of proof is imposed on the defendant invoking the RFOA provision.[113] However, this interpretation (as fully developed below) conflicts with the large body of ADEA case law which embraces and applies the *McDonnell Douglas-Burdine* paradigm. Other courts, not reading the RFOA exception as an affirmative defense, impose upon the defendant only the burden of articulating a legitimate, nondiscriminatory reason for its action. Arguably, these decisions can be applied so as to undercut (as discussed below) the case law imposing more onerous burdens on defendants in both discriminatory impact cases, and discriminatory treatment cases grounded on direct evidence of ageist animus or involving systemic violations of the ADEA.[114]

IV. What Constitutes a Differentiation Based on a Reasonable Factor Other than Age

Before analyzing the conflicting positions regarding the affirmative defense issue, some attention is due the question of what factors have been argued to be, and sometimes recognized as, reasonable factors other than age for the purpose of the RFOA exception. The non-specific language of the RFOA provision signals a Congressional intent to leave considerable room for flexible interpretations by courts and litigants. Legislative history certainly does not contradict this conclusion. Indeed, as with the question whether the RFOA provision constitutes an affirmative defense,[115] the his-

---

the Act contiguous to what is, without any doubt, an affirmative defense—the BFOQ provision. Nonetheless, the good cause exception's substance; its general placement in ADEA § 4(f), 29 U.S.C. § 623(f) (1982), which contains most of the ADEA's other affirmative defenses; and a legislative history treating the good cause provision in tandem with the other defenses, *see infra* notes 189, 193 and accompanying text, all lead to reading this exception in the same way as the RFOA provision is construed in this article.

[113] *See infra* notes 147-52 and accompanying text.

[114] There is only one case, EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734 (E.D. Pa. 1985), in which the RFOA exception was invoked by a defendant in support of arguing against the more rigorous burden imposed by non-RFOA case law. The rarity of such an argument being made likely is a function of one or both of two factors. First, most courts and litigants probably have not recognized the potential consequence of rejecting a characterization of the RFOA exception as an affirmative defense. Second, those courts which may have perceived this implication perhaps have wished it away through silence. In any event, whatever the explanation for the non-affirmative defense cases not yet having upset current doctrine, there is nothing to assure that future courts will continue to misunderstand and/or ignore their import.

[115] *See infra* notes 188-93 and accompanying text.

tory here, too, is uninstructive. Save for some testimony in committee concerning cost as constituting a reasonable factor other than age,[116] the only substantive discussion was provided by Senator Yarborough, manager of the bill in 1967, who explained the RFOA exception thusly:

> The bill provides for four exceptions from the enforcement provisions:
>
> . . .
>
> Second. Where differentiation is based on reasonable factors other than age. For example, if a test shows that a man cannot do certain things. He might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply.[117]

While this brief explication is unexceptionable, it obviously affords only superficial guidance. Case law is somewhat more instructive, or at least more illustrative, regarding what constitute reasonable factors other than age. The survey offered here of judicial rulings requires at least two cautionary notes, however. First, generalizations are confounded by the cases being very much fact-bound.[118] Second, accurate generalizations cannot be applied across the gamut of RFOA case law because determinations of reasonable factors other than age are at least in part a function of judicial understandings of the burden which must be satisfied by defendants, and on this latter issue the courts of course are split.

The most common type of ADEA case involves a discharge. The defendant typically contends that the inadequate performance of the terminated plaintiff generated the employee's termination. This holds true both in cases specifically addressing the RFOA exception, as well as those failing to do so.[119] Thus, for example, in *Bittar v. Air Canada*[120]—in which the exception was addressed—the court concluded that the defendant had satisfied its burden of production under the RFOA provision with evidence of "numerous instances of unsatisfactory job performance on the part of the plaintiff."[121] Similarly, a reduction in force may lead to termination of employees

---

[116] *See infra* note 134.

[117] 113 CONG. REC. 31,253 (1967).

[118] The EEOC has pointed out that "[w]hether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation." 29 C.F.R. § 1625.7(b) (1985).

[119] *See, e.g.*, Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 566 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); Scharnhorst v. Independent School Dist. #710, 686 F.2d 637, 640 (8th Cir. 1982), *cert. denied*, 462 U.S. 1109 (1983); Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982). *See generally* 2 EGLIT, *supra* note 4, § 17.66.

[120] 512 F.2d 582 (5th Cir. 1975).

[121] *Id.* at 582; *accord* Price v. Maryland Cas. Co., 561 F.2d 609, 612 (5th Cir. 1977); Erwin v. Bank of Miss., 512 F. Supp. 545, 551-52 (N.D. Miss. 1981); Carolan v.

who, while they may have adequately carried out their former job functions, performed less well than their co-workers and so were the most expendable in a time of retrenchment.[122] A reduction in force also may result in the discharge of employees who, although adequate in their old jobs, lack the skills needed for the jobs remaining following the employer's shrinkage. Such lack of qualification will satisfy the RFOA provision,[123] as it does in a refusal to hire or promote case.[124] A reduction in force may abolish the employee's former position, and the non-existence of any replacement job also constitutes a reasonable factor other than age.[125]

These foregoing rulings all involved courts which construed the RFOA exception as imposing only a mild burden of production; thus, their guidance only cautiously can be heeded in jurisdictions and in legal settings in which the defendant's burden is a heavier one. Of course, even if a court reads the RFOA exception as an affirmative defense, a defendant still may prevail. Thus, in one of the rare cases both so construing the RFOA provision and reaching the merits of the defendant's argument, the court in *EEOC v. Governor Mifflin School District*[126] upheld a pay scheme challenged as treating older teachers less advantageously than younger ones, but which the court viewed as justified by a reasonable factor other than age, *i.e.*, generally improving the lot of all teachers as a group.

Some justifications virtually have been foreclosed as ever being reasonable factors other than age. The courts of appeals for both the Third[127] and Ninth[128] Circuits have held that an employee's eligibility for early retire-

---

Central Freight Lines, Inc., 489 F. Supp. 941, 944 (E.D. Tex. 1980); *see also* Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959-60 (8th Cir. 1978); Magruder v. Selling Areas Mktg., 439 F. Supp. 1155, 1164 (N.D. Ill. 1972); Bishop v. Jelleff Assoc., 398 F. Supp. 579, 593-94 (D.D.C. 1974).

[122] *See, e.g.*, Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979); Raggett v. Foote Mineral Co., 16 Fair Empl. Prac. Cas. (BNA) 1771, 1777 (M.D. Tenn. 1975); Gill v. Union Carbide Corp., 368 F. Supp. 364, 368 (E.D. Tenn. 1973); Stringfellow v. Monsanto Co., 320 F. Supp. 1175, 1181-82 (W.D. Ark. 1970); White v. Bobbie Brooks, Inc., 30 Empl. Prac. Dec. (CCH) ¶ 33,147 (N.D. Ohio Bankr. 1982).

[123] *See* Smith v. Farah Mfg., 650 F.2d 64, 68-70 (5th Cir. 1981).

[124] *See* Morgan v. Goldschmidt, 33 Fair Empl. Prac. Cas. (BNA) 797, 799 (D.D.C. 1980). Actually, since this was a federal employee case, the court erred in referring to the RFOA exception, since ADEA § 15, 29 U.S.C. § 633a (1982), establishes a separate and distinct mechanism for addressing age discrimination allegedly perpetrated by the federal government. Pursuant to ADEA § 15(f), 29 U.S.C. § 633a(f) (1982), the provisions of the rest of the Act—including the RFOA exception—are inapplicable.

[125] *See* Mizrany v. Texas Rehabilitation Comm'n, 522 F. Supp. 611, 616-17 (S.D. Tex. 1981), *aff'd mem.*, 685 F.2d 1384 (5th Cir. 1982).

[126] 623 F. Supp. 734, 744-46 (E.D. Pa. 1985).

[127] *See* EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222 (3d Cir.), *cert. denied*, 105 S. Ct. 92 (1984).

[128] *See* EEOC v. Borden's Inc., 724 F.2d 1390, 1394 (9th Cir. 1984).

ment, and thus for retirement benefits, cannot constitute a reasonable factor other than age justifying excluding the employee from other benefits available to workers ineligible for such retirement.[129] Similarly, the Court of Appeals for the Third Circuit also has rejected pension eligibility as a basis for differentiation between employees.[130] In these instances, the courts have viewed the factor relied upon as being so closely linked to age as to constitute a virtual proxy for it. Thus, the courts have rejected the defendants' arguments because the acceptance of such arguments would be tantamount to accepting age itself—as opposed to a factor "other" than age—as a legitimate basis for differentiation.

Efforts to rely on the higher costs often associated with older job applicants who have extensive experience[131] or with older employees who have long tenure with an employer[132] have generated particularly emphatic rejec-

---

[129] *Accord* EEOC v. Great Atl. & Pac. Tea Co., 38 Fair Empl. Prac. Cas. (BNA) 827 (N.D. Ohio 1985).

[130] EEOC v. City of Altoona, 723 F.2d 4, 6 (3d Cir. 1983), *cert. denied,* 467 U.S. 1264 (1984); *accord* EEOC v. Great Atl. & Pac. Tea Co., 618 F. Supp. 115, 119 (N.D. Ohio 1985); Popko v. City of Clairton, 570 F. Supp. 446, 451-52 (W.D. Pa. 1983); EEOC v. City of New Castle, 32 Fair Empl. Prac. Cas. (BNA) 1409, 1413 (W.D. Pa. 1983), *aff'd mem.,* 740 F.2d 956 (3d Cir. 1984).

[131] *See* Geller v. Markham, 635 F.2d 1027, 1032-34 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981).

[132] EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983); Popko v. City of Clairton, 570 F. Supp. 446, 452 (W.D. Pa. 1983); EEOC v. City of New Castle, 32 Fair Empl. Prac. Cas. (BNA) 1409, 1413 (W.D. Pa. 1983), *aff'd mem.,* 740 F.2d 956 (3d Cir. 1984); *see also* EEOC v. City of Altoona, 723 F.2d 4, 6 (3d Cir. 1983), *cert. denied,* 467 U.S. 1264 (1984).

There are a couple of older decisions in which cost was deemed a relevant factor to consider and to act upon. *E.g.,* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1318-19 (E.D. Mich. 1976); Donnelly v. Exxon Research & Engineering Co., 12 Fair Empl. Prac. Cas. (BNA) 417, 422 (D.N.J. 1971), *aff'd mem.,* 521 F.2d 1398 (3d Cir. 1975); *see also* Adama v. Doehler-Jarvis, 115 Mich. App. 82, 90, 320 N.W.2d 298, 302 (1982) (construing state statute). *Mastie* is probably no longer viable, in light of the later ruling in EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984).

The interpretations of the ADEA administrative agencies—first the Department of Labor and now the EEOC, *see supra* note 2—have consistently rejected cost as a reasonable factor other than age. The now-rescinded Labor Department interpretation provided:

> [A] general assertion that the *average* cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the

tion in most instances,[133] notwithstanding some seemingly relevant legislative history to the contrary regarding the cost factor.[134] Compliance with state laws in conflict with the ADEA has been rejected out-of-hand as a

terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

29 C.F.R. § 860.103(h) (1985) (rescinded). The EEOC interpretation sets forth a like position: "A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) [29 U.S.C. § 623(f)(2)] exception to the Act." 29 C.F.R. § 1625.7(f) (1985).

Even apart from interpretation of the RFOA provision, ADEA case law is consistent in rejecting cost as a basis for terminating or otherwise disadvantaging older workers, except in the context of the § 4(f)(2) proviso. *See generally* 1 EGLIT, *supra* note 4, § 16.33 (addressing exception for bona fide employee benefit plans). Several courts addressing the BFOQ defense have rejected economic factors as a valid BFOQ. *See, e.g.,* Monroe v. United Air Lines, 736 F.2d 394, 407 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 983 (1985); Air Line Pilots Assoc. Int'l v. Trans World Airlines, 713 F.2d 940, 951 (2d Cir. 1983), *aff'd in part, rev'd in part on other grounds,* 105 S. Ct. 613 (1985); Smallwood v. United Airlines, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied,* 456 U.S. 1007 (1982); EEOC v. County of Los Angeles, 526 F.2d 1135, 1140-41 (C.D. Cal. 1981), *aff'd,* 706 F.2d 1039 (9th Cir. 1983), *cert. denied,* 464 U.S. 1073 (1984). *See generally* 2 EGLIT, *supra* note 4, § 16.30A.

[133] The court in EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984), asserted a somewhat more receptive position on the cost issue than did the appellate courts noted *supra* note 132, but it still articulated an analysis making very dubious the likelihood of defendants successfully establishing cost as a reasonable factor to take into account under the ADEA.

In two rulings the Court of Appeals for the Ninth Circuit noted, but did not resolve, the cost issue. Douglas v. Anderson, 656 F.2d 528, 534 n.6 (9th Cir. 1981); Haydon v. Rand Corp., 605 F.2d 453, 455 (9th Cir. 1979).

[134] Secretary of Labor Wirtz testified in support of the proposed legislation which ultimately was enacted as the ADEA. He was asked by Senator Randolph to offer his view as to the refusal by an airline to train a 45-year-old man to be a pilot, given the facts that a Federal Aviation Administration regulation required retirement at age 60, that the training period would be three years, and that the training would be very expensive. Responding in an admittedly tentative manner, Secretary Wirtz first quoted § 4(f)(1) (ultimately codified at 29 U.S.C. § 623(f)(1) (1982)), which contained—then and now—both the ADEA's BFOQ and RFOA defenses. Without identifying one or the other defense as the source of his insights, Secretary Wirtz went on to state:

> I would think that where there is that much training requirement, that that would be a legitimate factor; that you would weigh the period of the usefulness of that person against the period of the training that was required, taking full account of the cost factors and human factors . . . . I would not think it would be a violation of the provision to deny employment on those terms.

Age Discrimination in Employment: Hearings on S. 830 Before the General Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 49 (1967).

reasonable factor other than age.[135] Insofar as tests measuring knowledge or intellectual capacity are concerned, the interpretations of the Department of Labor, which originally administered the Act,[136] expressed particular concern about the potentials for abuse, but did not go so far as to reject entirely test results as reasonable factors other than age on which to base hiring and other employment decisions.[137] The EEOC, which has administered the ADEA since mid-1979,[138] likewise registers sensitivity, asserting that tests defended as reasonable factors other than age are to be scrutinized in accordance with the Uniform Guidelines on Employment Selection Procedures,[139] the extensive multi-agency standards issued in 1978 to provide guidance for acceptable testing methodologies.[140] Finally, there are a number of courts which, while addressing the RFOA exception, have not reached the merits of the question; that is, they never determined whether the defendant's action or decision indeed was justifiable on RFOA grounds.[141]

V. The Affirmative Defense Issue

A. *Affirmative Defenses Generally*

Typically, a defendant who seeks to challenge the truth of a fact alleged by the plaintiff does so by a denial. Sometimes, however, a denial will not suffice, and the defendant must affirmatively plead a defense in order to improve his chances of prevailing. As a general matter, the party who invokes a defense bears the burden of persuasion as to it.[142] However, this generalization does not offer direction for determining, in the first instance, what constitutes an affirmative defense—a task rooted in ambiguity.[143]

---

[135] *See* EEOC v. City of Altoona, 723 F.2d 4, 7 (3d Cir. 1983), *cert. denied,* 467 U.S. 1264 (1984); EEOC v. County of Allegheny, 705 F.2d 679, 682 (3d Cir. 1983); Popko v. City of Clairton, 570 F. Supp. 446, 452-53 (W.D. Pa. 1983).

