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The First Ten Years of the Age Discrimination in Employment Act

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I. INTRODUCTION

The Age Discrimination in Employment Act [hereinafter ADEA] was adopted by Congress in 1967 as the official position on employer discrimination against employees between the ages of 40 and 65. Since 1967, ADEA has been indifferently enforced by the U.S. Department of Labor, Wage-Hour Division, by several state agencies responsible under state law for enforcing antidiscrimination legislation, and by federal and state courts in civil actions filed by private aggrieved parties. The Act stated a three-pronged Congressional policy:

—to promote employment of older persons based on their ability rather than age;

2. 29 U.S.C. § 626(b) (1967). The Secretary of Labor is charged by Congress with all enforcement duties under the Age Discrimination in Employment Act [hereinafter ADEA]. The secretary delegated enforcement duties to the Wage-Hour Division of the Labor Department in 1969.
— to prohibit arbitrary age discrimination in employment; and
— to help employers and workers meet problems arising from the im-
pact of age on employment.4

After ten years, none of these three congressional goals for passing
the ADEA have even been tentatively realized. The Wage-Hour Divi-
sion received more than 23,600 complaints from employees claiming
age discrimination between 1969 and July 1, 1976.7 During calendar
1976, the Wage-Hour Division received more than 6,000 complaints
about age discrimination.8 Of the 23,600 complaints received through
the end of fiscal 1976, 8,700 were found by the Wage-Hour Division to
have some merit.9 The Division claims an impressive success record in
age discrimination enforcement.10 However, impartial investigation by
other parties indicates that the Division's success rate is much less
than the Division would indicate. Two congressional reports, one in
1972 and one in 1974, indicate that the Labor Department has been
unable to contend with the growing caseload of aggrieved employees
claiming age discrimination.11 Age discrimination in employment has
been sufficiently significant to receive major nationwide television
coverage,12 although only about one of every three age discrimination
complaints filed with the Wage-Hour Division results in a successful
conciliation for the aggrieved employee.13

Consequently, two of three employees who claim mistreatment at
the hands of their employers are not hired, reinstated, or paid any
compensation for lost income. There are many possible explanations
for this condition: a) the complaints are by chronic troublemakers; b)
the system of conciliation has a low probability of success; c) the provi-
sions of the Act are too complicated and difficult, and the standards of
proof too high to create an even chance of success for aggrieved par-

5. Id.
6. Id.
7. (Statement of Francis V. LaRuffa, Jr., chief of the Age Discrimination branch,
Wage and Hour Division, U.S. Department of Labor.) National Observer July 4, 1977 at 13
col. 1.
8. Id.
9. Id.
10. Id.
11. See, e.g., Employment Aspects of the Economics of Aging, Senate Working
Paper, 91st Cong., 1st sess. GPO Y4 Ag 4 7/4 (on file at Ohio Northern Law Review)
(1970). More recent criticism of enforcement of ADEA appears in Senate Special Commit-
tee on Aging, Developments in Aging: 1973 and January-March 1974, S. REP. No. 346, 93d
Cong., 2d sess. (1974) [hereinafter Developments in Aging 1973]; Developments in Aging:
Developments in Aging 1972].
12. CBS televised two 60 Minutes Shows on age discrimination in employment in
1974. The first broadcast, Sunday, March 24, 1974 caused such general interest that the
segment was repeated that summer. 60 Minutes interviewed a number of retired salesper-
sons who formerly worked for Standard Oil of California. For a description of these prac-
tices see Transcript, 60 Minutes, Vol. VI No. 10, as broadcast March 24, 1974, 8-14.
ties. Although no study of ADEA can isolate the key factor in this muddle, an analysis of all reported district court and courts of appeals decisions since 1968 relating to ADEA suits by the Secretary of Labor and by private persons shows a success rate for plaintiffs of 41.5%.

This tends to confirm the low rate of success reported by the U.S. Labor Department for its conciliation efforts, which raises some fundamental questions about ADEA. This article will attempt to answer why the success rate is at such a low level, and what structural changes could be made in the Act to remove the obstacles responsible for that low success rate.

A. Structural Analysis of The Age Discrimination in Employment Act

1. PURPOSE. Section 2 of the Act makes four significant findings which summarize the history of age discrimination in employment:

   (1) older workers are at a disadvantage in their efforts to retain or regain employment;
   (2) arbitrary age limits for hiring and discharge are a common practice to the disadvantage of older workers;
   (3) older workers have a higher unemployment rate than younger workers; and
   (4) arbitrary age discrimination is a burden on the free flow of interstate commerce.

Congress therefore concluded that the Act should promote the employment of older persons based on ability rather than age; prohibit arbitrary age discrimination in employment; and help employers and workers find ways of meeting the impact of age on employment.

For analytical purposes, the remainder of the Act should conform to a logical, consistent program for administration and enforcement of these legislative purposes without internal obstacles created by the Act itself.

14. See infra for further statistical analysis.
For a student work of special merit see the extensive note, Damage Remedies under the Age Discrimination in Employment Act, 43 BROOKLYN L. REV. 47-51 (1976). This note is based upon the district court decision in Rogers v. Exxon Research & Engineering Co., 404 F. Supp. 324 (D.N.J. 1975).
2. THE EDUCATION PROGRAM. Section 3 of the Act required the Secretary of Labor to:

undertake studies and provide information to labor unions, management and the general public concerning the needs and abilities of older workers and their potentials for continuing employment.\(^7\)

To accomplish this, the Secretary of Labor will conduct a research program which is geared toward finding new ways to employ older workers. The Labor Department is also charged with providing assistance to state agencies assigned to enforce state anti-age discrimination laws. In addition, the Secretary is to assist private and public agencies in a program of anti-age discrimination measures.\(^8\) To do so, Labor Department staff members are set aside to research discrimination of older workers. However, the annual appropriation for all anti-age discrimination programs from 1967 to 1974 was limited to $3,000,000 annually.\(^9\)

The Labor Department initially allocated 69 positions to ADEA enforcement in 1969.\(^20\) No increase was made in the number of Labor Department personnel assigned to ADEA until fiscal 1975.\(^21\) The annual budget for all age discrimination programs was $500,000 in 1969 and only $1,500,000 in 1974,\(^22\) although no new personnel were assigned to research projects. In short, through neglect and lack of specific program provisions in the 1967 Act, Congress did not fund, and the Labor Department did not provide, any significant educational and research programs on the dilemma of older workers from 1967 to 1975.

3. CONGRESSIONAL DEFINITION OF AGE DISCRIMINATION. Section 4 of the Act defines unlawful age discrimination in employment by three prohibited activity categories; employer discrimination, employment agency discrimination, and union discrimination.

EMPLOYER DISCRIMINATION FORBIDDEN. Subsection (a) of section 4 states that it shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age, or

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18. Id.
21. Id.
22. Id.
The prohibitions, which echo the provisions of section 703(a) of the Civil Rights Act of 1964, appear acceptable only on a superficial examination. An employer cannot refuse to hire, discharge, segregate, or classify his employees between 40 and 65 because of age. However, "because of such individual's age" is textually similar to the common law notion of proximate cause which has terrorized personal injury law for the last century. Can an employer make a list of his employees who are (i) over 55 (ii) have less than 12 years of formal education, and (iii) more than 20 years seniority, and discharge all of them because they did not meet a job description which required all workers to have completed high school? What is the standard for "limit, segregate or classify" enabling enforcement officers to identify what is forbidden by the Act? Did Congress intend to make a rule which would instruct employers not to take into account an employee's age in evaluating his performance, or did Congress intend to permit employers to use age as the one discriminatory factor among other acceptable criteria in job selection, placement, hiring, and retention; providing that age alone did not dictate the category assigned workers?

The prohibitions in section 4(a) of the ADEA allow judges a great deal of freedom in assigning and characterizing employer activity as discriminatory or non-discriminatory. Notwithstanding the congressional intent to curb age discrimination, precise definitions of a prohibited practice were not provided by the Act itself.

**Employment Agency Discrimination.** Subsection (b) makes a relatively clear statement of prohibited activity for employment agencies:

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

Any employment agency which does not refer workers between the ages of 40 and 65 for employment violates the Act. It also violates the Act when it classifies its applicants on the basis of their being between 40 and 65, or their being below 40. The committee report accompanying the Act simply repeats the statutory language in its definition.

**Labor Union Discrimination.** Congress also attempted to reach union activities, making it unlawful for a labor organization:

26. The Act defines a labor organization as:
"[a]n organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency or
(1) to exclude or to expel from its membership, or otherwise to discriminate against any individual because of his age;

(2) to limit, segregate or classify its membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause any employer to discriminate against an individual in violation of this section.27

The committee report, as in subsections (a) and (b), simply restates the statute to explain its meaning.28 Within the Act, the section which makes conduct unlawful is preceded by the section on legislative findings and a section authorizing the Department of Labor to investigate the problems of aging and employment. No definitions have been given, nor has the class of protected citizens been identified. The statute uses the false imperative "it shall be unlawful" to describe three prohibitions not classified as functional discriminatory activities. Some acts forbidden to a labor organization may be performed by an employment agency, e.g., refusal to accept a potential applicant for employment because of his age. In each of the three subsections, Congress sought to prohibit the following specific acts:

(1) classifying employees on the basis of chronological age;

(2) refusing to accept an application for employment on account of the applicant's chronological age;

(3) discharging an employee on account of the employee's chronological age;

(4) any other act which discriminates against an employee or applicant for employment on account of his chronological age.

Any employer, employment agency, or labor organization which did anything prohibited by Congress would be subject to the Act's penalty provisions.

AGE LIMITS. Section 4 did not limit age discrimination. Theoretically any classification of employees between 18 and 35 which favored younger employees over older employees, as most union apprentice training programs do, would violate the Act. Therefore, Congress limited the application of section 4 by section 12 to employees over 40

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Consequently, union apprentice training programs do not violate the Act because their age limitations terminate below the minimum age limitation of section 12. Nor would an employer violate the Act by discriminating against workers over 65, by placing them in an inferior status to workers under 65.

**Bona Fide Retirement Plan Escape Clause.** Section 4(f) of the Act contains congressional approval of three forms of age discrimination. First, no employer, employment agency, or labor union violates the Act if it commits an act forbidden by sections (a), (b), (c), or (e) in furtherance of a bona fide occupational qualification based on chronological age. Second, the Act does not prohibit an employer, employment agency, or labor organization discriminating against some person on "reasonable factors other than age." Third, an employer is able to follow an employee seniority system or "any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter," even though it classifies or discriminates against employees on account of chronological age. This section creates interpretative problems: Are these exceptions matters which an employee must negate in order to prove a case of age discrimination under sections 4(a), (b), (c), or (e)? Is the employer required to "confess and avoid" age discrimination by any of these three defenses? Do these defenses have any practical application to an employment agency or a labor organization? Does the "bona fide retirement plan" exception authorize "early out" programs by companies which force persons between 40 and 65 into voluntary retirement, on the ground that these forced retirees will receive some pension program benefits before "normal retirement" at 65? This subsection seems to permit emasculation of the provisions of sections 4(a), (b), (c), and (e) by employers, if not by labor organizations or employment agencies as well. Thus, a skilled employer ought to be able to justify termination on "reasonable factors other than age" or justify early dismissal by showing "a bona fide retirement plan" which pays small benefits to early retirees compared with their former income.