[136] *See supra* note 2.

[137] 29 C.F.R. § 860.104(b) (1985) (rescinded).

[138] *See supra* note 2.

[139] 29 C.F.R. § 860.104(b) (1985) (rescinded).

[140] 29 C.F.R. § 1625.7(d) (1985).

[141] *See, e.g.,* Krieg v. Paul Revere Life Ins., 718 F.2d 998, 999 (11th Cir. 1983), *cert. denied,* 466 U.S. 929 (1984); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591-92 (5th Cir. 1978); Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975); Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 366 (N.D. Ga. 1979); *see also* Marshall v. Goodyear Tire & Rubber Co., 22 Fair Empl. Prac. Cas. (BNA) 775, 778-79 (W.D. Tenn. 1979).

[142] *See supra* note 11 and accompanying text.

[143] Federal Rule of Civil Procedure 8(c) speaks to affirmative defenses, but it avoids coping with the problem of definition. Rather, it specifies 19 identified defenses to "set forth affirmatively," and then simply adds a general catch-all phrase

Here, at least, the inquiry seemingly should be facilitated by the general rule, asserted on numerous occasions by the Supreme Court, that anyone claiming the benefit of an exception to the prohibition of a statute bears the burden of proving that the challenged action fits within the exception.[144] This rule has particular bite when the statute is a remedial one, as illustrated by the courts that have addressed the ADEA's bona fide occupational qualification and bona fide pension plan exceptions and have relied upon the remedial nature of the age discrimination statute to justify reading these statutory provisions as narrow affirmative defenses.[145] Obviously, however, the gen-

---

calling for the pleading of "any other matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c). The guidance offered by case law and commentators is cast in vague terms, also. It has been noted that "[o]ne standard . . . for deciding which defenses must be pleaded affirmatively is whether a particular issue arises by logical inference from the allegations of plaintiff's complaint." 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271, at 311-12 (1969). Professors Wright and Miller explain that "[t]he theory of this approach is that a simple denial of the allegations in the complaint relating to a necessary or intrinsic element of plaintiff's claim is sufficient to put those matters in issue and therefore pleading by way of affirmative defense is unnecessary." *Id.* at 312. This approach has been severely criticized, with the conclusion following that in determining what constitutes an affirmative defense "resort often must be had to considerations of policy, fairness, and in some cases probability." *Id.* at 313.

It also has been observed that a "highly relevant consideration is whether plaintiff will be taken by surprise by the assertion at trial of a defense not pleaded affirmatively by defendant." *Id.* at 315. This is a variation, perhaps, on the theme that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." MCCORMICK ON EVIDENCE § 337, at 950 (E. Cleary 3d ed. 1984). According to three authorities, "one can distinguish a matter that must be raised by affirmative defense from one that can be raised by denial merely by determining whether the particular fact controverts one of plaintiff's allegations or whether it deals with an entirely new matter having to do with whether plaintiff's claims are or are not true." J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 5.20, at 289 (1985). Expressing a less confident view of the matter, two other commentators have observed that "there is no single simple test for determining what must be affirmatively pleaded . . . ." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 4.5, at 198 (1985). They point to a number of factors which may affect the determination of whether a matter must be asserted as an affirmative defense, including convenience, a desire to make the party who claims the unusual occurrence plead it affirmatively, superior access to evidence, and a desire to place handicaps against disfavored, albeit permitted, defenses. *Id.* at 196.

[144] United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967); Federal Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 44-45 (1948); Javierre v. Central Altagracia, 217 U.S. 502, 508 (1910).

[145] *See, e.g.*, Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983) (BFOQ defense); Sexton v. Beatrice Foods Co., 630 F.2d 478, 486 (7th Cir. 1980) (bona fide pension plan exception); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (Title VII BFOQ exception); A.H. Phillips, Inc.

eral rule regarding statutory exceptions has not been uniformly persuasive, given that several courts have refused to read the RFOA exception as an affirmative defense.[146]

B. *Case Law*

The courts of appeals for the First,[147] Third,[148] Fifth,[149] and Tenth[150] Circuits have ruled that the RFOA exception does not constitute an affirmative defense.[151] There are a few district courts outside these circuits in agreement,[152] as well as a small number of consistent rulings by district

---

v. Walling, 324 U.S. 490, 493 (1945) (Fair Labor Standards Act exception); Rachbach v. Cogswell, 547 F.2d 502 (10th Cir. 1976) (Truth-in-Lending Act exception).

[146] Actually, not one court—including both those construing the RFOA exception as an affirmative defense and those ruling to the contrary—has ever even adverted to the general rule.

[147] Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 (1st Cir. 1979).

[148] EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222-23 (3d Cir.), *cert. denied,* 105 S. Ct. 92 (1984). As a result of this ruling, earlier contrary decisions of district courts within the circuit are of course no longer good law. *See, e.g.,* EEOC v. City of New Castle, 32 Fair Empl. Prac. Cas. (BNA) 1409 (W.D. Pa. 1983), *aff'd mem.,* 740 F.2d 956 (3d Cir. 1984); Popko v. City of Clairton, 570 F. Supp. 446 (W.D. Pa. 1983).

[149] Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 590-91 (5th Cir. 1978). Other Fifth Circuit decisions both before and since *Marshall* have taken the same position. *See, e.g.,* Smith v. Farah Mfg., 650 F.2d 64, 67 (5th Cir. 1981); Price v. Maryland Cas. Co., 561 F.2d 609, 612 (5th Cir. 1977). *Contra* Hodgson v. First Federal Savings & Loan, 455 F.2d 818, 822 (5th Cir. 1972); Schulz v. Hickok Mfg. Co., 538 F. Supp. 1208, 1213 (N.D. Ga. 1973) (both holding that the RFOA exception imposes a burden of proof on the defendant). It is only in the *Marshall* opinion that the Fifth Circuit court has offered any analysis.

[150] Schwager v. Sun Oil, 591 F.2d 58, 61 (10th Cir. 1979).

[151] While the Court of Appeals for the Eleventh Circuit has not directly addressed the issue, arguably it endorsed the non-affirmative defense view of the RFOA exception in Krieg v. Paul Revere Life Ins., 718 F.2d 998, 999 (11th Cir. 1983), *cert. denied,* 466 U.S. 929 (1984). In any event, the Court of Appeals for the Fifth Circuit has so held, see *supra* note 149, and Fifth Circuit decisions handed down prior to October 1, 1981, govern in the Eleventh Circuit until the appellate court for the latter circuit rules on a given issue. Bonner v. City of Prichard, 661 F.2d 1206, 1209a (11th Cir. 1981) (en banc). Thus, the ruling of a district court in the Eleventh Circuit, in which the court held that the RFOA provision constitutes an affirmative defense, is of dubious validity. *See* Cowen v. Standard Brands, Inc., 572 F. Supp. 1576 (N.D. Ala. 1983).

[152] Jacobs v. College of William & Mary, 517 F. Supp. 791, 800-01 (E.D. Va. 1980), *aff'd mem.,* 661 F.2d 922 (4th Cir.), *cert. denied,* 454 U.S. 1033 (1981); Morgan v. Goldschmidt, 33 Fair Empl. Prac. Cas. (BNA) 797, 800-01 (D.D.C. 1980); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1308 (E.D. Mich. 1976); White v. Bobbie Brooks, Inc., 30 Empl. Prac. Dec. (CCH) ¶ 33,147, at 27,539 (Bankr. N.D. Ohio 1982).

courts within these appellate jurisdictions.[153] In contrast, arguably the Court of Appeals for the Eighth Circuit,[154] and unquestionably the Court of Appeals for the Ninth Circuit,[155] subscribe to the view that the RFOA provision does constitute an affirmative defense. There are a small number of district court rulings from other jurisdictions which fall into this judicial camp.[156] The Court of Appeals for the Sixth Circuit takes this position regarding some, but not all, circumstances in which the RFOA exception comes into play.[157]

It appeared that the Supreme Court would resolve this judicial split when it granted certiorari to review the Ninth Circuit decision.[158] However, the Court ultimately did not reach the issue when it decided *Western Air Lines, Inc. v. Criswell.*[159] It reasoned that even though the trial and appellate courts had characterized the RFOA exception as an affirmative defense, the actual instruction to the jury had imposed on the plaintiff the burden of proof and so the defendant could not have suffered any harm, even if it were correct in contending that the lower courts had erred on the law.[160]

It could be argued, albeit unpersuasively, that the Supreme Court already had resolved the matter: in *Trans World Airlines, Inc. v. Thurston,*[161] an ADEA decision handed down some months prior to *Criswell,* the Court adverted to the RFOA provision and in doing so denominated it an affirmative defense.[162] This reference, however, was at most a passing aside, and

---

[153] *See, e.g.,* Mizrany v. Texas Rehabilitation Comm'n, 522 F. Supp. 611, 617 (S.D. Tex. 1981), *aff'd mem.,* 685 F.2d 1384 (5th Cir. 1982); EEOC v. County of Allegheny, 519 F. Supp. 1328, 1333 (W.D. Pa. 1981), *aff'd,* 705 F.2d 679 (3d Cir. 1983); Erwin v. Bank of Miss., 512 F. Supp. 545, 551-52 (N.D. Miss. 1981); Carolan v. Central Freight Lines, 489 F. Supp. 941, 944 (E.D. Tex. 1980); Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 363 (N.D. Ga. 1979).

[154] Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959-60 (8th Cir. 1978).

[155] Criswell v. Western Air Lines, 709 F.2d 544, 552 (9th Cir. 1983), *aff'd on other grounds,* 105 S. Ct. 2743 (1985); EEOC v. County of Santa Barbara, 666 F.2d 373, 375 & n.6 (9th Cir. 1982).

[156] EEOC v. Liggett & Meyers, Inc., 29 Fair Empl. Prac. Cas. (BNA) 1611, 1643 (E.D.N.C. 1982) (dictum); Marshall v. Goodyear Tire & Rubber Co., 22 Fair Empl. Prac. Cas. (BNA) 775, 778 (W.D. Tenn. 1979); Marshall v. Baltimore & O.R.R. 461 F. Supp. 362, 372 (D. Md. 1978), *aff'd in part, rev'd in part on other grounds,* 632 F.2d 1107 (4th Cir. 1980), *cert. denied,* 454 U.S. 825 (1981); *see also* Grohs v. Gold Bond Bldg. Prods., 627 F. Supp. 1555, 1558 (N.D. Ill. 1986); EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734, 740 (E.D. Pa. 1985); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974).

[157] *See* Laugesen v. Anaconda Co., 510 F.2d 307, 315 (6th Cir. 1975).

[158] Western Air Lines v. Criswell, 105 S. Ct. 80 (1984).

[159] 105 S. Ct. 2743 (1985).

[160] *Id.* at 2749 n.10.

[161] 105 S. Ct. 613 (1985).

[162] The Court, in summarizing the facts, stated: "Petitioners contend that the age-based transfer policy [at issue here] is justified by two of the ADEA's five

while it is tempting to extract substantively significant morsels from judicial scraps, it would seem more prudent to conclude that such a cursory notation should not be given any significant weight. After all, had the *Thurston* Court resolved the issue of the status of the RFOA exception as an affirmative defense, the *Criswell* Court, in abjuring disposition of the issue, presumably would have made some comment to the effect that it already had disposed of the matter in its earlier decision.[163]

Since the Supreme Court did not resolve the issue in *Criswell*,[164] examination of the lower court rulings is in order to ascertain what insights, if any, may be gained. The first decision rejecting treatment of the RFOA exception as an affirmative defense in which any sort of analytical presentation was put forth was *Marshall v. Westinghouse Electric Corp.*,[165] handed down by the Court of Appeals for the Fifth Circuit. The court compared the bona fide occupational qualification and RFOA exceptions. It characterized the former as clearly constituting an affirmative defense applicable to general exclusionary rules whereby "otherwise statutorily protected individuals [may be excluded] solely on the basis of class membership."[166] In contrast, the court reasoned, the RFOA exception constitutes only a denial of the plaintiff's prima facie case: "Plaintiff says that the employer fired him because of his age; employer replies, in effect, not so, plaintiff was fired for excessive absences, general inability, or some other nondiscriminatory reason."[167] As an apparent policy basis for reading the BFOQ exception as an affirmative defense, while reading the RFOA provision differently, the *Marshall* court observed in a footnote that "the establishment of a BFOQ necessarily has an effect beyond the case being litigated since it permits an

---

affirmative defenses." *Id.* at 622. One could read this sentence as constituting nothing more than a paraphrasing of the petitioners' argument, and thus the words "five affirmative defenses" would not necessarily constitute the Court's own characterization.

[163] Certiorari was granted in *Criswell* prior to the Court's decision in *Thurston*. Thus, one could not argue that if *Thurston* indeed had resolved the issue, certiorari would not have been granted on the RFOA affirmative defense issue.

[164] The reference to the RFOA exception in EEOC v. Wyoming, 460 U.S. 226 (1983), offers no enlightenment. In reviewing the ADEA's structure prior to addressing the actual issue before it—the constitutionality of the Act's extension to state governments—the *Wyoming* Court stated:

> [I]n order to insure that employers were permitted to use neutral criteria not directly dependent on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provided that certain otherwise prohibited employment practices would not be unlawful "where age . . . [is a BFOQ], or where the differentiation is based on reasonable factors other than age."

Id. at 232-33.

[165] 576 F.2d 588 (5th Cir. 1978).

[166] *Id.* at 591.

[167] *Id.*

employer to deal with an entire class of persons on an age-related basis in derogation of the statute."[168] As further justification for its construction of the RFOA provision, the court asserted that "[t]he natural tendency of the court to place the burden of proof upon the party desiring change and the special policy considerations disfavoring the statutory exceptions both justify the distinction between these defenses."[169]

There are critical flaws in the *Marshall* analysis, such as it is. The court perceived an RFOA-based explanation for a challenged action as arising in the context of an individual plaintiff-defendant relationship, with the acceptance or rejection of that explanation having no consequences beyond the contours of that particular relationship. That perception is wrong. A purported reasonable factor other than age may well involve a policy or practice which applies to many, or even all, of the employees in a given plant; its upholding or demise will have consequences for large numbers of workers.[170] The second juncture where the *Marshall* court went astray was in its approving reference to "special policy considerations disfavoring . . . statutory exceptions" as justifying a defendant-protective reading of the RFOA provision. This position turns on its head—without support—the canon that remedial statutes, such as the ADEA, are to be liberally construed and so exceptions which erode protection for plaintiffs are to be given only narrow scope.[171]

---

[168] *Id.* n.3.

[169] *Id.* at 591.

[170] For example, in Criswell v. Western Air Lines, Inc., 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds,* 105 S. Ct. 2743 (1985), the defendant attempted to justify as an RFOA a policy which prohibited pilots who reached age 60 from transferring to positions as flight engineers. The airline argued that its ban on transfers was based on a policy embodied in its collective bargaining agreement which prohibited downbidding—*e.g.,* movement of an employee from a superior job (pilot) to a lesser one (flight engineer). Here, then, was a company-wide practice justified under the RFOA provision. And while the defendant did not prevail, its failure was not due to the court's reading the RFOA exception as being inapplicable to policy-based discrimination.

Other examples readily can be envisioned. An employer may require a certain skill of persons who seek employment in a particular position, or may require that job applicants pass a prescribed test. Confronted with the allegation that its rejection of an applicant was discriminatory, the employer can invoke the RFOA provision, contending that its decision was based on a reasonable factor other than age—*e.g.,* the plaintiff's lack of the requisite skill or low test score. By upholding the defendant's contention, a court would place the seal of judicial approval on a practice applicable generally. (For a discussion of the administering agencies' views on testing see *supra* notes 136-140 and accompanying text.)

[171] *See, e.g.,* Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (7th Cir.), *cert. denied,* 464 U.S. 992 (1983) (BFOQ defense); Sexton v. Beatrice Foods Co., 630 F.2d 478, 486 (7th Cir. 1980) (bona fide pension plan exception); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (Title VII BFOQ exception); A.H. Phillips, Inc.

The Court of Appeals for the Third Circuit sides with *Marshall* in reading the RFOA provision as not constituting an affirmative defense. Its decision, *EEOC v. Westinghouse Electric Corp.*,[172] is devoid of legal analysis, however. The Court of Appeals for the Tenth Circuit likewise offered no analysis in *Schwager v. Sun Oil Co.*;[173] it simply asserted, without more, that the RFOA exception does not constitute an affirmative defense.

In *Loeb v. Textron, Inc.*[174] the Court of Appeals for the First Circuit reasoned, by way of dictum, that the similarities between the ADEA and Title VII warranted reading Title VII analysis into the age statute. The court then observed that under Title VII the defendant in a discriminatory treatment circumstantial evidence case bears only a burden of production, and so a like burden pertains to ADEA defendants. In addressing what would seem to be an important barrier to unhesitatingly equating the ADEA and Title VII—namely, the absence of exceptions in the latter which are present in the former—the court offered what can only be fairly characterized as a nonresponse. It stated that "as *McDonnell Douglas* is merely 'a sensible, orderly way to evaluate the evidence in light of common experience,' . . . [it] affords ample scope for the operation of [the RFOA] provision."[175] While this assertion is unexceptionable in the abstract, it fails to explain why the reasonable factors other than age exception should or should not be read as an affirmative defense.

The reasoning in the cases supportive of an affirmative defense reading is hardly more persuasive. The best that can be said for the decision of the Court of Appeals for the Eighth Circuit in *Cova v. Coca-Cola Bottling Co.*[176] is that it is very obscure.[177] Nor does the ruling of the Court of Appeals for

---

v. Walling, 324 U.S. 490, 493 (1945) (Fair Labor Standards Act exception); Rachbach v. Cogswell, 547 F.2d 502 (10th Cir. 1976) (Truth-in-Lending Act exception).

[172] 725 F.2d 211 (3d Cir.), *cert. denied,* 105 S. Ct. 92 (1984). The case dealt with a general policy whereby employees who were eligible for early retirement were barred from obtaining certain benefits by virtue of their receipt of retirement benefits. Here, again, was a situation where a policy—characterized by the defendant as an RFOA (but rejected by the court on the merits because it was not deemed to be a factor *other* than age)—applied to many individuals. The case demonstrates the *Marshall* court's misapprehension in regarding the RFOA provision as not applying to a class of workers, but only to individual disputes.

[173] 591 F.2d 58, 61 (10th Cir. 1979).

[174] 600 F.2d 1003 (1st Cir. 1979).

[175] *Id.* at 1016. Immediately preceding the quoted language, the court stated: "In [the RFOA provision] . . . Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." *Id.* One could dispute just how "plain" Congress made anything concerning the RFOA exception. That quibble aside, the fact is that nothing in the *Loeb* court's observation clarifies the matter of the proper characterization of the exception.

[176] 574 F.2d 958 (8th Cir. 1978).

[177] The court at one point asserted:

the Sixth Circuit in *Laugesen v. Anaconda Co.*[178] offer any useful analytical treatment of the issue. The court drew a distinction between policies which have a discriminatory impact on older employees generally, and single plaintiff cases involving challenges to individualized decisions made by employers which harm particular individual plaintiffs.[179] The *Laugesen* court viewed the RFOA exception as constituting an affirmative defense in the first setting, but not in the second.[180] The distinction is an apt one, as will be discussed later in this article; the problem with the *Laugesen* opinion lies in the court's failure to offer any rationale to explain its distinction.

Like *Cova* and *Laugesen,* the decision of the Court of Appeals for the Ninth Circuit in *Criswell v. Western Airlines, Inc.*[181] was an abbreviated one insofar as analysis of the RFOA provision was concerned. The court deemed significant the fact that "[t]he 'reasonable factors' defense appears alongside the BFOQ exception . . . ."[182] It noted that the ADEA enforcement agencies—first the Department of Labor and now the EEOC[183]—have taken the position that the burden of proof regarding the RFOA exception rests on the defendant,[184] and considered this factor significant, given the usual judicial deference due agency interpretations.[185] With this brief review the court concluded that the RFOA provision constitutes an affirmative defense.

So much, then, for judicial analysis. It has been perfunctory, at best. The split among the circuits cannot be said to be the consequence of finely-tuned, albeit differing, interpretations. Nor do the cases—except perhaps *Criswell,* as discussed further below[186]—reveal any appreciation of the doctrinal prob-

---

> Once . . . a prima facie case has been made out, the burden shifts to the employer to rebut plaintiff's showing. An employer may meet this burden by showing that the discharge was . . . "based on reasonable factors other than age," 29 U.S.C. § 623(f)(1). If the employer meets its burden, *the burden of persuasion reverts to the plaintiff.*

Id. at 959-60 (emphasis added). Later, however, the court noted that the plaintiffs' evidence was sufficient to establish a prima facie case and stated: "Defendant was therefore obliged to satisfy its burden of production . . . ." *Id.* at 960. The problematic meaning of *Cova* is compounded by a recent ruling of a different panel of the court which—without mentioning *Cova* and without analysis—appeared to not consider the RFOA exception as constituting an affirmative defense. Holley v. Sanyo Mfg., 771 F.2d 1161, 1168 (8th Cir. 1985).

[178] 510 F.2d 307 (6th Cir. 1975).

[179] *Id.* at 315. This, of course, was a distinction which the *Marshall* court apparently could not appreciate, since in its view the RFOA exception only applies to the latter situation.

[180] 510 F.2d at 315.

[181] 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds,* 105 S. Ct. 2743 (1985).

[182] *Id.* at 552.

[183] As to the transfer of enforcement authority, see *supra* note 2.

[184] 709 F.2d at 552-53. *See infra* notes 203-206 and accompanying text.

[185] 709 F.2d at 553 (citing Udall v. Tallman, 380 U.S. 1, 4-18 (1965)).

[186] *See infra* notes 240-46 and accompanying text.

lems generated by both of the two polar positions. Certainly, neither side of the judicial division has put forth a persuasive dispositive justification for reading the RFOA language in one way or the other. Thus, a search for additional guidance is in order.[187]

C. *Legislative History*

While the RFOA provision's history is fairly unilluminating, the meager insights it does afford support the conclusion that the exception should be read as an affirmative defense. From its introduction through its passage, the bill ultimately enacted as the ADEA joined the BFOQ and RFOA provisions in one subsection which Congress approved without changes.[188] Only brief and unenlightening reference to the RFOA language was made by Secretary of Labor Wirtz when he testified in support of the bill during the Senate hearings. But he did at least speak of all of the exceptions as a group—describing them as "broad"[189]—rather than differentiating the RFOA provision from what are indisputably affirmative defenses, *i.e.*, the bona fide occupational qualification,[190] and the bona fide seniority and benefit plan, provisions.[191] The hearings in the House were hardly more informative.[192]

---

[187] As noted earlier, commentators have offered little by way of clarification. *See supra* note 10.

[188] H.R. 3651, 90th Cong., 1st Sess. (1967).

[189] Secretary Wirtz asserted in his prepared statement before the Senate that it was only "arbitrary" age discrimination which the legislation aimed to eradicate. *Age Discrimination in Employment, Hearings Before the General Subcomm. on Labor, Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 39 (1967). He followed this with recitation of the defenses, and with the ensuing statement that these defenses were "obviously broad." *Id.* The sole other attention directed to the RFOA provision during the course of the Senate hearings consisted of a tentative response by Secretary Wirtz regarding the application of the exception to pilots' training. *See supra* note 134.

[190] 29 U.S.C. § 623(f)(1) (1982). As to the provision's status as an affirmative defense, see *supra* note 103.

[191] 29 U.S.C. § 623(f)(2) (1982). As to the status of these exceptions as affirmative defenses, see *supra* notes 104-05.

[192] The closest to a direct discussion concerning the RFOA exception occurred during a dialogue between Representative Burton and Secretary Wirtz. The Congressman asked whether the provisions of the legislation would override a collective bargaining agreement with reference to seniority. The following colloquy then occurred:

> Secretary Wirtz. . . . If a seniority clause were so constructed or a retirement clause were so constructed that it unfairly attached significance to age, my answer would be "Yes" to your question.
> Mr. Burton. Who would judge that?
> Secretary Wirtz. The Secretary of Labor.
> Mr. Burton. By what standards?
> Secretary Wirtz. By the standards of whether there is differentiation on the basis of age which the facts do not warrant.

The committee reports accompanying the bill sent to the House and Senate for consideration noted the presence of the RFOA provision, but offered no explanations regarding its role within the Act. The floor debates likewise provided virtually no elucidation regarding the characterization of the exception. Senator Yarborough, like Secretary Wirtz, described the several exceptions without differentiation, referring to them generally as the "four exceptions," rather than singling some out as defenses and others as something short of that.[193] In sum, then, the legislative history at least (and at most) supports reading the RFOA exception in tandem with what indisputably are affirmative defenses.

D. *The Equal Pay Act Analogy*

The ADEA draws upon two earlier statutes: its prohibitory language derives from Title VII of the Civil Rights Act of 1964 while its enforcement sections are incorporated in good measure from the Fair Labor Standards Act (FLSA).[194] Title VII contains no statute-wide provision comparable to the ADEA's reasonable factors other than age exception, and so one cannot look to the 1964 Act for analogical guidance regarding the RFOA language. But the Equal Pay Act (EPA),[195] a component of the FLSA, does contain an analogous provision and that provision has special significance here.

The EPA addresses only gender discrimination; it prohibits unequal pay for the performance of equal work, where the employee's sex is the basis for the differential.[196] The statute contains four exceptions to this prohibition, one of which provides: "No employer . . . shall discriminate . . . except where such [differential] payment is made pursuant to . . . a differential based on any other factor other than sex."[197] In 1967, the year in which the ADEA legislation was introduced and enacted, it was clear that the EPA exceptions enacted four years earlier were affirmative defenses, and that the employer bore the burden of proving their applicability.[198] It was likewise

---

Age Discrimination in Employment, Hearings before the General Subcomm. on Labor, Comm. on Education and Labor, U.S. House of Rep., 90th Cong., 1st Sess. 14 (1967).

[193] See *supra* text accompanying note 117.

[194] 29 U.S.C. §§ 201-219 (1982).

[195] 29 U.S.C. § 206(d) (1982).

[196] To establish a violation, a plaintiff must prove that the challenged wage differential occurred in one "establishment," and that men and women both performed "equal jobs on work the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Id.* § 206(d)(1).

[197] *Id.*

[198] *See* Wirtz v. Basic Inc., 256 F. Supp. 786, 790 (D. Nev. 1966). This holding subsequently was iterated in Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974), and in numerous lower court decisions cited in that opinion, *id.* at 196 n.11.

clear in 1967 that the general rule was "that the application of an exemption under the Fair Labor Standards Act [, of which the EPA is a part,] is a matter of affirmative defense on which the employer has the burden of proof."[199]

Given the settled readings of both the FLSA generally, and of the EPA specifically, the observations of the Court in *Lorillard v. Pons,*[200] an ADEA case, are particularly relevant. In holding that jury trials are available in private ADEA suits, the Court observed that they were available under the FLSA and that the FLSA's enforcement mechanisms had been incorporated into the ADEA. Thus, in devising the proper interpretation of the statute, the *Lorillard* Court noted the presumption that when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute."[201] The Court reasoned that this presumption was particularly appropriate regarding consideration of the ADEA, since in enacting the age statute Congress "exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretations and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."[202] Granted, the EPA's "factor other than sex" exception was not itself incorporated into the ADEA, and so the *Lorillard* analysis is not directly apposite. Nonetheless, the similarity in language between the EPA provision and the independently constructed RFOA exception, plus the intimate nexus generally between the FLSA and the ADEA, support the conclusion that just as the EPA's "factor other than sex" exception in the EPA imposes upon the defendant the burden of proof, the RFOA exception in the ADEA imposes a comparable burden on ADEA defendants.

E. *Agency Interpretations*

In its early years the Age Discrimination in Employment Act was administered by the Department of Labor. In 1979 enforcement authority was transferred to the EEOC.[203] During the period in which the Labor Department had responsibility for enforcement of the Act, it took the position that the reasonable factors other than age provision was to be interpreted narrowly, with the defendant bearing the burden of proving the exception's applicability.[204] The EEOC appears to take a like position, at least insofar as

---

[199] Corning Glass Works v. Brennan, 417 U.S. 188, 197 n.12 (1974) (citing Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960) and other Supreme Court decisions).

[200] 434 U.S. 575 (1978).

[201] *Id.* at 581.

[202] *Id.*

[203] *See supra* note 2.

[204] 29 C.F.R. § 860.103(e) (1985) (rescinded).

disparate impact situations are concerned.[205] While agency interpretations, in contrast to regulations, do not possess legally binding force, they typically are given considerable judicial respect. As the Supreme Court observed in a Title VII case: "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."[206]

F. *The Proper Reading of the RFOA Exception*

A number of factors coalesce in support of construing the RFOA exception as an affirmative defense: the provision's placement in the statute contiguous to what is undeniably an affirmative defense—the bona fide occupational qualification provision, legislative history, the analogy afforded by the Equal Pay Act; administrative interpretations, and some case law. On the other side of the legal coin, there are a few contrary decisions which are either poorly reasoned, or devoid of any analysis whatsoever. Clearly, the affirmative defense reading of the RFOA provision is the better supported interpretation.[207]

Moreover, there is a policy-based rationale which supports, indeed even mandates, reading the RFOA provision as an affirmative defense. If the exception is not so read, significant bodies of current ADEA case law stand in real peril of being eroded by the exception. These bodies of case law have developed in three contexts, discussed earlier:

> —where the plaintiff has established the discriminatory impact of a facially age-neutral policy or practice maintained by the defendant;
> —where the plaintiff has established a pattern or practice of discriminatory treatment by the defendant, and the defendant seeks to avoid liability as to a member of the victimized group other than the named plaintiff by arguing that the same decision would have been made even had age not been taken into account; and
> —where the plaintiff has proved by direct evidence that the defendant intentionally violated the ADEA, and the defendant seeks to put forth an exculpatory justification.

In the first two instances—and in the third, as well, according to some courts—the defendant can only succeed by *proving* that some factor other

[205] 29 C.F.R. § 1625.7(d) (1985).

[206] Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); *accord* EEOC v. County of Santa Barbara, 666 F.2d 373, 376 n.7 (9th Cir. 1982).