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29. Section 12 states that "The prohibitions in this chapter shall be limited to individuals who are at least forty years of age but less than sixty-five years of age." 29 U.S.C. § 631 (1970 Supp. V 1975).

30. "It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited under subsections (a) (b) (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to normal operation of the particular business . . . ." 29 U.S.C. § 623(f)(1) (1967).


32. "It shall not be unlawful for an employer, employment agency or labor organization—(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire such individual. . . ." 29 U.S.C. § 623(f)(2) (1967).
4. AGE DISCRIMINATION IS A WAGE CLAIM. Section 6 of the Act confers power to delegate persons to enforce the Act on the Secretary of Labor and instructs the Secretary to cooperate with local, regional, and state anti-age discrimination agencies.\textsuperscript{34} It is the prelude to section 7 which is the enforcement or penalty provision of the ADEA. Unfortunately, the Act will be enforced by the "remedies and procedures"\textsuperscript{34} of the Fair Labor Standards Act [hereinafter FLSA]. The specific provisions of FLSA incorporated into ADEA include:

INVESTIGATION REGULATIONS. The Secretary of Labor is found to observe the same procedures in investigating an ADEA case as he is in investigating a minimum wage or overtime act violation.\textsuperscript{35} The Secretary and the Wage-Hour Division also have the power to compel attendance of witnesses at conciliation hearings by subpoena under FLSA provisions.\textsuperscript{36}

PENALTIES AND CIVIL LIABILITY. Any action which violates ADEA also violates 29 U.S.C. § 215\textsuperscript{37} which prohibits withholding wages payable as minimum wages, or refusal to pay overtime for more than 40 hours' work a week. It is also a "wage claim" for unpaid wages, for which an aggrieved party can recover unpaid minimum wages, or unpaid overtime compensation, and liquidated damages.\textsuperscript{38} Section 6(b) limits recovery of liquidated damages to "cases of willful violations of this chapter."\textsuperscript{39} Also, the aggrieved employee, if successful, can recover reasonable attorney's fees and court costs from his employer.\textsuperscript{40} This prescription for simplistic relief incorporated from FLSA must be read into the provisions of section 7(c) which give any aggrieved employee a "civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." The drafters may have intentionally limited the remedies available under

\begin{itemize}
  \item 33. 29 U.S.C. § 625 (1967).
  \item 34. 29 U.S.C. § 626(b) (1967).
  \item 35. 29 U.S.C. § 211 (1974).
  \item 37. 29 U.S.C. § 626(b) (1967).
  \item 38. Any employer who violates the provisions of sections 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount of liquidated damages. 29 U.S.C. § 216(b) (1974).
  \item 39. 29 U.S.C. § 626(b) (1967).
  \item 40. 29 U.S.C. § 216(b) (1974). The language used seems to suggest that the remedy structure of the ADEA is not tied to that of the Fair Labor Standards Act alone. Nevertheless, the normal interpretation of section 7 is that the remedies enumerated in section 7 and the Fair Labor Standards Act are all the remedies available to an aggrieved party under the ADEA. Consequently, the courts have been unwilling to go beyond an award of back pay, liquidated damages in rare instances, and reinstatement, or injunction against continuing violations such as advertisements. See, e.g., Schulz v. Hickock Mfg. Co., 385 F. Supp. 1208, 1217 (N.D. Ga. 1973); Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230, 238 (N.D. Ill. 1973); rev'd 499 F.2d 859 (7th Cir. 1974); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971); Brennan v. Weis Markets, 5 FEPC 850 (M.D. Pa. 1973); Hodgson v. Poole Truck Lines, Inc., 4 FEPC 165 (S.D. Ala. 1972).
\end{itemize}
the Act to those provided for unpaid minimum wage claimants under FLSA although it is probable that no one paid much attention to the conflict between the broad language of section 7(c) and 29 U.S.C. § 216(a) and (b).

Statute of Limitations. For reasons which cannot be ascertained from the Committee Report or contemporary debates, Congress allowed the drafters of the ADEA to incorporate the two year (3 years for willful violations) statute of limitations contained in section 6 of the Portal to Portal Act into ADEA. This incorporation conflicts with the provisions of section 7(d) which fixes an internal statute of limitations contingent upon the date of notice to the Secretary of Labor of intent to sue which could lead a court to conclude that the notice requirements in section 7(d) were not a statute of limitations.

5. Remedy Structure—Right to Sue. Section 7(c) of the ADEA provides for a civil suit in federal or state courts to recover unpaid wages, liquidated damages, attorney's fees, court costs and the right to receive equitable relief. However, no injured party can file a civil action unless he complies with the provisions of section 7(d):

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

(1) within 180 days after the alleged unlawful practice occurred, or

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

The Secretary is required to attempt conciliation of a dispute when notified by a private party under this section that the private party in-

41. This conclusion, except for Rogers v. Exxon Research & Engineering Co., 404 F. Supp. 324 (D.N.J. 1975), and Bertrand v. Orkin Exterminating Co., Inc. 419 F. Supp. 1123 (N.D. Ill. 1976), is consistent with the case law cited in footnote 96. The Rogers case has been overruled and is no longer precedent. Bertrand has not yet been reviewed by the Seventh Circuit. The limiting of remedies to those enumerated in the statute is consistent with earlier cases under the Fair Labor Standards Act. See, e.g., Crabb v. Weldon Bros., 164 F.2d 797 (8th Cir. 1974); Northwestern Yeast Co. v. Broutin, 133 F.2d 628 (6th Cir. 1943).

43. 29 U.S.C. § 626(d) (1967). Section 7(c) provides that:
"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, that the right of such person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter."

44. 29 U.S.C. § 628(c) (1967).
tends to sue." This provision must be considered with section 14(b) which states:

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the state law unless such proceedings have been earlier terminated.47

Both sections have been construed by appellate courts as jurisdictional requirements which, if not observed, bar an injured party from suit.48

6. OTHER PROVISIONS OF THE ACT. To complete the structural analysis of the ADEA, several ancillary provisions need to be reviewed.

DEFINITIONS. Section 11 contains the Act's definitions which, instead of preceding the operative clauses, follow them as an afterthought. Some of these definitions are essential to the enforcement of the Act:

(1) Employer is defined as "a person engaged in an industry affecting commerce who has 20 or more employees for each working day of 20 or more calendar weeks . . ."49 [This eliminates almost half of all workers 40 to 64 from coverage.50

(2) Labor organization is defined as an entity engaged in an industry affecting commerce, any agent of that entity, or any joint council, which exists for the purpose of dealing with employers concerning the terms and conditions of work. [However, the entity must have at least 25 members to be subject to the Act51 which exempts many small collective bargaining units from the Act's effect.]

(3) Industry affecting commerce is defined as any activity in commerce in which a labor dispute would hinder or obstruct the free flow of commerce, namely any activity or industry affecting commerce as defined by the Labor Management Reporting and Disclosure Act of 1959.52 [This definition seems to exclude local, regional, and state employees from

46. Id.
47. 29 U.S.C. § 633(b) (1967).
50. Developments in Aging 1972 supra note 11, at 67. This section was amended in 1974 to include a person engaged in "industry affecting commerce who has 20 or more employees." 29 U.S.C. § 628(b) (1974).
51. 29 U.S.C. § 630(d), (e) (1967).
coverage by the Act. However, an extended definition of "employee", added in 1974, now includes local, regional, and state employees.\textsuperscript{53}

Section 8 of the Act requires every employer, employment agency, and labor organization to keep a notice posted on its premises with information about ADEA as designed by the Secretary.\textsuperscript{54} Section 10 provides a five hundred dollar penalty or imprisonment for one year, or both, upon conviction of interfering with or impeding a duly authorized representative of the Secretary of Labor while engaged in the performance of his duties.\textsuperscript{55} Section 5 requires the Secretary of Labor to continue the study of age discrimination in employment.\textsuperscript{56} He is directed to make an annual progress report to Congress each January on research and enforcement.\textsuperscript{57} Section 4(d) forbids retaliation against any person who takes part in the investigation or trial of an ADEA complaint.\textsuperscript{58} Section 4(e) prohibits discriminatory listing or advertising which shows age requirements.\textsuperscript{59}

\textbf{Hints of Frailty in the Act.} This structural analysis of ADEA reveals weaknesses inherent when the Act was adopted. First, the notice and deferral periods required by sections 7 and 14 were unwieldy and practically impossible to understand without restructuring the two sections. The Act did not clearly state the duty of an aggrieved party to exhaust available state and federal administrative processes before civil litigation. Second, the Act failed to define the elements of an age discrimination complaint, or to establish the duty of the aggrieved party in presenting a prima facie case of discrimination. Third, the remedy structure of the Act, borrowed from FSLA, was limited both in scope and pecuniary awards for successful prosecution of a claim. Fourth, the Secretary of Labor had not received any efficient delegation of authority to investigate and try cases under ADEA. Fifth, it did not cover any municipal, regional, or state employees, nor did it apply to federal employees.

\begin{itemize}
\item 54. 29 U.S.C. § 627 (1967).
\item 55. 29 U.S.C. § 629 (1967).
\item 56. 29 U.S.C. § 624 (1967).
\item 57. 29 U.S.C. § 632 (1967).
\item 58. 29 U.S.C. § 623(d) (1967) states:

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

\item 59. 29 U.S.C. § 623(e) (1967) states:

"It shall be unlawful for an employer, labor organization, or employment agency to print or publish or cause to be printed or published, any notice or advertisement relating to employment by such an employer, or membership in any classification or referral for employment by such labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age."
\end{itemize}
The only change since 1967 has been the addition of section 15 of the Act which extended protection to federal employees.\textsuperscript{60} As noted earlier, the same revision eliminated definitional limitations against including municipal, regional, and state governmental employees.\textsuperscript{61} In the following section, it should be clear that Congress has not revised its original program despite continuous warnings from the Labor Department that the Act was not working. It should also be evident that the judicial handling of the Act has been both haphazard and ineffectual.

II. ADEA—THE STERILE LAW?

The Wage-Hour Division claimed that between two-thirds and one-half of all filed suits fail for procedural reasons. The 147 reported cases were studied to determine why plaintiffs won and lost. This study was based on several assumptions; the 147 cases represented a reasonably good sampling of all cases filed; and some of these decisions involved the same litigants, first in the district court and then in the court of appeals, and each case was analyzed to reduce the basic or the decision to the narrowest possible reason under the rules of decision established by the ADEA. Although a number of cases were reported in such a fashion that more than one possible ground for decision could be asserted, each case was assigned a single, narrowest rule for decision, to avoid the necessity for multiple regressions. The results of this study confirm the Labor Department assessment of the success of ADEA litigation.

Of the cases studied, the plaintiff succeeded 41.5\% of the time. Defendants prevailed 17\% more often than plaintiffs. The reason given most frequently for deciding an ADEA case was compliance or non-compliance with section 7(d) of the Act relating to notice.\textsuperscript{62} This reason was given for the decision in 28.6\% of all cases. It was, however, usually given by the courts as a reason for deciding the case in favor of the defendant. A plaintiff whose case turns on timeliness of notice prescribed by section 7(d) has slightly less than a three to one chance of losing.