[207] Federal Rule of Evidence 301 is not a bar to reading the RFOA provision as an affirmative defense. Rule 301 provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301. The Rule "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion . . . ." NLRB v. Transp. Management Corp., 412 U.S. 393, 404 n.7 (1983).

than age affords a legitimate basis for its apparent wrongdoing. This is so whether the factor bears—in impact cases—the label "business necessity," or in other cases is simply a generic excuse, such as failure to perform adequately. The RFOA exception, which in formal statutory language excuses differentiations which are based on reasonable factors other than age, jibes with these bodies of case law, but only so long as the exception imposes a burden comparable to those fashioned in these cases. If, instead, the RFOA provision is not construed as an affirmative defense, but rather is read as an exculpatory provision whereby a defendant can avoid liability simply by *producing* evidence of a reasonable factor other than age, the exception stands as a potential source for undermining the non-RFOA cases. Indeed, this line of reasoning, while not yet embraced in any reported majority opinion, animated the dissent written by Justice Rehnquist from a denial of certiorari in *Markham v. Geller.*[208] In arguing that the Court should have granted a petition to review an appellate court decision espousing disparate impact analysis, Justice Rehnquist contended that the RFOA exception foreclosed the applicability of such analysis. While his position commanded no additional support when first asserted, and has not since,[209] it nonetheless reveals the potential for damage (or improvement, depending on one's viewpoint) posed by a non-affirmative RFOA defense.

None of the courts which has rejected reading the RFOA exception as an affirmative defense has expressed any appreciation of the danger its position poses for these bodies of non-RFOA ADEA case law. Indeed, *Marshall v. Westinghouse Electric Corp.* and like rulings fail even to recognize, let alone resolve, the conflict which their readings of the RFOA exception create vis-a-vis the non-RFOA ADEA decisions. In contrast, of course, a reading of the RFOA exception as an affirmative defense forecloses such damage to existing doctrine.

---

[208] Markham v. Geller, 451 U.S. 945 (1981) (Rehnquist, J., dissenting). Admittedly, the conclusion that the RFOA exception constitutes an affirmative defense does not necessarily lead to the further conclusion that the defendant's burden in a discriminatory impact case can only be satisfied by proof of business necessity or job relatedness. For example, Professor Player reads the exception as an affirmative defense and then goes on to use that reading as partial basis for his thesis that Title VII-derived impact case law should not be applied in the ADEA context. He argues that the RFOA affirmative defense should apply in ADEA impact situations and that that defense imposes upon defendants a much less rigorous burden—in substantive terms—than does the business necessity standard. *See* Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is A Transplant Appropriate?,* 14 U. TOL. L. REV. 1261 (1983); *infra* notes 260, 268 and accompanying text.

[209] *See* EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734, 740-41 (E.D. Pa. 1985) (rejecting argument that existence of RFOA exception forecloses disparate impact analysis under the ADEA).

VI. MESHING THE RFOA AFFIRMATIVE DEFENSE WITH NON-RFOA CASE LAW

Characterization of the RFOA exception as an affirmative defense is, as already discussed, solidly supported both on analytical and policy grounds. Even so, significant problems are generated by this construction. An uncompromising RFOA affirmative defense, entailing the defendant shouldering a burden of proof, undermines the many ADEA decisions following *Texas Department of Community Affairs v. Burdine*,[210] which imposes only an easy burden of production on defendants. If this conflict can be resolved only by the rejection of *Burdine* in the ADEA context, ADEA plaintiffs benefit: defendants should have a much harder time in avoiding liability. On the other hand, the RFOA exception's construction as an affirmative defense also creates the potential for diluting the protection afforded ADEA plaintiffs by other bodies of case law. This is because arguably a reading of the exception as an affirmative defense confirms the inaptitude, for example, of Title VII disparate impact doctrine and so precludes imposition on defendants of the too-rigorous (according to this argument) business necessity justification.[211] A lesser burden, peculiar to the RFOA defense, would enhance the ability of defendants to prevail in situations in which, were they required to prove business necessity or job-relatedness, they well might fail. It is necessary to attend to both of these potential consequences, and to reach sensible and sensitive resolutions of the problems generated.

A. *The* Burdine *Conflict*

There is a very large body of ADEA case law in which lower federal courts have embraced *Burdine* as the guiding precedent for determining the burden to be shouldered by defendants in discriminatory treatment circumstantial evidence cases,[212] which make up the great majority of ADEA decisions.[213] Typically, the defendant, which by virtue of *Burdine* only needs to articulate a legitimate, nondiscriminatory justification for its challenged action or decision, will attempt to satisfy this burden by pointing to some factor other than age. The defendant may assert that the plaintiff applicant was less qualified than the person actually hired, or that the plaintiff failed to adequately perform the job and so was terminated, or that no job was in fact available. In most instances, the courts do not formally identify such excuses as invocations of the RFOA exception. Nonetheless, there can be no doubt that the defendants in these circumstantial evidence cases are putting forth

---

[210] 450 U.S. 248 (1981).

[211] *See* Player, *supra* note 208, *infra* notes 260, 268 and accompanying text.

[212] *See supra* note 64. The cases cited therein are only court of appeals decisions; there are many additional district court rulings. *See* 2 EGLIT, *supra* note 4, §§ 17.57, 17.66.

[213] *See* 2 EGLIT, *supra* note 4, §§ 17.56-17.69.

explanations which amount, in a generic sense, to reasonable factors other than age as rebuttals to plaintiffs' prima facie cases. Indeed, the occasional instance in which a court blithely describes the defendant's excuse as a generic reasonable factor other than age, while at the same time not looking explicitly to the statutory exception, confirms this equation.[214]

If the RFOA exception is read as an affirmative defense, as it should be, the result arguably is to deny defendants this course of response. In other words, a defendant no longer will be able to rebut a prima facie case simply by *articulating* a reasonable factor other than age, because such a factor will now only be legally significant if couched in the form of an affirmative defense, which typically entails a burden of persuasion rather than the much milder burden of production imposed by *Burdine* and its progeny. At least one consequence would be that some, perhaps many, future cases would be decided differently, for burden shifting is more than just a technical issue—it can be outcome-determinative.[215] Moreover, an enormous number of existing ADEA cases embracing *Burdine* seemingly would be overturned by the RFOA's invigoration as an affirmative defense.

That this preclusion of the easier *Burdine* prescription seems to inevitably follow from acceptance of the RFOA exception as an affirmative defense is highlighted and further confirmed by the implications emanating from *County of Washington v. Gunther,*[216] a Supreme Court decision following *Burdine* by one year. The *Gunther* Court addressed, albeit unclearly, the intersection of Title VII's prohibition of gender-based employment discrimination with the Equal Pay Act's "factor other than sex" affirmative defense.[217] Given the close nexus generally between the ADEA and Title VII,[218] and given further the close nexus between the RFOA exception and the EPA provision,[219] *Gunther* is particularly apposite.

The EPA outlaws unequal compensation for equal work. Its prohibition is not absolute, however. An employer as to which a prima facie violation has been established may escape liability by proving that the wage differential was based on "(i) a seniority system; (ii) a merit system; (iii) a system which

---

[214] *See, e.g.,* EEOC v. Wyoming Retirement System, 771 F.2d 1425, 1429 (10th Cir. 1985); Holley v. Sanyo Mfg., 771 F.2d 1161, 1168 (8th Cir. 1985); Krieg v. Paul Revere Life Ins., 718 F.2d 998 (11th Cir. 1983), *cert. denied,* 466 U.S. 929 (1984); Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979); Morgan v. Goldschmidt, 33 Fair Empl. Prac. Cas. (BNA) 797, 799 (D.C. Cir. 1980); Raggett v. Foote Mineral Co., 16 Fair Empl. Prac. Cas. (BNA) 1771 (M.D. Tenn. 1975); White v. Bobbie Brooks, Inc., 30 Empl. Prac. Dec. (CCH) ¶ 33,147 (N.D. Ohio Bankr. 1982).

[215] *See supra* note 13.

[216] 452 U.S. 161 (1981).

[217] 29 U.S.C. § 206(d)(1)(iv) (1982).

[218] Numerous courts, from the Supreme Court on down, have deemed the ADEA to be intimately related to Title VII, and so have looked to the latter statute as providing very persuasive analogical guidance. *See supra* note 44.

[219] *See supra* notes 194-202 and accompanying text.

measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ."[220]

The *Gunther* case involved a county which paid substantially lower wages to female jail guards than it paid to male guards. The plaintiff women claimed that this differential constituted gender-based discrimination in violation of Title VII. In ruling for the defendant the district court reasoned that the jobs performed were not equal; the court of appeals affirmed this determination,[221] and no further appeal of it was taken. In addition, the district court dismissed the plaintiffs' claim that the pay discrepancy was attributable to intentional sex discrimination. It held as a matter of law that a sex-based wage discrimination claim could not be maintained under Title VII unless it satisfied the equal work standard set forth in the EPA, even though the plaintiffs had not made an EPA claim.[222] The court of appeals reversed, holding that the failure of the plaintiffs to satisfy the EPA's standard did not preclude suit under Title VII.

The defendant in *Gunther* argued that both the EPA's prohibition and its four affirmative defenses were incorporated into Title VII by virtue of the latter statute's so-called Bennett Amendment, which allows employers "to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees . . . if such differentiation is authorized by the . . . [EPA]."[223] The Court rejected the defendant's argument: while it agreed that the affirmative defenses were absorbed into Title VII, it held that the prohibitory language of the EPA was not. Arguing against this conclusion, the defendant asserted that a reading of the Bennett Amendment which resulted in absorption only of the affirmative defenses would render the amendment superfluous, inasmuch as the first three defenses already were contained elsewhere in Title VII[224] and the fourth—the "factor other than sex" defense—was already implicitly contained in Title VII's general prohibition of sex-based discrimination. The Court's explanation for rejecting the last part of this argument is very relevant to the ADEA's RFOA exception and its relation to *Burdine*.

The Court pointed out that Title VII outlaws both employment practices which are intentionally discriminatory and those which, although facially neutral, are discriminatory in impact. "The structure of Title VII litigation,

---

[220] 29 U.S.C. § 206(d)(1) (1982).

[221] Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *supplemental opinion on denial of rehearing*, 623 F.2d 1303 (9th Cir. 1980), *aff'd on other grounds*, 452 U.S. 161 (1981).

[222] 602 F.2d at 891. Suit was not brought under the EPA because at the time the alleged wrong occurred the Act did not apply to municipal employees. Such coverage was imposed by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 1974 U.S. CODE CONG. & AD. NEWS (88 Stat.) 55, 78-79.

[223] 42 U.S.C. § 2000e-2(h) (1982).

[224] *Id.*, providing, prior to setting forth the Bennett Amendment:

including presumptions, burdens of proof, and defenses, has been designed," the Court explained, to reflect the fact that liability may flow from a policy or practice having a discriminatory impact.[225] In contrast, the EPA's "factor other than sex" defense is designed to serve one narrow end—confining the reach of the EPA to sex discrimination arising out of the payment of unequal wages for equal work. The EPA exception leaves open to employers the ability to freely use job evaluation systems (even ones having a gender-discriminatory impact) which are based on "factors other than sex." Accordingly, the defendant's contention that the Bennett Amendment did nothing more than was already provided by Title VII independent of the amendment was an inaccurate one, since the amendment's scope is much narrower than is Title VII's reach.

The *Gunther* Court's unwillingness to read into Title VII's ban on gender discrimination a generalized "factor other than sex" affirmative defense apparently flowed from its fear that this defense could undermine Title VII case law concerning presumptions, burdens of proof, and defenses. As the Court observed at the outset of its discussion regarding the intersection of the EPA defense with Title VII: "incorporation of . . . [the] defense could have significant consequences for Title VII litigation."[226] Had the Court ruled that there indeed was a generalized "factor other than sex" defense applicable to all sex-related compensation issues under Title VII, it presumably would have followed that *Burdine* would have been rendered irrelevant in every such context. For under *Burdine* a defendant against whom a prima facie gender-based violation has been proven can adequately rebut by articulating a legitimate reason other than gender for its action, which reason is the same as a factor other than sex. However, were a defendant to be able to avoid liability only by successful invocation of an affirmative defense, it would confront liability unless it could satisfy the comparatively heavy burden of persuasion which accompanies assertion of such a defense. In brief, the *Gunther* Court's handling of the Bennett Amendment spared *Burdine* from likely destruction.

Even given this narrow reading of the EPA's relation to Title VII compensation claims, there is still one area in which simple articulation, per *Burdine,* of a legitimate nondiscriminatory reason will not suffice. Where gender-based unequal pay for equal work—the specific focus of the EPA—is involved, the EPA's affirmative defenses *will* apply by virtue of their incor-

---

Notwithstanding any other provision of this title it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production . . . provided that such differences are not the result of an intention to discriminate because of . . . sex. . . .

[225] *Gunther,* 452 U.S. at 170.

[226] *Id.*

poration into Title VII. Accordingly, a defendant here will be held to a burden of persuasion, rather than a lighter burden of production.

The foregoing assessment of *Gunther's* impact upon *Burdine* does not follow from explicit Supreme Court exposition. Indeed, interpretive analysis is necessary because the Court, despite having expressed concern about conflict between the "factor other than sex" EPA defense and existing Title VII doctrine, refused to decide "how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act . . . ."[227] The Court's reluctance notwithstanding, a number of lower federal courts have read *Gunther* as negating *Burdine* in the context of gender-based Title VII equal pay claims.[228] For example, in *Kouba v. Allstate Insurance Co.*[229] Allstate contended that because Kouba had brought her wage disparity claim under Title VII rather than directly under the EPA, the standard Title VII rules governed the allocation of evidentiary burdens. Rejecting this argument, the court read *Gunther* as recognizing "that very different principles govern the standard structure of Title VII litigation, including burdens of proof, and the structure of Title VII litigation implicating the 'factor other than sex' exception to an equal-pay claim . . . ."[230] It followed "that even under Title VII, the employer bears the burden of showing that the wage differential resulted from a factor other than sex."[231] Turning to the significance of *Burdine,* the court asserted: "Nothing in *Burdine* converts this affirmative defense, which the employer must plead and prove . . . into an element of the cause of action which the employee must show does not exist."[232]

---

[227] *Id.* at 171.

[228] *See* Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1977); Chang v. University of Rhode Island, 40 Fair Empl. Prac. Cas. (BNA) 3 (D.R.I. 1985); Lanegan-Grimm v. Liberty Ass'n of Portland, 560 F. Supp. 486 (D. Or. 1983); Serpe v. Four Phase Systems, Inc., 33 Fair Empl. Prac. Cas. (BNA) 169 (N.D. Cal. 1982); Melanson v. Rantoul, 32 Fair Empl. Prac. Cas. (BNA) 1025 (D.R.I. 1982); Schulte v. Wilson Indus., Inc., 547 F. Supp. 324 (S.D. Tex. 1982). *Contra* EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1328-32 (N.D. Ill. 1986); Groussman v. Respiratory Home Care, Inc., 40 Fair Empl. Prac. Cas. (BNA) 122 (C.D. Cal. 1986); Derouin v. Litton Indus. Prods., 37 Empl. Prac. Dec. (CCH) ¶ 35,398 (E.D. Wis. 1984); Handy v. New Orleans Hilton Hotel, 33 Fair Empl. Prac. Cas. (BNA) 1458 (E.D. La. 1982); Grove v. Frostburg Nat'l Bank, 31 Fair Empl. Prac. Cas. (BNA) 1675, 1688 n.10 (D. Md. 1982); *see also* Spray v. Kellos-Sims Crane Rental, Inc., 507 F. Supp. 745, 751-52 (S.D. Ga. 1981) (a pre-*Gunther* decision). The *Spray* court observed that a defendant conceivably could establish enough—*e.g.*, articulate a legitimate, nondiscriminatory reason—to evade Title VII liability, yet at the same time fail to establish enough to prove an affirmative EPA defense, and so it would be liable under the EPA.