The second reason most often given by the courts for deciding a case is sufficiency or insufficiency of evidence. This reason was given 22 times, six times for the plaintiff and 16 times for the defendant. A plaintiff whose case turned on the issue of the sufficiency of the evidence establishing his claim for relief had about a three to one chance of losing.

The third most frequently cited reason for decision-making is that of deferral to state agencies responsible for ADEA conciliation. A plaintiff whose suit rested on whether the requisite deferral to a state agencies was necessary.
enforcement agency under section 14(b) of the Act had occurred had about a three to one chance of prevailing, whatever he may have done.

The fourth most significant reason for decision is the nature of the remedy constructed by ADEA. This issue covers the theory or cause of action, elements of a prima facie case, nature and type of damages, and the creation of a new tort. A plaintiff whose case turns on the theory of the remedy provided by ADEA is about twice as likely to win as he is to lose.

The remaining reasons for decision are interesting congeries. A plaintiff is about two and a half times more likely to lose on the issue of whether he is entitled to a jury trial under ADEA. Conversely, the courts are about four times more likely to do equity for a preliminary or final injunction against a discriminatory practice than not. If a plaintiff's case turns on following the appropriate conciliation procedure of the Wage-Hour Division or state agencies, the plaintiff is about five times more likely to lose than to win.

In the miscellaneous category, there are a collage of reasons for dismissals which have not presented a discernable trend over the past decade. Therefore, these issues become statistically insignificant in terms of granting or denying relief under the Act.

A. Judicial Obstruction to Appropriate Relief for Age Discrimination in Employment

The preceding discussion shows that the ADEA has been frustrated by an inherently difficult legal structure administered by an underfunded agency, which must anticipate judicial relief generally confined to disposing of cases on the basis of procedural problems created by the Act's own structure. Even more profoundly, the way in which judges have described the nature and extent of the Act's remedial provisions have tended to confine ostensibly substantive issues and the difficult task of weighing and sifting evidence to procedural decisions on burden of proof, presumptions, and allowable evidence.

1. The Legal Standard for Age Discrimination. The few reported ADEA decisions written before January, 1974, did not articulate the meaning of the Act's remedial structure. For example, *Stringfellow v. Monsanto Company,* a case filed by six employees who were discharged effective May 1, 1969 from the El Dorado, Arkansas nitrogen plant which was being closed by the company, involved plaintiffs involuntarily retired rather than reassigned to a different plant, which was evidenced by Monsanto's management having screened its employees at El Dorado to determine which would be retained.

64. Id. at 1178.
Evaluation sheets were made up on all personnel, twelve were retained, ten were let go.\textsuperscript{68} Only three of the forty evaluated employees were under 40.\textsuperscript{66} After shutdown, the average age of employees in the three departments affected declined slightly.\textsuperscript{67} All plaintiffs contended that termination should have been by seniority rather than by department-wide evaluation. This assertion characterized the ADEA as the creator of a seniority system for all employees. The court rejected this view declaring:

The method of the company's impartial evaluation of the ability of each of the plaintiffs and other employees evaluated by Monsanto was based upon established factors and criteria ordinarily utilized for such purpose. The Court concludes that the differentiation resulting from the application of such factors and criteria in the plan of evaluation which Monsanto used was based on reasonable factors other than age, and in the opinion of the court constitutes a lawful practice envisioned under 29 U.S.C.A. § 623(f).\textsuperscript{69}

In \textit{Monroe v. Penn-Dixie Cement Corp.},\textsuperscript{70} the plaintiff won a jury verdict on the allegation that Penn-Dixie wilfully discharged him by reason of his age. The trial judge overturned the jury verdict on a motion for judgment n.o.v., finding the plaintiff had not been brought within the Act's protection because he was fired prior to the Act's effective date, although his five weeks' paid vacation carried his salary period into the effective date. The trial judge noted, in dicta, his refusal to find the plaintiff was not discharged by reason of age, without elaborating on the traditional notion that there was sufficient evidence to sustain the jury verdict. Unfortunately, no restatement of the facts occurs in the opinion.\textsuperscript{71}

In \textit{Cochran v. Ortho Pharmaceutical Co.},\textsuperscript{72} the court failed to pass on the theory of plaintiff's complaint or to otherwise explain the decision, since the suit was dismissed on the ground that the plaintiff had not filed the necessary notice of intent to sue with the U.S. Labor Department.\textsuperscript{73} In \textit{Gebhard v. GAF Corp.},\textsuperscript{74} the plaintiffs, four salaried

\begin{tabular}{ll}
\textbf{Maintenance Dept.} & \textbf{Average Age} \\
\textbf{Manufacturing Dept.} & Before Shutdown \\
\textbf{Personnel Dept.} & \textbf{After Shutdown} \\
48.4 yrs. & 47.3 yrs. \\
52.5 yrs. & 51.5 yrs. \\
53.6 yrs. & 52.5 yrs. \\
\end{tabular}

\textit{Id.}

65. \textit{Id.}
66. \textit{Id.} at 1180.
67. \textit{Id.}
68. \textit{Id.} at 1180-81.
70. \textit{Id.} at 234.
72. \textit{Id.} at 303.
supervisors involuntarily retired by GAF Corporation, filed suit on a theory of implied contract. GAF allegedly induced them to render continued services by guaranteeing their employment to age 65. The court held the implied contract void since it did not comply with the statute of frauds. Further, the GAF retirement plan directly refuted the existence of such an implied contract, since it provided for both voluntary and involuntary retirement at age 55. Finally, the plaintiffs had simply not filed their notice within 180 days of the discharge date.

Prior to 1974 there were some helpful guidelines offered in *Hodgson v. Greyhound Lines, Inc.* where the Northern District of Illinois had held a bench trial in which the Wage-Hour Division was able to prove that Greyhound engaged in discriminatory hiring practices. It was held that the defendant had refused to consider employing anyone as a new driver 35 years or older. This was not, as the defendant claimed, a bona fide occupational qualification vitally linked to passenger safety. The trial judge concluded that:

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

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

The court, in this instance chose to follow a pattern common enough in Title VII Civil Rights Act litigation. It found the plaintiff had made a prima facie case when it showed Greyhound refused to hire a driver over 35. Therefore, it required the defendant to carry the burden of justifying its discriminatory activities on the grounds that it was a bona fide occupational qualification. This rationale generated

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74. **Id.** at 506.
75. **Id.** at 507.
77. **Id.** at 508.
78. **Id.** at 509.
79. **Id.** at 297.
from Hodgson v. First Federal Savings & Loan Association of Broward County, a Wage-Hour Division suit brought against a mammoth south Florida savings and loan association. The Wage-Hour Division wanted to enjoin First Federal from refusing to hire two women over 40 as tellers although First Federal already had 35 tellers over 40. It refused to hire the women, otherwise qualified, allegedly because they were overweight. These objective factors, e.g., that overweight individuals are not physically fit for the position were immaterial and a limited injunction was entered against discriminating among potential hirers over 40. The Labor Department appealed loss of back wages for one hiree. In review, the court declared:

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

This doctrine comes from Title VII litigation. It has been understood as a doctrine which required the plaintiff to show only the elements of a claim, whereupon the defendant had to show by a preponderance of evidence that the discriminatory act was justified on some basis other than a federally protected interest.

In early 1974, a plaintiff filing suit under ADEA would most likely have to establish the existence of a claim for relief by competent evidence which would force the defendant to disprove the plaintiff's case by a preponderance of the evidence.

It was unclear at that time whether a prima facie case had to be made by showing that the plaintiff was discriminated against on the basis of age. In Schulz v. Hickok Mfg. Co., Inc., a successful plaintiff established a prima facie case from the depositions of another employee also discharged by the same employer. The plaintiff was also able to offer statistical evidence which showed that the average age of the employer's eight district managers declined from 53.39 years to 40.75 years. The court held the defendant had the duty to rebut plaintiff's case and evidence was introduced which showed that plaintiff's poor sales record in his division had led to his discharge. That submission included evaluation from a superior which stated plaintiff was guilty of "lack of mobility, energy and enthusiasm over too long a period—making development of a sales team very difficult." Although Schulz sales were dropping, the court said that this

80. 455 F.2d 818 (5th Cir. 1972).
81. Id. at 822.
84. Id. at 1213.
85. Id. at 1216.
evidence was not sufficient to justify his removal and replacement. The logical inference from Schulz was that if an employer discharges an employee by reason of age, together with other factors, the discharge is prima facie evidence of age discrimination.

Other courts articulated decisions relating to the pairing of "age plus something else" management decisions, classifications, and plans. The first case was Laugeson v. The Anaconda Co. in which the plaintiff, discharged by Anaconda, was within the age group protected by the ADEA. He elected to file suit and requested a jury trial which resulted in a jury decision for the defendant. Laugeson had placed personnel evaluation records of his performance into evidence which were made prior to discharge stating he "had too many years on the job." Evidence also included statistics showing similar level supervisors were younger after the date of his discharge than at earlier selected dates. After Laugeson lost the jury trial, he appealed to the Sixth Circuit, alleging a multitude of theoretical and evidentiary errors. Principally, Laugeson alleged the district court erred by not instructing the jury that if they found the plaintiff made a prima facie case, then the burden of proof shifted to the defendant to disprove the plaintiff's case. The Sixth Circuit refused to accept Laugeson's theory, holding that the United States Supreme Court did not have jury trials in mind when it decided the burden of proof rules in McDonnell Douglas Co. v. Green. The plaintiff in a jury trial on age discrimination in employment always has the burden of proof unless the defendant admits liability and should expect to have the burden of proof on all material issues which entitle him to recovery. However, the trial judge did instruct the jury that Laugeson could recover if it was shown that he was discharged solely because of age. This, the circuit judge said, was reversible error:

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

(Emphasis added.)

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

A second 1975 ADEA case attempted to add significant concepts to

86. Id. at 1215-16.
87. 510 F.2d 307 (6th Cir. 1975).
88. Id. at 310-11.
89. Id. at 312.
90. Id.
91. Id. at 317.
the theory of relief in which *Rogers v. Exxon Research & Engineering Co.* appeared to be a garden variety suit. The plaintiff, a 60 year old research chemist, was involuntarily retired and claimed age discrimination although the employer claimed Rogers was discharged for mental instability. Although Rogers died during litigation, his estate claimed actual damages for lost wages, liquidated damages, punitive damages, and damages for pain and suffering arising from the mental distress of an involuntary retirement. The jury returned a verdict of $30,000 for lost wages and fringe benefits, and $750,000 for pain, suffering, and mental distress. The defendant's motion for judgment n.o.v. or a new trial in the alternative was denied on the condition that the plaintiff accept a remittitur of $550,000 on the damages found for pain and suffering. What followed the plaintiff acquiescence in the remittitur was a new furrow in ADEA litigation.

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

The trial judge noted that Title VII litigation recognized the right of an injured party to receive compensatory damages for the totality of harm caused by wrongful conduct, citing *Curtis v. Loether* to support this contention. On that basis, the greatest wrong to an older worker was intangible rather than economic:

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

A number of cases decided under Open Housing were cited to support this conclusion.

However, in the Northern District of California an opposite result was reached in *Sant v. Mack Trucks, Inc.* rejecting a claim for

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92. 404 F. Supp. 324 (D.N.J. 1975). 93. *Id.* at 327. 94. *Id.* 95. *Id.* 96. 415 U.S. 189 (1974). 97. 404 F. Supp. at 329. 98. *Id.* at 332, citing Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974) among other cases to prove his point. The court also allowed the plaintiff liquidated damages. The *Rogers* case was followed some months later by Bertrand v. Orkin Exterminating Co., Inc., 419 F. Supp. 1123 (N.D. Ill. 1976) in which the court upheld plaintiff's claim of damages for pain and suffering as part of a claim upon which relief can be had under ADEA. This case has not, as of July 1, 1977, been heard by the Seventh Circuit. 99. 424 F. Supp. 821 (N.D. Cal. 1976).
damages from mental distress, pain and suffering. The trial judge declared:

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

The judge was prescient. Conciliation, after all, reduced the amount of litigation, and curbed the need for compensating workers for their actual injuries.

In January, 1977, the Third Circuit reversed the district court's holding in *Rogers v. Exxon Research & Engineering Co.* with a strict interpretation of supposed congressional policy. With *Rogers* at the appellate level it was decided that ADEA did not create a new tort. It did not permit a plaintiff to recover for pain and suffering. One judge's opinion stressed congressional policy, which was to deter litigation by requiring potential litigants to exhaust administrative relief before filing a lawsuit. The thrust of the ADEA's remedy scheme, according to the court, was "that private lawsuits are secondary to administrative remedies and suits brought by the Department of Labor." A private litigant's right to sue depends upon first exhausting the conciliation process although it was nowhere apparent that litigants might file ADEA suits to recover money damages not expressly listed in the FSLA as recoverable wage claims.

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

It was also feared that a claim for pain and suffering would impair the conciliation process by introducing an element of uncertainty into the negotiating process and "substantially increase the volume of litigation in the trial courts." Congress did not express a desire to permit recovery for every wrong done to Rogers as a proximate result of age discrimination in employment and the case was remanded for a new

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100. *Id.* at 622.
102. *Id.* at 841.
103. *Id.*
104. *Id.* Citations omitted.
105. *Id.*
106. *Id.* at 840.
trial, although, as the court pointed out, Rogers did not attempt conciliation through the New Jersey Department of Law and Public Safety; a jurisdictional defect which would normally bar the suit. The circuit court, in its mercy, declined to dismiss the suit for want of jurisdiction.

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

2. BONA FIDE OCCUPATIONAL QUALIFICATIONS DEFENSE. One way for an employer to avoid the provisions of the ADEA is to establish "bona fide occupational qualifications" which specify a maximum age for employment. The Labor Department has tried, unsuccessfully, to establish favorable precedents showing that arbitrary upper age limits for employment are not intimately related to job safety. Initially, the Labor Department had some victories, notably Hodgson v. Greyhound Lines, Inc., 108 discussed earlier, where Greyhound advanced four reasons for its age qualification:

(1) The law requires it as a common carrier to maintain the highest degree of care for passengers, which means that its drivers must be young;

(2) Although an individual may pass a company physical up to 65, a physical examination may not detect signs of decreased functional ability to drive a bus;

(3) A beginning bus driver spends 10-15 years as an "extra board" driver which requires drivers to have the "highest degree of physical ability and use of the senses." 109

(4) The safest bus driver has 16 years' driving experience, and new men 40-75 could not acquire such experience with Greyhound before retirement. 110

The district court rejected all four arguments because the plaintiff

107. Id. at 844.
108. 354 F. Supp. 230 (1973). During the Rogers era, one district court apparently adopted the Laugeson rule. In Connaughton v. Monsanto Co., 423 F. Supp. 660 (E.D. Mo. 1976) the plaintiff's case was held to be rebutted because the defendant showed that age played no part in Monsanto's decision to terminate the plaintiff.
110. Id.
had made a prima facie case by showing Greyhound's blanket refusal to hire employees over the age of 35. Therefore, Greyhound had not established a bona fide occupational qualification for bus drivers.

When the Seventh Circuit reviewed Hodgson in 1974, it reversed the district court stating that the defendant had proven a bona fide occupational qualification restricting the initial hiring age of drivers to persons under 35. Although the evidence produced by Greyhound was ambiguous, the Seventh Circuit, in determining that Greyhound's aversion to older employees was lawful, stated:

Greyhound need not establish its belief to the certainty demanded by the government and the District Court, for to do so would effectively require Greyhound to go so far as to experiment with the lives of passengers in order to produce statistical evidence pertaining to the capabilities of newly hired applicants forty to sixty-five years of age. Greyhound has amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reasons or rationale. (Emphasis added.)

The theory seems to be that age is a bona fide occupational qualification when an employer can produce some statistical evidence which tends to show that age is relevant to matters affecting public safety. If the employer is a common carrier, its belief may be unilateral and supported by a scintilla of evidence, yet be lawful.

The same issue was litigated in Usery v. Tamiami Trail Tours, Inc. The district court, relying upon Hodgson, said that age was a bona fide occupational qualification for an interstate bus line, making it lawful for Tamiami to refuse to hire anyone over 40. Tamiami submitted essentially the same statistical evidence as that submitted in Hodgson. The court also allowed the standards of the U.S. Department of Transportation relating to minimum driver qualification into evidence via judicial notice. The district court said that Tamiami could present a valid defense to the Labor Department's claims if it showed that (i) there was a factual basis for discrimination by reason of age; and (ii) it was commercially unreasonable to deal with each individual over 40 on a case by case basis.

On review, the Fifth Circuit relied upon two Civil Rights Act cases which it thought analogous to a "bona fide occupational qualification."

111. Id. at 231, 237.
113. Id. at 865.
114. 531 F.2d 224 (5th Cir. 1976).
115. Id. at 226.
116. Id. at 230-34.
117. Id. at 231-32.
In *Weeks v. Southern Bell Telephone & Telegraph Co.*,\(^{118}\) Southern Bell's failure to hire women as switch operators based on a theory that females could not perform the heavy lifting required by the job was not a bona fide occupational qualification.\(^{119}\) Likewise, in *Díaz v. Pan American World Airways, Inc.*,\(^{120}\) the Fifth Circuit held that an airline could not refuse to hire males to act as flight attendants on a theory that sex was a bona fide occupational qualification. The court in *Tamiami* saw the *Weeks* case as establishing a rule of decision that any discrimination based on sex (or age) would be bona fide if the employer shows that "it is impossible or highly impractical to deal with women on an individualized basis, wherein it may apply a general rule" which bars members of the protected class.\(^{121}\) *Díaz* adds a second rule of decision that if the particular job classification does not directly affect the safe transportation of passengers, then no bona fide occupational qualification can be supported, however, reasonable, if the employer is a common carrier.\(^{122}\) Thus a bona fide occupational qualification must be reasonably necessary to the effective maintenance of the employer's business.\(^{123}\)

*Tamiami* met these rules with its reiteration of the same style evidence presented by Greyhound in *Hodgson*. The court stated:

> We emphasize safety in bussing just as we would in a variety of other industrial areas where safety to fellow employees is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards, which, if they err at all, should err on the side of preservation of life and limb. The employer, of course, must show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.\(^{124}\) (Emphasis added.)

If an employer refuses to hire someone on the ground that the prospective employee is too old to be hired, the employer states a bona fide occupational qualification under section 4(f) of the ADEA if there is some rational basis, however, tenuous, for the decision not to hire. Of equal importance to employers is the standard of judicial review of a common carrier's hiring practices; in the Fifth and Seventh Circuits the "clearly erroneous" rule applies. Unless the employer's decision making process is clearly erroneous, his decision is non-reviewable.

Notwithstanding these unfavorable decisions there are instances where private litigants have had some success in beating "bona fide oc-

\(^{118}\) 408 F.2d 228 (5th Cir. 1969).
\(^{119}\) Id. at 235.
\(^{120}\) 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).
\(^{121}\) 531 F.2d at 235.
\(^{122}\) Id.
\(^{123}\) Id. at 238.
\(^{124}\) Id.
cupational qualification" defenses. In *Aaron v. Davis* the two Little Rock, Arkansas fire chiefs were forcibly retired at 62, on the theory that age made them less capable to be firefighters. Although the City of Little Rock introduced evidence showing that advanced age could not be detected by an annual physical examination it was held that age could not be a bona fide occupational qualification for a firefighter. Both parties agreed that the position required great physical stamina which would invariably strain the cardiovascular system. But the trial judge did not agree that chronological age was identical to functional age, thereby refusing to classify this retirement policy as a "bona fide occupational qualification."

In clarifying the nature of a bona fide occupational qualification the court noted:

It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, than the more arbitrary may be the fixing of the mandatory retirement age. *But at no point will the law permit, with the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition, or stereotyping, i.e., without any empirical justification.* (Emphasis added.)

Consequently, the bona fide occupational qualification defense to liability for age discrimination in employment has to be rooted in, and justified by, the risk to the public and fellow workers. Further, it has to be supported by empirical evidence and by behavioral studies which show a decline in the specific functions of the body due to chronological age.

*Aaron* has since become the leading case on bona fide occupational qualifications, inferentially being the catalyst for *Houghton v. McDonnell Douglas Corp.*, a case involving a chief test pilot for McDonnell-Douglas' F-4 and F-15 fighters, who was forced to take a desk job after the corporation grounded him in July, 1971, effective December 31, 1971. Houghton, at that time, was 51. In December, 1972, he was transferred from an experimental non-flight category to a production job. He refused, and was discharged. The district court found that Houghton had been discharged not because of his age, but because of his "non-satisfactory performance and ... refusal to accept another

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126. *Id.* at 459-60.
127. *Id.* at 459.
128. *Id.* at 461.
130. *Id.* at 1234.
131. *Id.* at 1235.
position for which he was qualified.\textsuperscript{132} The district court also accepted McDonnell-Douglas' statistical evidence which showed that as a person ages, his reaction time and resistance to stress or fatigue declines in some measurable proportion. Pilots, as a general rule, are subject to physiological age changes which makes it more probable that mistakes in judgment will occur.\textsuperscript{133} The court admitted that no attempt had been made to prove that Houghton personally showed any of the signs of aging which would diminish his ability to fly although two findings which seemed to be in accord with Greyhound and Tamiami were made.

(1) That functional age, as distinguished from chronological age, cannot be determined with sufficient reliability to meet the special safety demands which are imposed upon defendant McDonnell-Douglas.

(2) In the absence of a comprehensive test by which an individual's functional age might be determined, there is no alternative to establishing an arbitrary age limit.\textsuperscript{134}

The court of appeals reversed, agreeing with the plaintiff's contention that McDonnell-Douglas had failed to prove a bona fide occupational qualification.\textsuperscript{135} Mr. Justice Tom Clark, sitting by designation in the Eighth Circuit when this case came up for hearing, wrote the opinion for the panel reversing the district court.