[229] 691 F.2d 873 (9th Cir. 1982).

[230] *Id.* at 875.

[231] *Id.*

[232] *Id. But see* Foster v. Arcata Assocs., 772 F.2d 1453 (9th Cir. 1985), *cert.*

It follows analogically from *Kouba* and like rulings that *Burdine* likewise is inapposite in the ADEA context, given the presence in the age statute of an affirmative defense addressing differentiations based on reasonable factors other than age. And because the RFOA defense applies in all the ADEA settings, unlike the limited EPA's "factor other than sex" defense, *Burdine's* applicability would seem to be negated across the range of factual contexts in which the ADEA applies.

B. *Preserving* Burdine

Admittedly, the repudiation of *Burdine* in the ADEA context would not directly contradict Supreme Court case law, inasmuch as the Court has yet to explicitly endorse the applicability of *Burdine* to the age statute. Moreover, apart from this judicial silence on the matter, it could be argued that *Burdine* indeed should be deemed inapposite because it was devised in the context of Title VII. While in *Lorillard v. Pons* the Court noted that the "prohibitions of the ADEA were derived *in haec verba* from Title VII,"[233] this observation actually is somewhat misleading. The ADEA's prohibitions are cabined by the RFOA defense, which is not contained at all in Title VII, save for the similar (but not identical) "factor other than sex" EPA defense which is incorporated into Title VII by the Bennett Amendment, and which is applicable only to gender-based compensation differentiations.[234] Thus, the analogical pressure of *Burdine* is not so heavy as the *Lorillard* dictum might suggest.

Still and all, the overwhelming approval of *Burdine* expressed by lower federal courts in ADEA cases cannot be easily ignored. Although a large and uniform body of decisional law embracing a given interpretation may not foreclose a change in direction,[235] it should give considerable pause. More importantly, one must ask whether a rejection of *Burdine* really would be

---

denied, 106 S. Ct. 1267 (1986), a confusing decision in which the court first asserted that "when a Title VII claimant contends that she has been denied equal pay for substantially equal work . . . Equal Pay Act standards apply." *Id.* at 1465. The court then stated, however, that "[t]he basic allocation of burdens and the order of proof for Title [VII] cases alleging disparate treatment . . . apply. . . ." *Id.* at 1465-66. Accordingly, once a prima facie violation is established, "the burden then shifts to the employer *to demonstrate* that the unequal pay results from . . . any factor other than sex." *Id.* at 1466 (emphasis added). *Contra* EEOC v. First Citizens Bank of Billings, 758 F.2d 397 (9th Cir. 1985).

[233] 434 U.S. 575, 584 (1978).

[234] *See supra* notes 194-202 and accompanying text.

[235] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976), in which the Court held that a prima facie case under the equal protection guarantee of the fifth amendment requires proof of discriminatory purpose. In so doing, the Court effectively overturned sixteen then-recent district court and court of appeals decisions holding to the contrary. *Id.* at 244-45 n.12.

understandable in policy terms. *Burdine* is applicable in race discrimination cases arising under Title VII, and most would agree that racism is the most odious of biases. This is true today and it was no doubt true when Congress passed Title VII, and when it later adopted the ADEA.[236] It would seem to be anomalous that under Title VII a defendant against whom a prima facie case of racial discrimination has been proved confronts a relatively easy burden of simply producing a legitimate, nondiscriminatory reason for its action, whereas under the ADEA—if the RFOA exception were deemed to foreclose *Burdine's* viability—a defendant would confront the much more difficult task of proving an affirmative defense. Common sense supports the proposition that the extent of statutory protection should correlate with the perniciousness of the evil regulated.

While in fact the ADEA in some respects does treat age discrimination victims more favorably than Title VII protects its favored classes, each of the advantages accorded the ADEA plaintiffs—the opportunity to secure

---

[236] One Congressman, Representative Burke, suggested that age discrimination was unlike racism, in that the former was less insidious than the latter. 113 CONG. REC. 34,742 (1967). Otherwise, there is nothing in the debates or the committee reports regarding the ADEA to support the proposition that the managers of the bill, or anyone else, viewed ageism as not being comparable to racism. Still, that inference as to Congress' attitudes is a legitimate one. For one, the ADEA contains an exception allowing age to be taken into account when it is a bona fide occupational qualification. Title VII also contains a BFOQ exception, but it is not applicable in instances of race discrimination. In other words, the Congress which adopted Title VII clearly was cognizant of the BFOQ concept, yet it could not see race as ever being a bona fide occupational qualification. In addition, the 1965 report by the Secretary of Labor which laid the groundwork for the ADEA set forth a distinction between racism and ageism. *See infra* notes 278-80 and accompanying text.

Later Congresses have openly drawn a distinction between ageism and racism. In amending the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1982), to outlaw—to some extent—credit discrimination based on age, the Senate concluded that whereas race was never relevant to the determination of credit-worthiness, age sometimes was. *Senate Comm. on Banking, Housing, and Urban Affairs, Equal Credit Opportunity Act Amendments of 1976,* S. REP. NO. 589, 94th Cong. 2d Sess. 4 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 403, 406-07. Likewise, in considering the legislation ultimately enacted as the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (1982), which purports to ban discrimination on the basis of age by recipients of federal financial assistance, the House and Senate conferees expressed the view that age was more justifiable than race as a basis for distinctions. H.R. CONF. REP. NO. 670, 94th Cong., 1st Sess. 56 (1975), *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1290, 1323. As to both the Equal Credit Opportunity Act and the Age Discrimination Act, see 1 EGLIT, *supra* note 4, at ch. 5, 6, and 12; *see also* EGLIT, *The Age Discrimination Act of 1975, as Amended: Genesis and Selected Problem Areas,* 57 Chi.-Kent L. Rev. 915 (1981).

Even given the foregoing, it need not follow that ADEA plaintiffs should receive less protection than victims of racism and sexism. *See infra* note 257.

liquidated damages awards,[237] the availability of jury trials,[238] and the ability to file suit without awaiting administrative permission[239]—is explicitly prescribed. The RFOA exception is a far more ambiguous, and therefore unconvincing, basis for inferring Congressional intent to extend to age discrimination claimants considerably greater protection than is afforded to grievants under Title VII. In sum, notwithstanding the analogical press of *Gunther*, policy concerns counsel against allowing the EPA analogy to inflate the rigor of the RFOA exception so greatly as to consume *Burdine*. The optimum treatment of the RFOA defense is therefore one which allows for *Burdine's* continued viability.

---

[237] ADEA § 7(b), 29 U.S.C. § 626(b), incorporates the remedies embodied in § 16 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216 (1982). Section 16(b) of the FLSA provides that an employer shall be liable for unpaid minimum wages or unpaid overtime compensation "and an additional equal amount as liquidated damages." Such damages may only be recovered if the defendant willfully violated the ADEA. 29 U.S.C. § 626(b) (1982). In Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613 (1985), the Court resolved—albeit not without leaving some residuary ambiguity—the disarray among the lower courts as to the definition of willfulness. *See generally* 3 EGLIT, *supra* note 4, §§ 18.14-18.18.

[238] The availability of jury trials for private litigants in ADEA cases is established by § 7(c)(2), 29 U.S.C. § 626(c)(2) (1982). Most courts have held that this jury trial guarantee extends the right to a jury trial to the EEOC, as well. *See, e.g.*, EEOC v. Chrysler Corp., 759 F.2d 1523, 1524 (11th Cir. 1985); EEOC v. Ford Motor Co., 732 F.2d 120, 121 (10th Cir. 1984); EEOC v. Brown & Root, Inc., 725 F.2d 348, 349-50 (5th Cir. 1984); EEOC v. Corry Jamestown Corp., 719 F.2d 1219, 1224-25 (3d Cir. 1983). Even before the enactment of § 7(c)(2), which was added to the ADEA in 1978, the Supreme Court had held that jury trials were available to private litigants in ADEA suits. *Lorillard v. Pons*, 434 U.S. 575, 585 (1978).

The general wisdom is that most juries are particularly sympathetic to ADEA plaintiffs, and so the jury trial guarantee is of special advantage to plaintiffs. Given this perception, the business community not surprisingly has supported repeal of the ADEA jury trial provision. *See, e.g., Prohibition of Mandatory Retirement and Employment Rights Act of 1982, Hearing before the Subcomm. on Labor, Comm. on Labor and Human Resources, U.S. Senate*, 97th Cong., 2d Sess. 48, 57-58 (1982) (statement of Robert T. Thompson, Regional Vice Chairman, Board of Directors, U.S. Chamber of Commerce). Actually, there has been very little data gathered regarding jury sympathies in ADEA cases. *See* McConnell, *Age Discrimination in Employment*, in POLICY ISSUES IN WORK AND RETIREMENT 186-87 (H. Parnes ed. 1983). Recently, the results of an empirical study were published, and the conclusion of the researcher was that the jury trial system does not favor plaintiffs. Fosberg, *A Comparison of Jury Trials & Bench Trials in Age Discrimination Cases*, 5 BIFOCAL 4 (Fall 1984) (published by the ABA Commission on Legal Problems of the Elderly and the ABA Young Lawyers Division's Committee on Delivery of Legal Services to the Elderly).

[239] An ADEA plaintiff may file suit 61 days after filing an administrative complaint either with the EEOC or a state anti-discrimination agency. ADEA § 7(d), 29 U.S.C. § 626(d) (1982). A Title VII complainant cannot sue until she receives what is

1. Postponing Application of the RFOA Defense

In *Criswell v. Western Airlines, Inc.*,[240] one of the few rulings reading the RFOA exception as an affirmative defense, the court took the position that affirmative defenses, including the RFOA provision, do not come into play at all at the defendant's rebuttal stage. Rather, the defense is unavailable until the prima facie case/rebuttal/proof of pretext chain of litigation has transpired and the plaintiff has succeeded in establishing discrimination on the defendant's part. The benefit of this construction is to save *Burdine*, since by distancing *Burdine* from the RFOA affirmative defense, the two never directly clash.[241]

Benefit for *Burdine's* viability notwithstanding, the *Criswell* court's analysis does not tolerate careful scrutiny either in doctrinal or practical terms. The court erred in maintaining that an affirmative defense comes into play only after the prima facie case/rebuttal/proof of pretext route has been traversed. Establishment by the plaintiff of a prima facie case based on circumstantial evidence of discriminatory treatment triggers a presumption that the defendant discriminated,[242] and nothing precludes a defendant from immediately invoking a defense in response to that presumption. The defendant, for example, may point to the BFOQ or the bona fide benefit plan

---

commonly known as a 'right to sue' letter from the EEOC. Sheehan v. Purolator Courier Corp., 676 F.2d 877 (2d Cir. 1982).

[240] 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 105 S. Ct. 2743 (1985).

[241] The EEOC perhaps subscribes to the same view. The EEOC first proposed interpretations of the RFOA exception in November of 1979, following the transfer of enforcement authority to it from the Department of Labor. Proposed Interpretations; Age Discrimination in Employment Act, 44 FED. REG. 68858-62 (1979). This proposal elicited numerous comments from the public, which led to revised interpretations in the final issuance, which is what remains on the books today.

The agency in its initial proposal had in complicated language taken the position that the RFOA defense would not be available at all if "age discrimination comprises any element of the employment decision adverse to the applicant or employee, either expressly or by implication." 29 C.F.R. § 1625.7(c) (proposed). The final interpretation says the same, albeit in different language. 29 C.F.R. § 1625.7(c) (1985). In explaining its modification of the language, the EEOC asserted in the commentary accompanying the issuance of the final interpretations:

> [W]here an employment practice uses age as a limiting criterion, the defense that the practice is justified by the section 4(f)(1) exception . . . is unavailable. *See* Marshall v. Goodyear Tire & Rubber Co., 19 EPD 8973 (W.D. Tenn. 1979). Considerable confusion was generated on [sic] the proposed section from the apparent misunderstanding that, as originally written, it applied to the employer's burden of rebutting the *prima facie* case. That was incorrect. The section refers to the use of the Section 4(f)(1) defense of "a reasonable factor other than age . . . ."

46 Fed. Reg. 47725 (1981). Arguably, this exegesis echoes *Criswell*.

[242] United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983). *See also supra* text accompanying note 53.

provisions, arguing its conduct was justifiable under one of these defenses. The defendant need not postpone this approach until after it offers a *Burdine*-based rebuttal, with the plaintiff then attempting to prove the rebuttal to be pretextual.[243]

Abstract legal analysis aside, *Criswell* fails in practical terms. This is made clear by tracking the typical case. Most commonly, the defendant will seek to justify its challenged decision by pointing to some generic factor other than age as the basis for that decision. Thus, for example, in a discharge case the employer usually contends that the plaintiff was terminated because of poor performance, and not because of age. While in theory the employer in a circumstantial evidence discriminatory treatment case bears only a burden of production regarding this explanation, as a matter of practical reality the employer likely will endeavor to establish this justification as persuasively as it can.[244] In other words, the intelligent defendant is not going to engage in some pallid exercise, putting forth a half-hearted presentation labeled 'articulation of legitimate, nondiscriminatory reason' and gambling that its evidence, while not as compelling as it might have been had more effort been exerted, nonetheless will be adequate to rebut the plaintiff's case. Rather, the defendant will do its best to persuade, even if as a matter of legal theory it need only produce.[245]

If the defendant fails because the plaintiff subsequently proves its response to be pretextual, the employer—following the logic of *Criswell*—then can assert its RFOA affirmative defense. Unfortunately for the employer, there almost certainly will be nothing to proffer, since the factor other than

---

[243] *See* Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198 (S.D. Ohio 1986) (illustrating that a statutory ADEA affirmative defense can be invoked in response to a prima facie disparate impact case without first having to prove a business necessity defense).

[244] The Court in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981), observed that "although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was unlawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation."

[245] One might conclude, then, that it really makes no difference, at a practical level, whether a defendant confronts a burden of persuasion or just a burden of production. Indeed, Dean McCormick wrote:

> In the writer's view [the burden of producing evidence] has far more influence upon the final outcome of cases than does the burden of persuasion, which has become very largely a matter of the technique of the wording of instructions to juries. This wording may be chosen in the particular case as a handle for reversal, but will seldom have been a factor in the jury's decision. § 307, at 634 n.2.

McCORMICK ON EVIDENCE § 336, at 946 n.6 (E. Cleary 3d ed. 1984) (quoting from the book's first edition). The author-editor of the third edition disagrees, concluding that—as a legal matter—the distinction between the two burdens is very important and thus should be recognized and maintained. *Id.* at 947-48.

age on which it staked its fate already would have been asserted and found wanting. It is inconceivable that the employer will have something new, and more persuasive, to put forth at this affirmative defense stage; if there had been a winning explanation, it would have been asserted already. Likewise, it is inconceivable that an employer failing to prevail when all it had to manage was a burden of production subsequently will be able to succeed by adducing the same evidence at a juncture in the case at which it now will bear the much more onerous burden of persuasion; indeed, the *Criswell* court itself acknowledged this.[246] It is silly to suppose, then, that as a practical matter there is anything left to the RFOA defense if it is read as only applying after the path set out by the *McDonnell Douglas-Burdine* paradigm has been traversed unsuccessfully by the defendant. Conversely, if a defendant at the rebuttal stage produces an explanation which the plaintiff cannot prove to be pretextual, no occasion would even arise for the defendant to assert an affirmative RFOA defense. Here, too, no role would be left for the RFOA defense.