Justice Clark reviewed the evidence which showed that Houghton was in superb physical condition in 1972 and in 1975 when he took his annual flight physicals.\textsuperscript{136} The experts had agreed that in general, the populace suffers physical impairment as it ages and that changes in the aging process occur at diverse rates for different individuals. "In short", wrote Justice Clark, "some pilots could fly beyond the age limit proposed", but in the absence of a functional test as to individual capacity the company's arbitrary age limit was invalid. The defendant's evidence was "insufficient to support an inference of diminished ability among pilots of the age of Houghton. . . ."\textsuperscript{137}

The defendant had the burden of proving that its actions were excused by section 4(f)(1) of the ADEA.\textsuperscript{138} It had already admitted violating the Act. This burden, according to Justice Clark, was to show some "factual basis for believing that substantially all of the older pilots are unable to perform the duties of test pilot safely and efficiently, or that some older pilots possess traits precluding safe and efficient job performance unascertainable other than through knowledge of the

\textsuperscript{132} Id.
\textsuperscript{133} Id. at 1236.
\textsuperscript{134} Id.
\textsuperscript{135} 553 F.2d 561, 564 (8th Cir. 1977).
\textsuperscript{136} Id. at 563.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 564.
pilot’s age." Justice Clark believed the defendant simply did not procure evidence which aided its position.

If on remand it is found that Houghton is still physically capable of safely and effectively performing the duties of Chief Production Test Pilot, he must be reinstated in that position, awarded such damages as he has suffered by reason of his discharge, and other relief, including attorney’s fees, to which he is entitled.!

Recent reports indicate that McDonnell-Douglas plans to file a petition for writ of certiorari to the United States Supreme Court.!

In summation, there is an affirmative defense to liability under the ADEA labelled the “bona fide occupational qualification” defense. If chronological age is material to the performance of job functions, as shown by competent medical, psychiatric, and statistical evidence, than an employer can avoid liability for setting an arbitrary age limit on hiring or retention although the employer must prove its case by a preponderance of the evidence.

3. **BONA FIDE RETIREMENT PLAN DEFENSE.** An employer can also confess and avoid liability under ADEA if he admits discharging an employee between the ages of 40 and 64 pursuant to a seniority or bona fide employee benefit plan. McMann v. United Airlines, Inc., decided by the Supreme Court in December, 1977, resolved a division of opinion between the Third, Fourth, and Fifth Circuits on the meaning of “bona fide retirement plan.” The leading Fifth Circuit case, Brennan v. Taft Broadcasting Co., established a rule of law which held that any retirement plan in existence prior to 1967 which provided that an employer could forcibly retire any employee before 65 was not a violation of ADEA. Brennan was followed by a number of district courts from 1974 to mid 1977. The Third Circuit adopted a similar rule in Zinger v. Blanchette. The plaintiff was retired by the Penn Central Railroad at 64, which cost him $834 in annual retirement benefits. The Penn Central pension plan, originally the 1938 Penn-

139. Id. In fact, the company evidence tended to show that pilots over 40 were much safer than pilots under 40.

140. Id. at 565.


142. 29 U.S.C. § 623(f)(2) states:

“... shall not be unlawful for an employer... (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 purpose of this chapter...” (Emphasis added.)


144. 500 F.2d 212 (5th Cir. 1974).

145. Id. at 216-17.


sylvania Railroad plan, antedated the ADEA by nearly 30 years. In 1962, the railroad adopted a policy of making benefit payments to employees who were retired before 65, when benefits were due under the Railway Retirement Act. The company then had the right to retire any employee between 60 and 65. The receiver for the railroad admitted the discharge was discriminatory, but claimed the Penn Central retirement program was a "bona fide retirement plan" exempt from statutory liability. The Third Circuit held that forced early retirement pursuant to a bona fide pension plan did not violate the act, whether or not the plan pre-dated the ADEA.

McMann created the split among the circuits in 1977. McMann joined United in 1944. He voluntarily joined the United employee retirement program in 1964. The United plan provided for normal retirement at 60. It had been in effect since 1941. When McMann turned 60 in 1973, he was forcibly retired. He promptly filed notice of intent to sue under section 7(d) of ADEA, and brought suit in the district court for reinstatement and back pay. The court granted United's motion for summary judgment. The Fourth Circuit reversed the district court, concluding that the retention of the 1941 plan with forced retirement for employees at 60 was a subterfuge to evade the purposes of the act. The Supreme Court accepted certiorari on the case. It reversed the Fourth Circuit on December 12, 1977 with Chief Justice Burger's majority opinion citing both Brennan and Zinger with approval. The Supreme Court concluded that Congress did not intend to invalidate pre-existing retirement plans by adopting ADEA, nor did Congress intend to place the burden of proof on an employer to show that a pre-existing retirement plan served a bona fide business purpose.

Consequently, the bona fide retirement plan defense is not treated by any court as an affirmative defense which requires a defendant to prove the merit of its retirement program by a preponderance of the evidence. It has been consistently used by the courts as a procedural snare for the unwary plaintiff. A plan may be "grandfathered in" because it predated the adoption of ADEA or it may be bona fide, simply because it pays benefits to involuntary retirees before 65. So long as retirement is optional with the employer, and the employer makes some attempt to provide a small retirement benefit to early retirees, the plan is bona fide. Thus, nearly every American employer can discriminate against its employees based on age, if it pays them early retirement benefits. Under such a regime, salaried employees

148. Id. at 902-03.
149. Id. at 908.
150. Id. at 902-03. Mr. Zinger was an attorney employed by the railroad as house counsel.
152. 542 F.2d 217, 222 (4th Cir. 1976).
154. Id. at 4046.
will not prevail despite the fact that the plain evidence shows that the employee loses salary dollars plus increased retirement benefits and fringe benefits based on legitimate discrimination. If Congress intended to create such an exception to the Act’s prohibition, it may have intended to grant no relief except to persons who cannot be hired, or to those who receive severance pay dismissals. However, the courts seem to be in agreement that Congress did not mean to legislate forcible early retirement out of existence.

4. FAILURE TO NOTIFY DEFENSE. Section 7(d) of the ADEA states that no party can initiate a civil suit unless notice has been filed with the Secretary of Labor 60 days before suit. The notice has to be filed within 180 days of the event which is alleged to be discriminatory, or within 300 days of the date of the event, if the party pursues a state remedy. The courts have made this statute of limitations a jurisdictional prerequisite to dispose of cases without hearing them on the merits.

An individual who does not comply with the strict provisions of section 7(d), who fails to notify the Labor Department, cannot invoke the court’s jurisdiction. The complaint is subject to Federal Rule of Civil Procedure 12(b)(1) motion to dismiss for want of subject-matter jurisdiction. This logic arose in some early district court cases and was settled procedure in Powell v. Southwestern Bell Telephone Co. where an applicant was rejected because of age and, soon after rejection, in February 1970, had notified the U.S. Department of Labor. In June of 1970, the Labor Department responded by letter than her claim was without foundation. On that same date she wrote the Labor Department, requesting it to sue on her behalf. In March of 1971, the Regional Wage-Hour Division office told the complainant it would not sue on her behalf and she wrote the Department stating she would sue on her own. Southwestern moved to dismiss the plaintiff’s claim under Rule 12(b)(1). The telephone company claimed that Powell had not complied with the notice provisions of section 7(d), which deprived the court of subject matter jurisdiction. The district court agreed, and the court of appeals affirmed. It found that the 180 day notice provision of section 7(d) did not contradict the statute of limitations contained in the Portal Act, because the required notice to the Secretary of Labor was no limitation on filing suit. The purpose of the 180 day notice requirement was to put potential defendants on notice of possi-

157. 494 F.2d 485 (5th Cir. 1974).
158. Id. at 360.
159. Id.
160. Id.
161. Id.
The court also rejected plaintiff's argument that the 180 notice period in section 7(d) was essentially the same as the similar 180 notice period contained in 42 U.S.C. § 2000e-5. The Sixth Circuit has been particularly ferocious on enforcing the "notice is jurisdictional" doctrine. For example, in Rucker v. Great Scott Supermarkets, the district court dismissed Rucker's complaint because he failed to resort to the appropriate state agency in Ohio which was required to conciliate age discrimination cases. The court rejected the lower court's rationale but sustained its dismissal of the case because Rucker had not complied with the notice requirements of section 7(d) of ADEA. Rucker sent his notice of intent to sue only two days before he filed suit. In an earlier Sixth Circuit case, Hiscott v. General Electric Co., it was asserted that notice to the U.S. Department of Labor was a "jurisdictional prerequisite to the filing of any civil action under the ADEA." In Hiscott, however, the defendant had not posted notice required by the ADEA to warn its employees of

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162. Id. at 488. Of course Powell could have been disposed of by summary judgment, since it appears that Rosa Powell had no facts upon which she could prevail, since no one had been hired as a telephone operator at Cleburne, Texas since August, 1970. This was before the district court by affidavit. The court however, chose to avoid the sticky issue of liability and get rid of the case on a point of procedure.

163. Other courts have taken up this issue as an aside. The Third Circuit in Goger v. H.K. Porter Co., Inc., 492 F.2d 13 (3d Cir. 1974) decided the case in favor of the defendant, holding the plaintiff had not given appropriate notice to the New Jersey state agency authorized to conciliate age discrimination cases. The opinion, however, is also cited to support the "notice is jurisdictional" doctrine because of language in the opinion which suggests that deferral to a state agency may be called "jurisdictional."


164. 528 F.2d 393 (6th Cir. 1976).
165. Id. at 395.
166. 521 F.2d 632 (6th Cir. 1975).
167. Id. at 633.
their rights. The employee's allegation that this violation excused him from strict compliance with the notice provisions of section 7(d) was rejected, with the court stating:

We find nothing in the Act nor in its legislative history to indicate that compliance with the notice provisions was intended to be tolled or excused by the employer's failure, as here, to post the information notices.168

The Sixth Circuit party line, then, states that no equitable considerations will mitigate the jurisdictional requirement that a potential plaintiff send notice of intent to sue to the Labor Department during the required statutory time limits, and forbear filing his suit for 60 days after making notice.169

Not all courts have accepted the "notice is jurisdictional" rule. For example, failure of notice within the time limits of section 7(d) of ADEA was not adverse to the plaintiff's cause of action in Bishop v. Jellef's Associates170 where the employer failed to post the required statutory notice in its Washington, D.C. area store. Several of its former employees filed a class action against it for damages under ADEA although none of these employees complied with the 180 day notice requirement of the Act. The employees were excused from compliance by reason of Jellef's failure to post notices.

The Act also contains a precondition to a civil suit to enforce the terms of the Act that the claimant give the Secretary of Labor a "notice of an intent to file such action" at least 60 days prior to the suit and within 180 days after the alleged unlawful practice. . . . While this precondition, if strictly construed, was not complied with by the Plaintiffs, the Court finds that the failure to comply by the employees was excused by the actions of the employer. . . . The Court believes that the plaintiff-employees should not be penalized by the defendant-employer's failure to advise them of their rights as required by law.171 (Emphasis added.)

A retaliatory tone was applied in Bishop. If Jellef's concealed a civil right from its workers, then it could not be excused from liability for violating that civil right. Similarly, the Eastern District Court of Louisiana circumvented the "notice is jurisdictional" rule in Anisgard v. Exxon Corp.172 where the plaintiff failed to file notice within 180 days after he received his notice of discharge. However, his effective date of discharge came after the expiration of the 180 day notice period.173 Anisgard notified the Labor Department shortly after he was

168. Id. at 634.
171. Id. at 592.
173. Id. at 214.
let go. The plaintiff was relieved from any jurisdictional defect since notice to the Labor Department was within a reasonable time prior to filing suit.\textsuperscript{174} This theory was borrowed from similar decisions made under Title VII.\textsuperscript{175}

Unfortunately, the Fifth Circuit has accepted the "notice is jurisdictional" doctrine in \textit{Edwards v. Kaiser Aluminum and Chemical Sales, Inc.}\textsuperscript{176} when the plaintiff's first attorney neglected to issue notice to the Labor Department. The plaintiff then secured a second lawyer who made a late notice to the Labor Department. Kaiser Aluminum had not posted notice as required by ADEA. Although ADEA carried no penalty for failing to post notice, Edwards had not filed a notice of intent to sue within 180 days of his release from employment and was barred from suit.\textsuperscript{177}

The Eighth and Tenth Circuits, however, do not accept the "notice of jurisdictional" doctrine. The Eighth Circuit had the issue squarely before it in \textit{Moses v. Falstaff Brewing Co.}\textsuperscript{178} The plaintiff worked her last day November 16, and her last paycheck was issued November 30, 1973. She gave notice of intent to sue to the Labor Department May 24, 1974 and the district court dismissed her suit because she had failed to comply with the jurisdictional requirement of notice. She appealed.

In reversing the district court, the court of appeals panel rejected the Powell limitation on filing suit, finding that ADEA's procedural requirements should not be given a technical meaning and be so interpreted as to deny an employee a claim for relief unless "to do so would clearly further some substantial goal of the act."\textsuperscript{179} The panel did not say that notice to the Labor Department was not jurisdictional; rather it held that the employer had set the time for the running of notice by carrying the employee on their payroll until November 30, which made notice timely under section 7(d).\textsuperscript{180}

In \textit{Dartt v. Shell Oil Co.}\textsuperscript{181} the Tenth Circuit clearly rejected the "notice is jurisdictional" rule where the aggrieved employee was advised to forgo legal advice and directly seek the conciliation efforts of the Wage-Hour Division of the Labor Department. After the Wage-Hour Division failed to conciliate her grievance against Shell, she retained another attorney. This was more than 180 days after her discharge and her second attorney made late notice to the Labor Department.\textsuperscript{182}

\begin{thebibliography}{99}
  \bibitem{174} Id.
  \bibitem{175} Id. Judge Rubin repeated Judge Wisdom's remark about rigid interpretations of notice requirements in Title VII litigation.
  \bibitem{176} 515 F.2d 1195 (8th Cir. 1975).
  \bibitem{177} Id. at 1197.
  \bibitem{178} 525 F.2d 92 (8th Cir. 1976).
  \bibitem{179} Id. at 94.
  \bibitem{180} Id. at 94-95.
  \bibitem{181} 539 F.2d 1256 (10th Cir.), \textit{cert. granted}, 97 S. Ct. 1097 (1977) (No. 76-678).
  \bibitem{182} Id. at 1258.
\end{thebibliography}
district court dismissed her suit for failure to comply with the jurisdictional requirement of notice to the Labor Department. In overruling the district court, a procedural step which is jurisdictional was considered, when not taken, an absolute bar to bringing the action. The court of appeals noted equitable considerations are accepted as an excuse for noncompliance with the jurisdictional prerequisite, concluding that the notice requirement was not jurisdictional at all. It was a form of a statute of limitations. Thus, it could be tolled by equitable factors and was not an absolute bar to a plaintiff's claim. The plaintiff was relieved of her failure to file timely notice with the Labor Department because Shell did not conciliate in good faith with the Wage-Hour Division. It was also indicated that the Wage-Hour Division had given the plaintiff incorrect advice relating to her right to sue during the course of their relationship.183

ADEA has a trap for litigants. That trap is the required notice provision of section 7(d). The Third, Fifth, and Sixth Circuits, followed by a majority of district court decisions, use the notice provisions of section 7(d) as a means of reducing the flow of age discrimination litigation. If a litigant has not filed timely notice of intent to sue with the Labor Department, the litigant is out of court. This jurisdictional prerequisite means that litigants in those circuits must either issue the required notice of suit exactly as a competent lawyer would have done, or be barred from a hearing on the merits. The Eighth Circuit cannot decide whether it should verbalize its reduction of the flow of litigation in the same way the Third, Fifth, and Sixth Circuits have. The Tenth Circuit, however, has rejected the "jurisdictional prerequisite" rationalization, and treats the notice provisions as a means of excluding cases from court unless the facts of the case cry out for relief.

The purpose of notifying the Labor Department is to afford the litigant and the Labor Department the opportunity to work a conciliation of the litigant's claim. That is its only function. If conciliation is unlikely, improbable, or impracticable, then following the notice procedures is so much procedural punctilio. If Congress wanted to adopt an exhaustion-of-administrative-remedies-doctrine in the enactment of ADEA it would have designed the commencement of a claim under the Act to be an administrative charge, similar to comparable provisions of section 706 of the Civil Rights Act of 1964.

5. DEFERRAL TO STATE CONCILIATION AGENCY DEFENSE.

Section 14(b) of ADEA requires that civil litigation in a court of appropriate jurisdiction not be commenced until 60 days after a responsible state agency charged with enforcing a state age discrimination act has received notice of intent to sue.184 This provision is mysteriously worded, but there appears to have been a "60 day cooling off period"

183. Id. at 1259-62.
intended to let state officials attempt a non-judicial settlement of claims, similar to the provisions of section 7(d). In fact, the Labor Department still has concurrent jurisdiction over the same offense, and may attempt conciliation independently of any responsible state agency. If a potential litigant chooses not to commence a state proceeding, the Act apparently does not require the litigant to notify any state agency at all. However, the courts soon found that this provision of the Act could function like section 7(d) to reduce the case load by frustrating litigants who had not met and followed state age discrimination act notice procedure.

The first reported case on "deferral to state agencies" was McGarvey v. Merck & Co. McGarvey was employed by the Pennsylvania division of the Merck Company. The Pennsylvania Human Rights Commission had been given the duty of enforcing state age discrimination laws by conciliation. McGarvey never filed a charge with the Human Rights Commission, although he did give notice of intent to sue with the Wage-Hour Division of the Labor Department. Suit was dismissed for failure to file a complaint with the appropriate state agency. The plaintiff argued that a person aggrieved under ADEA had a choice of law that if the litigant desired to go before a state agency he could do so, and would then be required to wait 60 days before filing suit. If he chose not to submit to state conciliation, he simply followed the notice provisions of section 7(d) and filed his federal lawsuit. The employer alleged ADEA required deferral to appropriate state conciliation agencies as a "jurisdictional prerequisite" to filing a civil action. The court found itself in agreement with the defendant, for there are no meaningful distinctions to be drawn between subsections 2000e-5(c) and section 633(b) for the purposes of this action . . . . Plaintiff fails to allege any resort to the appropriate state agency within the period of the State Statute of Limitations which has now elapsed. Thus, any plaintiff could easily by-pass state agencies by waiting, for whatever reasons, until after the State Statute of Limitations has expired before commencing suit in a federal forum. Congress clearly did not intend to permit such an avoidance of primary state remedies when they exist under the Civil Rights Act of 1964. There is no evidence in the Legislative history of the Age Discrimination in Employment Act that Congress intended a different result in 1967.

In effect, the court declared that if a state agency had plausible jurisdiction over an age discrimination complaint, the injured employee had to take his case to the state agency, in addition to the U.S. Department of Labor to be able to file a civil action.

186. 43 P.S. § 951 et seq.
187. 359 F. Supp. at 528.
188. Id. at 526.
189. Id. at 526-27.
190. Id. at 527-28.
This same conclusion was reached in the Eastern District of Michigan in *Vaughn v. Chrysler Corp.*\(^{191}\) Michigan had a separate ADEA enforced by the State Secretary of Labor. All age discrimination complaints had to be filed with the Secretary 90 days after the occurrence of the discriminatory act. Vaughn failed to file a state age discrimination claim within 90 days after his discharge, although his federal notice to the Labor Department was timely. Vaughn's cause of action was dismissed since deferral to a state agency was jurisdictional\(^{192}\) with the court citing *Goger*\(^ {193}\) as authority for that proposition. In dictum the judge noted that the harshness of the jurisdictional referral rule could be mitigated if the plaintiff had received erroneous advice about filing notice with a responsible state agency.\(^ {194}\)

*Goger* was a fairly simple case. Virginia Goger filed appropriate notice with the U.S. Department of Labor, but did not file a charge with the New Jersey Department of Labor, Wage, Hour and Public Contracts Division. Her case was not dismissed, although the Third Circuit Court of Appeals found that filing a charge before the state agency was a jurisdictional prerequisite to a civil action in federal court.\(^ {195}\) It determined that, as ADEA was relatively new, and the Wage-Hour Division had informed the plaintiff that she was free to file suit without mentioning the existence of any state law,\(^ {196}\) equitable considerations will relieve a litigant from failure to pursue a state remedy.\(^ {197}\)

To make the deferral situation even more confusing, some courts have classified states as "deferral" and "non-deferral" states. This system was apparently developed by the First Circuit in *Lugo Garces v. Sangner International Corp.*\(^ {198}\) arising in Puerto Rico. The plaintiff failed to file a complaint with the Commonwealth Labor Department before he filed his ADEA suit in federal court. The applicable statute provided for a civil action either by the Commonwealth or by the aggrieved party, to redress age discrimination in employment.\(^ {199}\) The district court dismissed the suit for failure to comply with a jurisdictional prerequisite; deferral to the Commonwealth. The First Circuit

\(^ {192}\) Id. at 144-46.
\(^ {193}\) 492 F.2d 13 (3d Cir. 1974).
\(^ {194}\) 382 F. Supp. at 145-46.
\(^ {195}\) 492 F.2d at 16.
\(^ {198}\) 534 F.2d 987 (1st Cir. 1976).
\(^ {199}\) 29 L.P.R.A. § 146.
reversed the trial court since there was no state requirement that a
party discriminated against must automatically resort to a state agen-
cy under Commonwealth law.\textsuperscript{200}

Shortly thereafter, the Northern District of Illinois determined
that Illinois was not a "deferral state" where no Illinois agency had ad-
ministrative responsibility for enforcement of the state anti-age
discrimination act.\textsuperscript{201} Likewise, in Hadfield v. The Mitre Corp.\textsuperscript{202}
Massachusetts was found not to be a "deferral state" prior to 1974
when Chapter 151A of Massachusetts General Laws was amended to
require resort to state agencies for age discrimination.\textsuperscript{203}

On the other hand, the Eastern District of Michigan contradicted
itself within two years after its ruling in Vaughn\textsuperscript{204} that resort to the
State Department of Labor for administrative conciliation of age
discrimination cases was condition precedent to suit, unless the litigant
had been misled by acts of public authorities.\textsuperscript{205} Although Vaughn had
been followed in two subsequent controversies,\textsuperscript{206} the court in Nickel v.
Shatterproof Glass Corp.\textsuperscript{207} decided the plaintiff should not be barred
from court because he failed to file a state claim within the 90 day
Michigan statute of limitations for age discrimination conciliation
claims.\textsuperscript{208} The rationalization of this position was that:

\textit{To hold that failure to timely file with a state agency had the effect of
barring a federal remedy would mean that persons living in states that
have seen fit to pass legislation attempting to deal with the problem of
age discrimination would often be in a worse position than persons in a
state with no such legislation.}\textsuperscript{209}

Consequently, there are states which have statutory age discrimination
in employment acts providing a public agency will investigate and
conciliate age discrimination claims while other state statutes provide
no administrative enforcement. In those states which have an ad-
ministrative agency to enforce age discrimination claims, a potential
litigant is advised to file a complaint with a state agency and then wait
60 days to file a civil action, even though he has complied with ap-
licable provisions of section 7(d) of ADEA.