In sum, while the imperative for preserving *Burdine* persists, the mechanism set forth in *Criswell*—deferring the availability of the RFOA defense—is not a supportable means for meeting that imperative. The *Burdine* problem thus survives *Criswell* and still calls for the solution proposed below.

---

[246] *Criswell* involved an airline policy which precluded pilots who neared age 60 from downbidding to flight engineer positions. The plaintiff pilots, who had attained that age, wanted to downbid because of another policy—set by federal regulation and not challenged by them—which required them to cease working as pilots at that age. The airline contended that the ban on downbidding was required by the terms of its collective bargaining agreement with the pilots' union, and that this agreement, along with an administrative determination interpreting it, constituted a reasonable factor other than age justifying the refusal to allow the plaintiffs to downbid.

The plaintiffs prevailed in the trial court. On appeal the defendant unsuccessfully argued that the trial court's instruction regarding pretext was erroneous. The appellate court agreed, but further concluded that the error was harmless. It was in the context of discussing the pretext issue that the court dealt with the RFOA affirmative defense question.

The court first reasoned that "[o]nly when discrimination has been established does an affirmative defense come into play." 709 F.2d at 554. The court observed that the reasonable nondiscriminatory reason which the airline asserted to satisfy its *Burdine* burden was that downbidding generally was prohibited, by virtue of the agreement with the pilots. Then, to show that this explanation was pretextual, the plaintiffs introduced evidence that hundreds of downbids by younger captains had been permitted. Only if the jury concluded that the airline's explanation indeed was pretextual would the RFOA affirmative defense be reached. That defense would consist of the airline pointing to the agreement with the pilots, along with the administrative determination construing that agreement. However, as the court concluded, "[s]ince the same contentions, when offered as a legitimate nondiscriminatory reason, would have been rejected as pretextual in the case-in-chief, it is inconceivable that the jury would have accepted the same information when offered as an affirmative defense." *Id.* at 555.

2. Mitigating the Impact of the Equal Pay Act

A primary obstacle to *Burdine's* viability is the analogical pressure exerted by the Equal Pay Act's "factor other than sex" affirmative defense, amplified by the treatment of that defense in *County of Washington v. Gunther*. If this pressure were to be palliated, *Burdine's* prospects should improve. There is some basis for such relief pertaining.

In the one area under Title VII where *Burdine* does not come into play once an individual discriminatory treatment case grounded on circumstantial evidence is established—gender-based equal work-unequal pay situations—there is a specific statute constituting an explicit expression of Congressional concern about an identified, relatively narrow evil: unequal pay for equal work. The "factor other than sex" defense is a part of that narrow statute and so, no matter how broadly this defense is read, it does not extend across a broad range of gender-based discriminatory actions and decisions.

In contrast, the ADEA's RFOA exception applies to a wide range of employment issues, from differentials in salary to mandatory retirement, age-based promotion decisions, refusals to hire, and more. Thus, although there is a symmetry between the literal language of the EPA and the ADEA provisions,[247] the statutory settings in which these provisions repose are significantly different. This contextual disparity affords a respectable basis for reading the two provisions differently, given the great substantive disparity between the relatively minimal impact of the EPA defense and the very broad reach of the ADEA's RFOA exception.

3. Synopsis

Both practical and policy reasons join in pressing for preserving *Burdine's* viability in the ADEA setting. So many courts by now have embraced *Burdine* that only a particularly compelling reason could justify the decision's rejection now. Characterizing the RFOA exception as an affirmative defense—while generally acceptable and proper—does not seem to be a matter of sufficiently urgent concern to support that rejection. Moreover, from a policy perspective the demise of *Burdine* in the ADEA cases would

---

[247] The court in EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734 (E.D. Pa. 1985), rejected the defendant's effort to rely on *Gunther* as a basis for reading the RFOA exception as constituting a bar to the application of disparate impact analysis under the ADEA. One of its bases for rejecting the defendant's argument was the minor difference in language between the EPA and ADEA exceptions. The EPA provision excludes all pay differentiations which are based on "any" other factor other than sex, whereas the ADEA provision addresses differentiations based on "reasonable" factors other than age. Acknowledging that this difference is a small one, the court nonetheless found in it warrant for concluding that the "language in the ADEA requires that a court evaluate the proffered explanations for an action to determine whether the non-age bases are 'reasonable.' " The EPA "on the other hand, involves an absolute defense." *Id.* at 740.

give to age discrimination plaintiffs an advantage which neither their plight nor congressional intent warrants. The minimizing of *Gunther*—which constitutes the most pressing analytical basis for rejecting *Burdine* here—still leaves ripe for resolution the problem with which the *Criswell* court unsuccessfully coped: the meshing of *Burdine* and the RFOA exception. Before that resolution is posed, however, a related problem merits attention: the impact of the RFOA provision on disparate impact case law.

C. *Disparate Impact Analysis*

As discussed, the RFOA exception, when construed as an affirmative defense, generates conflict with the ADEA case law embracing *Burdine*. In addition, the exception—particularly when construed as an affirmative defense—arguably places significant stress on the decisions whereby disparate impact analysis, initially devised in the Title VII context, has been infused into the ADEA. A review of the disparate impact approach and its relation to the ADEA is necessary to understand the significance of the RFOA exception's role.

The legislative history of the ADEA indicates an awareness that some ostensibly age-neutral policies and practices could have disproportionately adverse impacts upon older workers.[248] More weighty, no doubt, has been the analogy of Title VII. Given the oft-noted similarity of Title VII and the ADEA,[249] a number of courts have either held or at least assumed that disparate impact analysis is applicable in ADEA cases.[250] None of them seemingly has been troubled by any doubts regarding the propriety of absorbing Title VII-derived doctrine into the ADEA context.

Notwithstanding this judicial consensus, objections have been raised about infusing *Griggs* and its progeny into the age statute. Justice Rehnquist, dissenting from the denial of certiorari in *Markham v. Geller*,[251] looked to the RFOA exception as the basis for concluding that disparate impact doctrine indeed was inapplicable in the ADEA setting. The Court of Appeals for the Second Circuit[252] had struck down an ostensibly age-neutral hiring

---

[248] *See supra* text accompanying note 117. Of course, in 1967, when the Act was debated and adopted, there was no direct mention of discriminatory impact analysis; there hardly could have been, inasmuch as the seminal case, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which first enunciated such analysis in the context of construing Title VII of the Civil Rights Act of 1964, was still four years in the offing. Since 1967 the ADEA has been amended on several occasions; the legislative history regarding these amendments, which have had nothing to do with disparate impact analysis and application, reveals neither direct approbation nor disapprobation of *Griggs'* infusion into the ADEA.

[249] *See supra* note 44 and accompanying text.

[250] *See supra* notes 100-01.

[251] 451 U.S. 945 (1981).

[252] Markham v. Geller, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

policy which had a disproportionately adverse impact upon older job applicants. Justice Rehnquist condemned the lower court ruling, apparently because of its endorsement of disparate impact analysis. He deemed this approach to establishing liability incompatible with the intent of Congress, which he contended had manifested its disavowal of such analysis by including the RFOA exception within the ADEA.[253]

Justice Rehnquist's has been a solitary judicial voice thus far.[254] However, some commentators likewise have disputed the relevance of disparate impact analysis, in whole or in part.[255] Professor Blumrosen has reviewed the ADEA's legislative history and has concluded that Congress never intended disparate impact analysis to apply in the ADEA context.[256] While he does not deem this history dispositive, he does identify several policy bases which buttress his view that disparate impact analysis ought to be spurned in the age arena. First, he apparently perceives ageism as being less pernicious than racism and sexism.[257] He also sees disparate impact analysis

---

[253] 451 U.S. at 948.

[254] The Court of Appeals also had looked to the RFOA exception, but obviously it did not read it as precluding application of disparate impact analysis. Indeed, it found the administrative interpretation of the RFOA provision to be useful. The plaintiff alleged that she had been denied a teaching position by the defendants because of a policy that teachers be recruited at salary levels below the sixth step of the salary schedule—a level reached by teachers who had more than five years experience. The court held, as a matter of law, that the plaintiff had established a prima facie case of disparate impact by showing that the rule disqualified 92.6% of teachers over the age of 40, while disqualifying only 62% of teachers under 40. The court rejected the school board's argument that the policy actually was justifiable as a cost-cutting measure; in so doing the court relied upon the then-extant Department of Labor interpretation of the RFOA provision, which provided: " 'a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies.' " 635 F.2d at 1034 (quoting 29 C.F.R. § 860.103(h) (1979) (rescinded)). The EEOC issued a comparable interpretation following its assumption of enforcement of the ADEA. 29 C.F.R. § 1625.7(f) (1985); *see supra* note 132.

In EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734 (E.D. Pa. 1985), the court rejected the argument that the RFOA exception—which it likened to an affirmative defense—justified precluding the application of disparate impact analysis.

[255] *See supra* note 99.

[256] Blumrosen, *supra* note 10, at 73-100. *But see* EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734 (E.D. Pa. 1985).

[257] Blumrosen, *supra* note 10, at 103-04:

> Race, national origin and sex discrimination have ancient roots in slavery and cultural subordination. The status of minorities and women is the result of the cumulative burdens which history has imposed upon the present generation. The lifting of those burdens, insofar as this can be accomplished by law, has been the objective of the Civil Rights Acts including Title VII. The "effect" or "impact" test is an important handmaiden in pursuit of this policy . . . .

as having the potential for striking down policies and practices which, while harmful to some older workers, are beneficial to others.[258] Finally, Professor

---

Age discrimination is different in historical roots. . . . There is no long history of subordination of aged persons . . . . [B]ecause membership in the group is "transient," recognition of the rights of one "aged person" may not benefit other members of the group as is the case in race or sex discrimination . . . . The fact that membership in the "over 40" class is determined not by birth, but by living, is the underlying phenomena [sic] which should infuse the interpretation of the statute.

"Age discrimination" in employment is oppressive. The stereotypes of the abilities of persons over 40 should be shattered. All this can be done within a conventional definition of age discrimination, which focuses on the abolition of intentionally imposed age barriers based on assumptions of incapacity.

Professor Blumrosen, perhaps because of the constraints of space, hardly gives due recognition to the nature of ageism. *See generally* Eglit, *Of Age and the Constitution,* 57 CHI.-KENT L. REV. 859 (1981) (exploring the treatment by the courts of age distinctions under the Constitution). In any event, even accepting for the moment his view that race and sex discrimination are more pernicious evils (although it should be noted that the addition of sex to the list of proscribed bases for discrimination was a last-minute legislative ploy apparently offered by opponents of the legislation's attack on race discrimination in order to make Title VII appear ridiculous, 1 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 3.30 (1985)), it need not follow that a plaintiff under the ADEA should receive lesser protection by way of legal doctrine than does a plaintiff under Title VII. After all, the Supreme Court does not accept the view that race and sex discrimination can be equated in terms of invidiousness for purposes of constitutional analysis, *compare* Loving v. Virginia, 388 U.S. 1 (1967), *with* Craig v. Boren, 429 U.S. 190 (1976), and yet under Title VII the two are equated for purposes of application of discriminatory impact analysis. *See* Dothard v. Rawlinson, 433 U.S. 321, 327 (1977) (sex discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (race discrimination). In brief, not all evils need be on the same plane in order to muster equally vigorous statutory assaults.

[258] Blumrosen, *supra* note 10, at 104-05:

In many situations, a principle or policy which has adverse effect on one aged person or group will have a beneficial effect on other older workers. This is true of seniority, promotion within and "step" increases in wages. Thus the "adverse impact" test is likely to have a "two sided" effect on older workers . . . . A requirement of termination at 60 benefits those below that age, in opening promotional opportunity; a maximum age on hiring protects incumbents against outside competition from the "over age group," the very group ostensibly protected by the ADEA.

As to this double-edged effect on older workers, Professor Blumrosen points out that Congress struck a balance in favor of workers between ages 40 and 70. But, he argues, race and sex are different:

Congress struck the balance . . . in favor of improving employment opportunities for minorities and women. In pursuit of this policy, the "adverse impact" test is a useful tool. The "adverse impact" test does not have a "two sided" effect in race or sex cases because the practices it condemns rarely benefit minorities or women.

Blumrosen sees a conflict between Title VII's focus on protecting and enhancing employment opportunities for minorities and women, and the ADEA's focus on protecting older workers, who often will be white males.[259]

Professor Player also has argued that Title VII disparate impact case law is inapposite, although he does accept the notion that there is room for imposing liability on the basis of ostensibly age-neutral policies and practice.[260]

Id. at 105.

Professor Blumrosen is, as a general matter, obviously correct in observing that often under the ADEA one person possessed of a certain amount of the critical characteristic—e.g., age—will benefit if he prevails under the Act, while another person possessed of a different amount of that characteristic will 'lose.' In other words, the 55-year-old who successfully fights his termination typically will be awarded reinstatement, *see* 2 EGLIT, *supra* note 4, § 18.24, and so will occupy a position for which someone who can also be characterized in relevant age terms—*e.g.*, a 45-year-old or a 41-year-old—will now have to wait longer. This facet of age discrimination case law is not peculiarly the function or result of disparate impact analysis, however. Rather, this scenario can be played out in many discriminatory treatment cases, as well. Thus, Professor Blumrosen's real complaint may be with protecting victims of age discrimination generally (although he certainly disavows such a posture); his analysis does not explain why disparate impact analysis, in particular, should be foreclosed under the age discrimination statute.

[259] "The more vacancies, the greater likelihood that affirmative action will benefit minorities and women coming into the work force. Restrictions on termination of senior employees, beyond those necessary to avoid the rigid age limits and stereotyped judgments, will inevitably reduce the scope for affirmative action for minorities and women." Blumrosen, *supra* note 10, at 105. Whatever the merits of this perception, the argument amounts to nothing more than a normative choice as to whose rights are of greater value. That choice clearly is one for the Congress to make. Until Congress does so, a preference for minorities and women should not be read sub silentio into the ADEA by virtue of doctrinal manipulation.

[260] Player, *supra* note 208. Professor Player infers from the fact that Title VII itself was not amended to include age in its list of proscribed characteristics for employment decisionmaking that "Congress desired that the two statutes be given appropriately differing and independent interpretations." *Id.* at 1271. He particularly singles out as a key difference between the two statutes the presence in the ADEA of the RFOA exception, and the absence of a comparable provision in Title VII. He notes that the RFOA exception authorizes the use of "reasonable" factors other than age, and he reasons that this cuts against imposition of a "business necessity" showing by defendants. *Id.* at 1271-72. Despite Professor Player's observation—an obviously unexceptionable one—that Title VII and the ADEA are two different statutes, it does not follow that Congress intended to extend to age discrimination claimants lesser protection than is accorded gender discrimination claimants under Title VII. Certainly the legislative history supports no such conclusion. Apparently, the ADEA was enacted as a separate statute, to be administered by the Department of Labor, because of a belief that the EEOC was already overburdened with administering Title VII. *See Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcomm. on Labor and Public Welfare, Comm. on Labor and Public Welfare,*

Both he and Justice Rehnquist rely upon the RFOA exception as a basis, perhaps *the* basis in Justice Rehnquist's instance, for contesting the infusion of Title VII-derived disparate impact analysis into the ADEA.[261] Almost certainly, Justice Rehnquist did not perceive the exception as constituting an affirmative defense, although in the course of his brief dissent he neither rejected nor accepted such a characterization. His use of the exception exposes its potential for undermining existing case law if read as not constituting an affirmative defense. That reading assumedly has been suitably refuted in the foregoing discussion. Professor Player, in contrast, does construe the RFOA provision as an affirmative defense.[262] Ironically, however, his construction lubricates the routes first to attacking Title VII-based disparate impact doctrine, and then to supporting a weaker, less plaintiff-protective test to be used in ADEA disparate impact cases.

U.S. Senate, 90th Cong., 1st Sess. 29 (1967) (remarks of Sen. Smathers); *see also* 113 CONG. REC. 31,254 (1967) (remarks of Sen. Javits, co-sponsor of the Senate version of the bill); Note, *The Age Discrimination in Employment Act of 1967,* 90 HARV. L. REV. 380, 381 (1976) (noting Congressional concern that the EEOC was overburdened by Title VII complaints).

Professor Player also reasons that Title VII-derived disparate impact analysis often involves complex, technical statistics and data regarding validation studies. "Submitting this often conflicting and exceedingly technical data to a jury with correct instructions could be quite difficult." Player, *supra* note 208, at 1272. In contrast, "a standard of 'reasonableness' could be applied by a jury." *Id.* However, before one ought to accept the argument of jury ineptitude, there should be at the very least a respectable body of data demonstrating juries' inability to deal with statistics. Otherwise, plaintiffs' rights—vindicated through the added protection of disparate impact analysis—will be diluted without adequate substantiation.

Professor Player further reasons that since disparate impact analysis deals with class-wide practices, and because the ADEA precludes true class actions, "challenging a class-wide practice with non-class action suits would, at best, be awkward and repetitive." *Id.* at 1273. *But see supra* notes 79-80 and accompanying text (regarding representative actions in the ADEA context). Moreover, Professor Player does not sufficiently credit the fact that data regarding patterns and practices of an employer certainly can be relevant in an ADEA suit—or a Title VII suit— whether or not the plaintiff is maintaining a representative action. For example, statistical evidence may be used to establish a prima facie ADEA claim. *See, e.g.,* Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525, 1529 (11th Cir. 1985); Kelly v. American Standard, Inc., 640 F.2d 974, 980 n.9 (9th Cir. 1981); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 70 (S.D.N.Y. 1981).

[261] Likewise, the RFOA exception is looked to as partial justification for rejecting disparate impact analysis in Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA,* 10 EMPL. REL. L.J. 437, 451-52 (Winter 1984-85); Note, *Age Discrimination and the Disparate Impact Doctrine,* 34 STAN. L. REV. 837 (1982).

[262] Professor Player concludes that the RFOA exception should be treated as a defense based upon its being "structurally so arranged in the statute. . . ." Player, *supra* note 208, at 1279. (He does not, however, attempt to explain the case law holding to the contrary).

County of Washington v. Gunther[263] plays a part in Professor Player's scenario. The *Gunther* Court rejected the defendant's argument that a general "factor other than sex" defense was implicit in Title VII's proscription of gender-based discrimination. In justifying this rejection the Court strongly implied that it perceived the EPA defense as endangering extant disparate impact doctrine: apparently, the defense would afford a Title VII defendant an easier vehicle for avoiding liability than does the business necessity or job-relatedness defense which ordinarily comes into play once a prima facie case of disparate impact is proven.[264] Accordingly, the Court confined the scope of the EPA defense to compensation cases in which the plaintiff proves the existence of unequal pay for equal work.

While the *Gunther* Court coyly refused to explain how the "factor other than sex" defense should mesh with Title VII,[265] lower courts have since asserted explicitly that indeed the defense cannot be equated with the business necessity or job-relatedness defense.[266] A number of other decisions confirm that, while the nature of the burden imposed by the EPA provision is somewhat murky, it is of a lesser order than that applied under usual disparate impact analysis.[267] Given that the RFOA exception likely was modeled after the EPA defense, symmetry of analysis leads Professor

---

[263] 452 U.S. 161 (1981).

[264] *See supra* notes 92-93 and accompanying text.

[265] *See supra* text accompanying note 227.

[266] Maxwell v. City of Tucson, 35 Fair Empl. Prac. Cas. (BNA) 355, 358-59 (9th Cir. 1984); Goodrich v. International Bhd. of Elec. Workers, AFL-CIO, 40 Fair Empl. Prac. Cas. (BNA) 303 (D.D.C. 1985).

[267] Some courts have gone so far as to equate the EPA defendant's burden with that of a Title VII defendant's burden under *Burdine,* even though the EPA defense clearly is just that—a defense. *See supra* cases cited in note 228 after *contra* signal; *see also supra* note 232. Most courts have not gone so far in espousing a weak burden under the EPA provision. Several have taken the position that the defendant that invokes the "factor other than sex" defense has a "heavy burden." EEOC v. Central Kansas Medical Center, 705 F.2d 1270, 1272 (10th Cir. 1983); Bence v. Detroit Health Corp., 712 F.2d 1024, 1029 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984); Odomes v. Nucare, Inc., 653 F.2d 246, 251 (6th Cir. 1981); EEOC v. Whitin Mach. Works, 635 F.2d 1095, 1098 (4th Cir. 1980).

One court has interpreted the defense as being limited just to factors traditionally included in job evaluation schemes. Schulte v. Wilson Indus., Inc., 547 F. Supp. 324, 339 n. 16 (S.D. Tex. 1982). At least two courts have read the exception more broadly, construing it as encompassing any non-sexual factor pertinent to the employer's business judgment as to how to run its business. Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982); Hodgson v. Robert Hall Clothes, 473 F.2d 589, 594-96 (3d Cir.), *cert. denied,* 414 U.S. 866 (1973). One court has noted the latter position, but abjured either endorsing or rejecting it. *Bence, supra,* at 1029-1031. In *Kouba* the court ruled that there must be an "acceptable business reason" for the factor at issue, and that the employer must use the factor "reasonably in light of the employer's stated purpose as well as its other practices." 691 F.2d at 876-77.

Player to conclude that the ADEA provision undermines Title VII-derived disparate impact analysis in the age context and imposes, instead, a lesser burden on defendants.[268]

Earlier, in discussing *Gunther's* relationship to *Burdine,* the argument was made that the pressure of *Gunther*, while not to be ignored, nonetheless could be relieved. The question arises here, too, as to whether *Gunther's* analogical weight is determinative, or whether there is still room left for the business necessity defense aspect of traditional disparate impact case law. Again, the *Gunther* analogy is not dispositive.

The EPA's "factor other than sex" defense is set forth within the narrow confines of a statute whose reach is quite limited. In contrast, the ADEA's RFOA exception reaches across a broad spectrum of employment decisions and actions which may be challenged on the ground that, while neutral in appearance, they have a disproportionately adverse impact on older workers. Absent some clear assertion on Congress' part that it intended the Draconian consequence of disparate impact analysis being precluded, or at best only being applicable in diluted form, the EPA analogy should not be allowed to swallow the ADEA case law. An analogy, after all, is no more than that; it is not binding precedent.

Moreover, there are positive bases for deeming Title VII-derived disparate impact doctrine to be pertinent to the ADEA. Section 4(a)[269] of the

---

[268] *Player, supra* note 208, at 1280-83. Professor Player views the RFOA defense as imposing upon the defendant a burden of persuasion, but as a substantive matter the burden he envisions entails a lesser task than that of proving business necessity:

> The term "reasonable factor" may not be easy to define. It would seem that such a term demands less of a showing than would be required to prove "business necessity." . . . First, "necessity" suggests a certain balancing that reaches a level of "compelling." A factor could be deemed reasonable under a less demanding standard. Nonetheless, a "reasonable factor other than age" has more of a substantive content than simple "legitimacy." Thus reasonableness would seem to require a "middle tier" showing somewhere between these two extremes. It presupposes a form of business rationality, a demonstration of a factual relationship between the "factor" and bona fide business purposes. Thus, upon a showing of substantial adverse impact of a particular factor, the defendant in an ADEA case must prove more than that the reason exists and is "rational." Defendant's burden is to prove that the reason is age neutral and serves an identified business purpose. Defendant, however, should not be required to show that the weight of the reason reaches the level of being "compelling."
>
> The term "necessity" also presupposes the absence of alternative devices that would accomplish the business objective with less of a discriminatory effect. If a lesser discriminatory alternative is available, then the "factor" utilized could not be "necessary." . . . [But a] reason could still be reasonable, even in the presence of other, lesser discriminatory alternatives. The presence of lesser discriminatory devices might be some evidence of unreasonableness, or it might suggest that the use of the factor was pretextual, but a lesser discriminatory alternative does not, as a matter of law, require the rejection of an otherwise "reasonable factor other than age."

Id. at 1279-80 (footnotes omitted).

[269] 29 U.S.C. § 623(a) (1982).

ADEA sets forth language which is comparable to that contained in Title VII and upon which the *Griggs* Court relied in devising disparate impact doctrine:

> It shall be unlawful for an employer . . .
>
> (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 such individual's age.[270]

Even though the history of the Act does not establish that in 1967 Congress, by virtue of the highlighted language, intended to approve the not-yet-devised discriminatory impact test, the language in and of itself certainly supports, as *Griggs* confirmed, such a standard.[271] In addition, while early agency interpretations of the ADEA did not read Title VII-based disparate impact doctrine into the age discrimination statute,[272] the current interpretation espoused by the EEOC does so.[273] In fact, it is the RFOA exception to which the EEOC's interpretation looks as the basis for supporting the applicability of disparate impact analysis.[274] Similarly, the ADEA case law, even that not taking a position as to the proper characterization of the RFOA exception, reveals a judicial perception of harmony, rather than conflict, between the statutory provision and Title VII-derived disparate impact analysis.[275]

---

[270] *Id.* § 623(a)(2) (1982) (emphasis added).

[271] The history of Title VII also does not indicate Congress' intent that that statute's comparable provision should be read as supporting disparate impact analysis. That legislative silence was no bar to the *Griggs* Court's fashioning such analysis.

[272] In 1978 the Uniform Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607 (1985), were issued. These provide guidance regarding adverse impact analysis and the modes of validating selection criteria which have adverse impacts. The Guidelines expressly exclude from their reach ADEA claims. 29 C.F.R. § 1607.2(D) (1985). However, the EEOC, after taking over administrative and enforcement responsibility for the ADEA, issued its interpretation of the RFOA exception, and this specifically provides that adverse impact analysis does apply. 29 C.F.R. § 1625.7(d) (1985). Indeed, this interpretation specifically provides that "[t]ests which are asserted as 'reasonable factors other than age' will be scrutinized in accordance with the standards set forth" in § 1607 of the Uniform Guidelines. *Id.*

[273] 29 C.F.R. § 1625.7(d) (1985) provides:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than age," and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity . . . .

Such interpretations are deserving of particular, albeit not unblinking, deference. *See supra* text accompanying note 206.

[274] *Id.*

[275] Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983), involved a reorganization of the college at which the plaintiff was employed as a tenured

VII. The Solution: A Variable Affirmative Defense

A. *Recapitulation*

The foregoing discussion leads to several conclusions. First, the RFOA exception should be read, generally, as an affirmative defense. Second, the conflict which this construction creates with discriminatory treatment circumstantial evidence case law, which is based on *Texas Department of Community Affairs v. Burdine,* is a serious one. The consequent imperiling of *Burdine* is not averted satisfactorily by postponing the defense's applicability, as prescribed in the *Criswell* case. On the other hand, at least the analogical pressure of *County of Washington v. Gunther*—which addresses the "factor other than sex" defense contained in the Equal Pay Act and which seemingly buttresses the argument for barring *Burdine's* applicability—can be relieved on the basis of features distinguishing the ADEA's RFOA exception from the EPA's "factor other than sex" defense. Granted, distinguishing *Gunther* does not resurrect *Burdine*. But it at least prevents the conflict between *Burdine* and the RFOA affirmative defense from assuming a form even more resistant to resolution.

Insofar as disparate impact case law is concerned, a reading of the RFOA exception as not constituting an affirmative defense poses danger to that body of decision. Justice Rehnquist's dissent in *Markham v. Geller* is testament to that observation. Even a construction which does accord the exception the status of an affirmative defense can imperil the continuing viability of disparate impact case law, if the RFOA affirmative defense does not jibe with the impact decisions. It is the analogy afforded by the Equal Pay Act's "factor other than sex" defense, and the construction of that defense in

---

associate professor, whereby the college was transferred from a city educational system to the state college system. In lieu of retaining the plaintiff, who was over 40, the new management selected a non-tenured under-40 teacher. This decision was made pursuant to a plan specifically designed to allow for the retention of only a set number of tenured faculty and a set number of non-tenured faculty, with the intended result being a reduction in costs. The plaintiff's statistical expert testified that there was a positive significant correlation between age and salary, so that the use of salary would have an adverse impact on older faculty members.

The court, citing the EEOC and Department of Labor RFOA interpretations abjuring cost as a reasonable factor other than age, *see supra* note 132, rejected the defendant's cost justification. The court stated:

> [B]ecause of the close relationship between tenure and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.

Id. at 691; *see also supra* note 254 (discussing Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980)), *cert. denied,* 451 U.S. 945 (1981), and EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734 (E.D. Pa. 1985)).

Gunther, which provides the bases for erecting a diluted affirmative defense formulation. Here too, however, *Gunther's* analogical pressure can be relieved.

B. *The Solution*

If the RFOA exception is not construed as an affirmative defense, the dictates of the analysis detailed earlier are ill-served. More importantly, the exception, if read as imposing no more in any context than an easy burden of production on defendants, will continue to stand as a potential device for undermining non-RFOA decisions in which courts—either ignoring, or unaware of, the implications of the RFOA provision as construed in cases such as *Marshall v. Westinghouse Electric Corp.*[276]—have imposed on defendants a tougher burden of persuasion.

The solution is to read the RFOA exception as varying in its force depending upon the setting in which it comes into play. In the context of all but individual circumstantial evidence discriminatory treatment cases, the exception should be read as constituting an affirmative defense, with the burden of persuasion falling on the defendant. In the context of individual discriminatory treatment cases, the situation in which the *McDonnell Douglas-Burdine* paradigm applies, the RFOA exception can be deemed not to constitute an affirmative defense. Instead, it may be construed as simply tracking existing *McDonnell Douglas-Burdine*-generated case law. In brief, the exception in this setting need impose only a burden of production upon defendants.

Very simply, the RFOA exception is to be equated openly and avowedly with existing case law. This solution gives formal name to what in effect already has been occurring in practice. For, after all, when a defendant proffers the defense of business necessity in a disparate impact case, or the defense that the same decision would have been made even absent discriminatory animus in a systemic discriminatory treatment case, what the defendant is doing is offering as its excuse a factor other than age. Likewise, in an individual discriminatory treatment case the defendant responding to the prima facie case on substantive (instead of procedural) grounds invariably articulates some justification other than age as explanation for its action or decision. While the courts have failed to characterize these responses as exemplars of application of the RFOA exception, their silence does not dispute the reality of what is happening. If the courts finally begin to recognize and properly denominate what defendants are doing, the RFOA exception would receive the recognition and construction that its very existence on the face of the ADEA demands.

Admittedly, this bifurcated approach is convenient: it simply tracks existing law in large measure.[277] Thus, it arguably can be criticized as a structure

[276] 576 F.2d 588 (5th Cir. 1978). *See supra* notes 165-69.