\textsuperscript{200} Id. at 989-90.
\textsuperscript{201} Bertrand v. Orkin Exterminating Co., Inc., 419 F. Supp. 1123, 1128 (N.D. Ill.
1976).
\textsuperscript{203} Id.
\textsuperscript{205} Id.
\textsuperscript{208} Id. at 887.
\textsuperscript{209} Id. at 886.
B. Prerequisites for Class Action.

There are formidable problems for a litigant who files a class action under ADEA. Do all potential plaintiffs have to give proper notice to both the appropriate state agencies and to the U.S. Department of Labor? Do all the plaintiffs in a class action have to consent to acting as party plaintiff under the provisions of the FSLA or may one plaintiff represent all others similarly situated under Rule 23 of the Federal Rules of Civil Procedure? These questions make ADEA class actions dangerous instruments.

1. REQUIREMENT OF NOTICE IN CLASS ACTIONS. In Bishop it was held that in a class action by discharged employees, the employees who failed to file notice with the Labor Department were excused from compliance with section 7(d) because the employer failed to post notice required by ADEA stating the employees’ rights under law. It was not mentioned whether this result was an effort to augment the class action, or a general proposition of law. Yet, in Hays v. Republic Steel Corp. there were four plaintiffs, one of whom failed to file notice with the Secretary. This plaintiff’s dismissal from the suit was affirmed by the Fifth Circuit Court of Appeals which did not disclose whether this action was a true class suit or a multiple plaintiff case. If this precedent applies to a class action under ADEA, then no one can be a member of a class of plaintiffs similarly situated unless he has already filed his notice with the Secretary of Labor under section 7(d) and if necessary, notified the appropriate state agency under section 14(b).

However, in Gebhard v. GAF Corp. where there were also four plaintiffs, the court found a representative number of persons similarly situated, constituting a class for class action purposes. Nevertheless, the court found since none of the four had filed notice of intent to sue with the U.S. Labor Department, the suit was dismissed. The court stated:

These plaintiffs are hardly representative of a class suing under the Age Discrimination Act since none has met the jurisdictional prerequisite of filing timely notice with the Secretary of Labor. Certifying this matter as a class action would bind all similarly discharged employees whose possible bona fide claims would be res judicata.

Another 1973 case, Burgett v. Cudahy Co., found, under circumstances identical to Gebhard, that three persons who had not given notice to the Secretary of Labor were proper persons to be class plain-

211. Id. at 592.
212. 531 F.2d 1307 (5th Cir. 1976).
213. Id. at 1312.
215. Id.
tiffs. Plaintiff Burgett had given notice under the Act while claimants Price, Walker, and Egan had not. The District Court of Kansas determined that Price, Walker, and Egan should remain in the action applying the provisions of section 16 of the FSLA to determine who could be parties plaintiff in an ADEA suit.

However, in Blankenship v. Ralston Purina Co. the district court for the Northern District of Georgia found that section 16 of the FSLA did not bind all litigants to a system of actual consent to be plaintiffs. Instead, the plaintiff was permitted to proceed as one of a class too numerous to practically require joinder of all parties. All parties similarly situated did not mean all those who had given notice to the Labor Department.

Thus, where an individual has timely filed notice with the Secretary of Labor in accordance with 29 U.S.C. § 626(d)(1) and thereafter seeks to maintain a class action on behalf of all others similarly situated to himself, the members of the alleged class need not file with the Secretary since they would have been aggrieved by the same discriminatory actions as those practiced upon the class representative. (Emphasis added.)

Yet Blankenship did not settle the prerequisites of a class action and a subsequent Georgia case concluded that an ADEA case could not be brought by a representative party plaintiff. Section 16 of the FSLA still required all plaintiffs to be plaintiffs who have consented to the action.

2. SECTION 16 OF THE FSLA

The ADEA incorporated section 16 of the FSLA by reference which specified the nature of the remedy for a wage claim. The section was designed to frustrate class litigation for those persons claiming unpaid minimum wages or overtime pay. The clause read:

No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

If this provision is applied to ADEA, class actions are impossible. If class actions are denied in ADEA suits, then the kind of evidence admissible on the issue of discriminatory practices is severely restricted. Further, the amount of damages recoverable in an individual action

217. Id. at 625.
218. Id. at 622.
220. Id. at 38.
221. Id. at 41.
222. Id. at 42.
224. Id. at 100.
may be quite insignificant and hardly worth the immense effort necessary to prove a case, although a class of several persons similarly situated increases the damage award and justifies a greater award for attorneys' fees. 226

In summary, despite the better reasoned analysis of Burgett, ADEA plaintiffs should probably not file a class action under Rule 23 since the FSLA frustrates it. Furthermore, all potential plaintiffs will likely be required to notify the Labor Department and applicable state agencies before being eligible to be a party plaintiff. This means that the courts have emasculated part of the potential relief plan for age discrimination by restricting suits to individual actions or actions by the Secretary of Labor although class actions are particularly appealing ways to redress social wrongs, since the cost-benefit ratio per individual litigant becomes much more favorable.

C. The Secretary's Suits under the ADEA.

Since 1968, the Secretary of Labor has been filing between 30 and 47 suits every year in an attempt to enforce ADEA against only the most flagrant violators. There are 31 reported cases filed by the Secretary including appellate review cases. The Secretary has won 16 and lost 15 which averages better than all other litigants in ADEA cases. Applying this figure to the 350 filings since 1968, the Secretary has had about 178 victories in nine years, averaging almost 20 successful suits a year. Considering the immensity of the phenomenon called age discrimination in employment, this is not an impressive court record. If private litigants cannot obtain class relief via ordinary litigation, the effort is unimpressive.

D. Title VII and ADEA.

Some, but not all courts reviewing ADEA cases have found the similarity between ADEA and Title VII. Some courts have admitted typical Title VII statistical evidence in ADEA cases while others have not done so. Additionally, the "overriding business purpose rule" has been considered in connection with ADEA's: "bona fide retirement plan" and "bona fide occupational qualification" exceptions to liability.

226. These realistic considerations must have been in the mind of the court in McGinley v. Burroughs Corp., 407 F. Supp. 903 (E.D. Pa. 1975). The plaintiff filed a two count action, one count a class action. The class plaintiffs had not filed consent to be plaintiff. The court dismissed the class action count, without consideration of the problem of notice to the Labor Department. In Murphy v. American Motors Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976) an individual plaintiff requested class relief, but no issue was made about an injunction issued in favor of persons similarly situated. In Sant v. Mack Trucks, Inc., 424 F. Supp. 621 (N.D. Cal. 1976) the plaintiffs were apparently a class of injured employees, but no challenge to the composition of the class or to notice to the Labor Department appears in the case report. Frank H. Mastie and Kenneth J. Seymour were plaintiffs in Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1975), but they were not considered class plaintiffs according to the class report.
Textually, ADEA appears to be a restatement of Title VII. The correlation is striking enough to have been considered by a number of judges in ADEA cases 227 which makes the following analogy appropriate.

1. PROHIBITIONS. ADEA's prohibitions have been lifted, with minor modifications, from section 703 of the Civil Rights Act. Both Acts use the operative language "fail or refuse to hire or discharge or otherwise discriminate against any individual." 228 Both make it unlawful to "limit, segregate or classify employees in any way which would deprive or tend to deprive" the employee of his rights. 229 Each Act also orders employment agencies not to "fail or refuse to refer to employment or otherwise to discriminate against any individual." 230 Each Act requires a labor organization not "to exclude or to expel from its membership or otherwise to discriminate" or "to limit, segregate or classify its members or fail or refuse to refer for employment any individual" protected by either Act. Title VII, of course, contains prohibitions against discrimination in employee training or retraining programs which do not appear in ADEA. 231 But both statutes provide protection for any person who has opposed or sought to change discriminatory practices. 228 Both statutes outlaw employers and employment agencies from publishing literature, lists, or advertising which describes discriminatory practices. 232 Title VII is aimed at discrimination based on sex, race, religion, color, or national origin. ADEA is only aimed at discrimination based on age.


229. Id.


2. Exceptions of Liability: Seniority System and Bona Fide Occupational Qualifications. Title VII establishes the principle that it will not be an unlawful employment practice for an employer, employment agency, or labor union to classify individuals according to sex, religion, or national origin when a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise requires the classification. ADEA adopts the same language with respect to age.\(^{234}\)

Both Acts permit an employer to establish a seniority system.\(^{235}\) ADEA adds the concept of a bona fide retirement system\(^{236}\) to the Title VII list of defenses to liability by confession and avoidance. Both Acts offer the same affirmative defenses, with the exception of the bona fide retirement plan defense which is limited to the ADEA.

3. Notice to Responsible Federal Agency. ADEA and Title VII require preliminary notice to be made to the responsible federal agency\(^{237}\) as a condition precedent to bringing a civil action. Both require the notice of intent to sue to be filed within 180 days after the occurrence of the alleged unlawful practice.\(^{238}\) If a responsible state agency exists which can conciliate disputes of the type arising under the Acts, notice to the federal agency must be made within 300 days of the occurrence of the precipitating event or within 30 days after termination of state proceedings, whichever is earlier.\(^{239}\)

4. Cause of Action. Although the language of the ADEA is more intelligible than section 706 of Title VII the statutes are essentially parallel. If a complaint filed with the Equal Employment Opportunity Commission [hereinafter EEOC] is not disposed of within 180 days after filing, or if the Commission dismisses the charge, the aggrieved party has the right to sue his employer for reinstatement, back pay, or any other equitable relief.\(^{240}\) ADEA authorizes an action by "any person aggrieved" for "such legal or equitable relief as will effectuate the purposes of this chapter."\(^{241}\)

There is still an important difference between the two Acts: The ADEA permits a plaintiff to obtain "legal or equitable relief,"\(^{242}\) but the plaintiff under Title VII is restricted to "equitable relief" only.\(^{243}\) The ADEA also incorporates rules from FSLA which restrict the scope of

\(^{238}\) Id.
\(^{239}\) Id.
\(^{241}\) 29 U.S.C. § 626(c) (1967).
\(^{242}\) Id.
legal relief to back pay and liquidated damages (double the actual loss) in cases of a wilfull violation.244

5. DEFERRAL TO STATE AGENCIES. Title VII and ADEA both provide for deferral to state agencies. Section 14(b) of ADEA requires deferral to state agencies to the extent that no civil action can be filed by an aggrieved party until 60 days after initiation of state agency proceedings to conciliate a dispute.245 The corresponding provision of section 706 of Title VII requires a party to file charges "in a state . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a state or local authority to grant or seek relief from such practice."246 Both provisions are intended to force aggrieved parties to exhaust administrative remedies before filing suit or to force at least a good faith attempt to conciliate a dispute short of litigation.