[277] The case law is not left entirely untouched. Those few cases in which the courts

borne of an effort to conserve, rather than innovate. Conservation, however, should not be objectionable, at least so long as it explains existing law and does not pose intolerable conflicts with statutory language, legislative history, policy, and case law. Moreover, the particular nature of age discrimination justifies a bifurcated construction of the RFOA exception. To appreciate this latter point, it is useful to recall the ADEA's genesis and its basic focus.

1. The Solution's Rationale and Application

It was the earlier-discussed 1965 report of the Secretary of Labor, prepared pursuant to congressional mandate, that laid the groundwork for enactment of the ADEA.[278] A critical facet of that report was the characterization of age discrimination as fundamentally different from discrimination based on race. Racial bigotry, the Secretary explained, often is generated by hatred or fear. Ill will is a component of racism. In contrast, discrimination based on age is much less emotionally charged. Ageism typically is not grounded on the perpetrator's dislike of old people generally; rather, age discrimination in most instances is the product of ignorance—the expression of employers' ill-founded notions about the competency of older workers. Thus, the Secretary reported finding "substantial evidence of arbitrary practice . . . [reflecting] discrimination based on unsupported general assumptions about the effect of age on ability . . . ."[279] The arbitrary discrimination which the ADEA is designed to outlaw, therefore, is not discrimination based on malice, but rather on mistaken assumptions about the debilitating effect of age on the ability of older workers to do a job "*when there is in fact no basis for these assumptions.*"[280]

Not surprisingly, in light of this perception of ageism, the Secretary's report did not condemn all age-based practices; rather, it focused on *arbitrary* discrimination. In addressing discrimination at the hiring stage, the Secretary urged: "A clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age."[281] In calling for broadening educational concepts and institutions to meet the needs and opportunities of

---

have, without caveat, construed the RFOA exception as an affirmative defense—the chief of which is Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds,* 105 S. Ct. 2743 (1985)—can no longer be accepted in full measure. Likewise, the cases rejecting the notion that the RFOA provision ever constitutes an affirmative defense are also debunked.

[278] *The Older American Worker: Age Discrimination in Employment* (1965), *supra* note 18.

[279] *Id.* at 5.

[280] *Id.* at 2.

[281] *Id.*

older age, the Secretary again stressed focusing on individualized treatment of people rather than utilizing generalized treatment turning on the matter of chronology alone: "There has been too narrow an emphasis on 'work,' too little recognition of the broader concept of 'function'—and the difference gets clearer when an individual's time for work is running out but his capacity, and need, to function continue."[282] In brief, "[t]o the extent that arbitrary discrimination occurs, it can and should be stopped."[283] Not suprisingly, given the significant role the Labor Department played in the development of the ADEA, the statute echoes the foregoing focus on arbitrary age discrimination.[284]

When an employer possibly relies on outmoded or insupportable conceptions about the capacities of older workers generally, the risk of stereotypical thinking—the foundation for arbitrary policies, practices, and treatment—is at its height. Such arbitrariness is the evil which the ADEA is designed to eradicate. It is only sensible to reason that the Act's prohibitions should be applied most vigorously, and its exceptions read most narrowly, when the potential for arbitrariness is greatest. As the risk of arbitrary employment decisions and actions subsides, the need for trenchant application of the statute likewise abates.

This framework can be fleshed out in more specific terms. The clearest situation calling for rigorous scrutiny is that in which an age differentiation is unambiguously and overtly utilized. Here, the ADEA's proscriptions are unquestionably directly implicated; accordingly, the need for leeway for employers, labor organizations, and employment agencies is minimal. The EEOC's position is that in such a circumstance the RFOA exception is completely unavailable to the defendant,[285] and some courts have agreed.[286] On one level, the agency's position certainly makes sense. The very language of the exception—reasonable factors *other than age*—argues against overtly age-reliant policies being susceptible to preservation through invocation of this provision. Not all case law appears to take such an unbending stand, however.[287] While this flexibility likely is meritorious,[288] certainly

---

[282] *Id.* at 24.

[283] *Id.* at 21.

[284] *See supra* note 32.

[285] 29 C.F.R. § 1625.7(c) (1985) ("When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.").

[286] *See, e.g.*, EEOC v. City of New Castle, 32 Fair Empl. Prac. Cas. (BNA) 1409 (W.D. Pa. 1983), *aff'd mem.*, 740 F.2d 956 (3d Cir. 1984); Popko v. City of Clairton, 570 F. Supp. 446 (W.D. Pa. 1983); EEOC v. County of Allegheny, 519 F. Supp. 1328 (E.D. Pa. 1981), *aff'd*, 705 F.2d 679 (3d Cir. 1983); Marshall v. Goodyear Tire & Rubber Co., 22 Fair Empl. Prac. Cas. (BNA) 775 (W.D. Tenn. 1979).

[287] In Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 105 S. Ct 2743 (1985), the Court viewed the RFOA defense as pertinent (although not ultimately persuasive) to a policy overtly providing that pilots

anything short of imposition on the defendant of a burden of persuasion would fail to take into account the seriousness of the employer's apparent wrongdoing. Construing the RFOA as an affirmative defense which imposes upon a defendant a strenuous burden of proof comports with this stance. Indeed, this posture meshes with existing case law involving the 'same decision' exculpatory justification.[289]

The fact that an employer does not overtly rely upon age as a basis for decisionmaking does not necessarily diminish the opportunity for inflicting harm. Quite the contrary is true, given the special nature of ageism. Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent.[290] Age discrimination, the abusive use of age distinctions, typically results from employers' ignorance about older workers, rather than active dislike of them. Because of this relatively innocuous nature of ageism, the likelihood is considerable that employers may adopt facially neutral policies without recognizing or caring that these policies may have a disparate impact upon older workers. The discriminatory impact approach for establishing liability, created in a Title VII setting by the *Griggs*

---

who reached the age of 60 were barred from downbidding to flight engineer positions. The court made no mention of the EEOC interpretation, which presumably would have foreclosed the RFOA defense, and the court's openness to the defense seems on balance appropriate. While it may be unlikely that a defendant which overtly relies upon age as a basis for differentiating between employees will be able to succeed with a RFOA defense, there appears to be no pressing need to foreclose any attempts to do so.

[288] The EEOC's position perhaps is too rigid, or not broad enough, to take account of situations where there is no overt policy, but there is some direct evidence of age discrimination: a supervisor who stated that he was going to 'get rid of' everyone over 55 years of age; or a memorandum from the president urging the personnel director to clear out 'over the hill' employees and bring in 'new, young blood.' In these situations, the risks of arbitrary ageism certainly are great. Yet, at the same time, there conceivably might be a reasonable factor other than age which could be put forth by an employer to establish that the same decision would have been made even had the plaintiff's age not been considered. In such a setting, the RFOA defense may have some relevance.

[289] *See supra* notes 89-91 and accompanying text.

[290] A classic example of the unreflective ways in which age distinctions are injected into our social and legal fabric is provided by the initial choice of age 65 as the critical chronological benchmark signifying eligibility for benefits under the Social Security Act of 1935. As reported by one of the Act's chief draftsmen, "[t]he [Congressional] committee made no detailed studies of alternative ages or of any proposals for voluntary retirement at earlier ages or of compulsory retirement or of any flexible retirement program in relation to the disability of an individual." W. COHEN, RETIREMENT POLICIES UNDER SOCIAL SECURITY 17-18 (1957) (footnotes omitted); *see also* Withers, *Some Irrational Beliefs About Retirement in the United States*, 1 INDUS. GERONTOLOGY, Winter 1974, at 23, 24.

decision and since applied in a number of ADEA cases, addresses this type of discrimination.

Certainly, not all age-neutral policies with age-related consequences inevitably need run afoul of the ADEA. However, because policies and generalized practices—in contrast to most individual acts of discrimination—can affect many individuals and thus have particular potential for extensive harm, intensive scrutiny must be leveled when an employer seeks to justify such a policy or practice. Moreover, the propriety of trenchant examination is especially confirmed by Congress' particular concern in adopting the ADEA for outlawing "arbitrary" discrimination—ageism grounded in canards about older workers' competencies and in misconceptions about the process and consequences of aging. Ostensibly neutral policies and practices classically entail the type of thoughtless bias characteristic of ageist attitudes.

In disparate impact situations the employer bears a heavy burden of persuasion to prove that its challenged policy is justifiable in terms of business necessity or job relatedness, according to most of the cases. This burden can be understood both in light of the serious potential for wide-ranging harm, and by virtue of the employer likely having readier access than its employee to data justifying, or belying, the policy or practice at issue. Business necessity and job relatedness actually are factors other than age; accordingly, construing the RFOA as an affirmative defense simply serves to harmonize statutory language with existing doctrine. This meshing, which some courts have already undertaken[291] in a somewhat unsophisticated manner, is nothing more than a meshing of nomenclature with practice. That which is a reasonable factor other than age in a disparate impact situation is that, and only that, which can be justified in business necessity or job relatedness terms.

Likewise, in pattern or practice discriminatory treatment situations, where there is systemic discrimination rather than just one or two isolated condemnable events, the employer's wrongdoing is magnified, so its burden in avoiding liability should be heavier than merely articulating a legitimate, nondiscriminatory justification. Certainly at the stage where a defendant seeks to establish that the same decision would have been made in any event, a burden of persuasion is appropriate, given the defendant's having been proven to be a wrongdoer. So the courts have held.[292] Here too, then, an RFOA affirmative defense meshes with existing law.

Individual instances of discriminatory treatment, while no doubt pernicious and even calamitous from the perspective of the victim, are—from a broad social perspective—the least damaging type of wrongdoing. Granted, an employer's discrimination against a given individual may produce negative generalized consequences for employee morale, and it may evoke reactive behaviors and actions by other employees. Still and all, the adverse

[291] *See supra* note 275.

[292] *See supra* notes 89-91 and accompanying text.

consequences of a wrongful discharge or a discriminatory refusal to hire will be experienced primarily by the harmed individual. Thus, absent direct evidence of unacceptable invidious intent to discriminate, it is appropriate to utilize a litigation framework which, while making it relatively easy for the aggrieved employee to be heard as to her grievance by allowing an inference of discriminatory animus to be easily erected, also insulates defendants from being unduly vulnerable.

The *McDonnell Douglas-Burdine* paradigm responds to this state of affairs. A reading of the RFOA exception as not constituting an affirmative defense when this paradigm applies likewise is properly responsive to the interests at stake in individual discriminatory treatment settings. This reading preserves *Burdine* and so imposes upon the defendant only the burden of producing evidence of a legitimate factor other than age, rather than a burden of proof. Of course, where there is direct evidence of wrongdoing, the concern about too easily exposing defendants to liability rightly subsides.[293] Thus, in direct evidence cases, the imposition of a burden of proof on a defendant to establish some basis other than age for its challenged action is appropriate.[294] Here, then, the *McDonnell Douglas* formula justifiably can be deemed inapposite.

The question remains whether reading the RFOA exception as sometimes not constituting an affirmative defense can be harmonized with the earlier analysis. That analysis looked to the framing of the RFOA provision as an exception in a remedial statute; to the location of the RFOA provision; to legislative history; to analogy; to agency interpretations; and to policy as the bases for reading the exception as an affirmative defense. At first blush, it would seem that this analysis is now being spurned. But this assessment, while not entirely off the mark, is too harsh. For one, not all exceptions need to be construed invariably as affirmative defenses. Second, insofar as analogy is concerned, the Equal Pay Act's pressure already has been discussed and diminished. Third, the EEOC's interpretation of the RFOA provision leaves room for equating the burden imposed by *Burdine* with that imposed by the RFOA exception in circumstantial evidence discriminatory treatment cases.[295] Moreover, the reading put forth here is consistent with the relevant

---

[293] *See supra* notes 71-75.

[294] This is a position admittedly not yet subscribed to in most circuits.

[295] The EEOC perhaps takes a somewhat more rigorous position. According to the agency interpretation the defendant in a case involving an individual instance of unlawful discrimination should bear the burden of "showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. § 1625.7(e) (1985). This interpretation, while not seeming to impose a burden of proof, does require factual veracity and so departs from the burden imposed by *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Not surprisingly, given the adherence of ADEA courts to *Burdine*, there are rulings in which courts have not held the defendant to the task of being factually accurate as to the decision it made. These courts have recognized that the critical concern is whether the defendant believed that its evaluation of the

policy concerns, given that the degree of harm inflicted by a discriminatory employer in individual treatment circumstantial evidence cases generally is localized in scope.

Thus, only the RFOA's location contiguous to the BFOQ defense and the legislative history remain as bases for rejecting a reading which equates *Burdine* and the RFOA exception. Granted, neither of these factors should be lightly dismissed. Nonetheless, neither is insurmountable. The history is not so monolithic that it precludes such flexibility. Nor, for that matter, is the factor of location so commanding that it forecloses a flexible approach.

Ideally, were a clean slate being written upon, Congress would have anticipated the *Burdine* problem and would have given explicit direction. None being forthcoming, the structure proposed here—a variable reading of the RFOA exception—is the best approach attainable given the dual legitimate imperatives of according the RFOA exception its proper significance and of conserving, rather than undermining, existing non-RFOA case law.

VII. Conclusion

The reasonable factors other than age exception set forth in section 4(f)(1) of the ADEA has been variously construed as constituting an affirmative defense in all settings; as constituting an affirmative defense in some situations, but not all; and as never constituting an affirmative defense. No matter the position taken, the courts' analyses either have been strained or, more commonly, non-existent.

Neither polar position is satisfactory. The first—holding that the RFOA exception constitutes in every setting an affirmative defense—does not jibe with the large body of case law which has followed the lead of the Supreme Court in *Texas Department of Community Affairs v. Burdine*. The *Criswell* appellate court, while it perhaps perceived this conflict, was unable to work out a satisfactory solution. The other polar stance—that the RFOA exception never constitutes an affirmative defense—is insupportable both in terms of legal analysis and policy.

The disarray in the lower courts might have been resolved by the Supreme

---

employee was correct and whether that belief—although in fact ill-founded—motivated the defendant. *See* Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) ("[E]ven had the [nondiscriminatory] reasons articulated here been frivolous or capricious, had they been the genuine causes of these discharges they would have defeated liability under the ADEA . . . ."); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 83 (2d Cir. 1983) ("Nothing in the ADEA prohibited . . . firing . . . on the basis of erroneous belief . . . ."); Moore v. Sears, Roebuck & Co., 29 Fair Empl. Prac. Cas. (BNA) 931, 932 n.4 (11th Cir. 1982); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1219-20 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 961 (8th Cir. 1978).

Court in *Western Air Lines, Inc. v. Criswell,* in which the Court had granted certiorari as to the question of the RFOA exception's status as an affirmative defense. As things turned out, the Court did not address this issue. This article does, and it proposes a middle course: the RFOA exception constitutes an affirmative defense in some, but not all, settings. This course envisions that the provision would not be treated as an affirmative defense when a plaintiff's prima facie case entails individual discriminatory treatment, the proof of which is grounded on circumstantial evidence. This is the setting in which the *McDonnell Douglas-Burdine* paradigm pertains. In all other contexts, the RFOA provision should be read as an affirmative defense. This article sets forth a principled rationale which justifies this middle ground position; a rationale which is premised on the perception that age bias can be of greater or lesser severity, depending upon the context in which it is expressed. Building on this perception, this article meshes the degree of burden imposed on a defendant with the severity of arbitrary use of age which the defendant's challenged action or policy entails.

VOLUME 66 NUMBER 2 MARCH 1986

BOSTON UNIVERSITY LAW REVIEW