6. NOTICE. Both Acts require an employer to post notices that anti-discrimination acts exist. The notices are prescribed by the relevant federal agency and must outline an individual's rights under the law.247

7. CONCLUSION. The drafters of ADEA clearly borrowed their language from Title VII without giving much thought to the phenomenon of the economic aspects of aging.248 Unfortunately, age discrimination is different in quality from other forms of discrimination.

Age can be a rational basis for discrimination between individuals seeking employment or retention. The difficulty in making discriminatory decisions based on age lies in the known phenomenon that each individual's aging process is different due to both hereditary and cultural factors.249 Blanket approaches to the aging process is an irrational method of employment classification, assignment, hiring, or retention. However, there is an economic price tag on anti-age discrimination: higher retirement benefits for older workers, the cost of which must be paid, as in all economic equations, by the purchaser of goods and services, including the older worker himself. Thus,

249. See Kovarsky & Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 VAND. L. REV. 839, 852-67 (1974). The Kovarsky study further concluded that: "In regard to the earlier problem of employability for the forty to sixty-five year age group, there would seem to be better predictors of morbidity and mortality in this group than chronologic age itself . . . . Age does not increase the probability of accident even though heart, circulatory and other diseases figure prominently in workmen's compensation claims."

Id. at 867.
vigorous enforcement of ADEA will be a cost-push item since it will generate an increment which increases the cost of goods and services.

E. Does the "Overriding Business Purpose Rule" Apply in Age Discrimination Cases?

The "overriding business purpose rule" was established by the Supreme Court in Griggs v. Duke Power Co. The Court determined that Duke Power's hiring requirement that all applicants have a high school degree and pass a simple aptitude test in two parts was a prohibited discriminatory act. Since the main point of the testing process was unrelated to any particular job, the process screened out a much higher number of Blacks proportionately than it did Whites. The Court found that despite the fact that Duke did not subjectively intend to discriminate against Blacks the objective effect of its policy was to force them to take the most menial jobs in the company, or to be refused employment. Furthermore, since there was no substantial relationship between the testing process and any job qualifications at Duke, the procedure was invalid. The Court demanded that a discriminatory employment practice be substantially related to job qualifications and if not, it was a prohibited practice under Title VII.

Later, the Fifth Circuit Court of Appeals held in Robinson v. Lorillard Corp. that workers in the Greensboro, North Carolina, tobacco processing plant who were victimized by a pre-1974 union seniority system which created seniority rights favorable to Whites and prevented Blacks from attaining better level positions was unlawful. The court found that a practice deemed unlawful cannot be justified by a business purpose. Although the seniority system was not overtly discriminatory, its impact on Blacks was discriminatory because it maintained a pre-1962 status quo which was de facto discriminatory. The court said:

The true test of such a practice is whether there exists an overriding business purpose such that the practice is necessary to the safety and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact. (Emphasis added.)

The Fifth Circuit concluded that the Lorillard seniority system had no overriding business purpose, and was infirm under Title VII.

There is a substantive difference between the "bona fide occupational qualification" and the "overriding business purpose". The "bona fide occupational qualification" rule in the Seventh and Fifth Circuits is

251. Id. at 436.
253. Id. at 796-97.
254. Id. at 798.
a "clearly erroneous" test. If the employer has some rational basis on which to rest his discriminatory practice, then the courts may not substitute their judgment for the employer.\textsuperscript{255}

The "overriding business purpose" rule, however, places the burden of proof on an employer to establish that his discriminatory practice is essential to the safety and efficient operation of his business.\textsuperscript{256} The only ADEA case which appears to have used the "overriding business purpose" rule is \textit{Houghton},\textsuperscript{257} wherein Mr. Justice Clark excoriated McDonnell-Douglas for its lack of evidence on the relation between chronological age and job ability for test pilots.

\textbf{F. Shifting the Burden of Proof to the Defendant.}

Although some courts appear confused over the difference between the burden of proof and the burden of going forward with the evidence, most judges would agree that a litigant must establish each material proposition of his case by a preponderance of the evidence in civil litigations. As in Title VII litigation, however, the litigant's stance has been so imbalanced that special burden of proof rules had been worked out by the Supreme Court in \textit{McDonnell-Douglas Corp. v. Green}.\textsuperscript{258} The majority opinion, written by Mr. Justice Powell, held that in order to establish a prima facie case, a Title VII plaintiff had to meet four requirements:

(a) the plaintiff belonged to a racial, religious, or ethnic minority, or was a woman;

(b) he applied for and was qualified for a job which was open for hire;

(c) he was rejected, despite his qualifications; and

(d) after his rejection, the position was still open and the employer continued to look for persons to hire.

An employer was required "to articulate some legitimate non-discriminatory reason for the employee's rejection".\textsuperscript{259} Once the employer does so, he has "discharged his burden of proof" with the caveat that "the employee at that point, must be afforded a fair opportunity to show that [the employer's] stated reason . . . was in fact pretext."\textsuperscript{260}

\textsuperscript{255} \textit{Id.}

\textsuperscript{256} See, e.g., United States v. United Gypsum Co., 333 U.S. 364 (1952); John Blue Co. v. Dempster Mill Mfg. Co., 275 F.2d 666 (8th Cir. 1960); Cleo Syrup v. Coca Cola Co., 139 F.2d 416 (8th Cir. 1943).

\textsuperscript{257} 553 F.2d 561, 564 (8th Cir. 1977).

\textsuperscript{258} 411 U.S. 792 (1973).

\textsuperscript{259} \textit{Id.} at 802.

\textsuperscript{260} \textit{Id.} at 804. The \textit{McDonnell-Douglas} decision had been anticipated by several appellate decisions in the early 1970's. See, e.g., United States v. United Brotherhood of Carpenters & Joiners Local 169, 457 F.2d 210, 214 (7th Cir. 1972); Walston v. Nansemond County School Board, 492 F.2d 919, 924 (5th Cir. 1971).
Occasionally, ADEA cases have caused courts to toy with the idea of applying the holding in *McDonnell-Douglas Corp.* to ADEA cases. In *Hodgson v. First Federal Savings & Loan Association Broward County* the court allowed the Labor Department to use statistical evidence, as if the case were tried under Title VII to present a prima facie case. The trial judge noted in dicta:

Adding to this circumstance the fact that defendant's representative wrote "too old for teller" on his interview noted on Mrs. Hall, we think it plain that the Secretary has made out a strong prima facie case of age discrimination against Mrs. Hall. That being so, the burden shifted to the defendant to show that it had good and sufficient reasons, other than age, for not hiring her.

Clearly, the court believed that ADEA stated the same requirements of burden of proof as applied to Title VII cases.

The Fifth Circuit accepted *McDonnell-Douglas* as "the law of the case" in *Wilson v. Sealtest Foods Division of Kraftco Corp.* which involved an unsuccessful jury trial where the district judge directed a verdict for the defendant at the close of the plaintiff's case. The Fifth Circuit reversed and remanded the case for a new trial with Wilson arguing that the effect of *McDonnell-Douglas* was to make it impossible for a trial judge to direct a verdict if an ADEA plaintiff showed himself to be part of the protected age group, performing satisfactorily at work, and dismissed without explanation and replaced by a younger man. The following explanation of the court's decision to remand was offered:

We agree with the Appellant that there are certain factual dissimilarities between *McDonnell* and the present case. We do not, however, find it necessary to rely solely upon *McDonnell* precedent in order to determine that the Appellant presented sufficient evidence to prohibit the District Court from directing a verdict against him. We simply state that in the particular procedural framework within which this case is presented, a showing that the Appellant was within a protected class, was asked to take early retirement against his will, was doing apparently satisfactory work, and was replaced by a younger person will not permit dismissal at such an early stage of the trial proceedings. A minimal showing of these analogous *McDonnell* factors justifies some explanation upon the part of the employer.

Since *Wilson*, Title VII standards on burden of proof and rebuttable presumptions apply to ADEA and since 1974, no Fifth Circuit ADEA cases have altered this holding.

261. 455 F.2d 818 (5th Cir. 1972).
262. *Id.* at 823.
263. 501 F.2d 84 (5th Cir. 1974).
264. *Id.* at 87.
265. *Id.* at 86.
266. *Id.*
The Sixth Circuit also struggled with the burden of proof and persuasion in ADEA cases in *Laugeson* discussed earlier where the plaintiff attacked the defendant’s jury verdict by charging the trial judge with errors of law in instructions to the jury on the issue of burden of proof. Laugeson claimed he was entitled to a jury instruction which stated in substance that plaintiff had made a prima facie case by showing he was within the protected age group, had been forcibly retired when performing his job adequately, and was replaced by a younger man, thus requiring the defendant to prove that it had not acted in a prohibited manner. The appellate court refused to automatically apply *McDonnell-Douglas*, holding that the district court committed no error in refusing to give the requested instruction, nor did it commit error in refusing to direct a verdict for Laugeson at the close of defendant’s case. The court also noted that Laugeson could be distinguished from *McDonnell-Douglas* since Laugeson involved a discharge and *McDonnell-Douglas* involved a refusal to hire. Furthermore, subsequent developments and the independent legislative histories of ADEA and Title VII demanded caution in analogizing the two Acts.

The Sixth Circuit contended that an ADEA suit was ordinary civil litigation in which the plaintiff had to prove his case by a preponderance of the evidence without any aid from a presumption of discrimination arising from a showing of the elements required by *McDonnell-Douglas*. Since Laugeson, the Sixth Circuit has not been approached with burden of proof and persuasion questions arising under ADEA and no other circuit since 1975 has been requested to untangle burden of proof problems arising under ADEA. Nor has any court thoroughly applied *McDonnell* to an ADEA case.

The theory of burden of proof and presumptions in civil litigation is complex and contradictory. Some presumptions arise as a result of in-

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267. 520 F.2d 307 (6th Cir. 1975).
268. Id. at 312.
269. Id. at 311.
270. Id. at 311 n.3.
271. Id. at 411 n.4. Judge Engel’s footnote reads as follows:

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

Id.
272. Id. at 513.
ferences from statistics produced in court. Other presumptions are created by judges as legal fictions geared to reach results. Some presumptions disappear when any probative evidence to the contrary is produced by the opposing party. Normally, the party assigned the burden of proof on any issue or proposition in litigation must produce sufficient evidence to establish his issue by a preponderance of all evidence admitted into court. Once the plaintiff, who normally has the burden of proof on all issues in his case, has made a prima facie case, the burden of going forward with the case shifts to the defendant. The plaintiff may make his case by use of one or more presumptions which are not generally considered evidence. The defendant, however, does not have the burden of proof on any issue and is only required to provide sufficient contradictory evidence to rebut the plaintiff's case.

If the usual standard for civil litigation applies to the ADEA then plaintiffs are likely to lose for insufficiency of evidence. Since the statistics show this to be true, the unequal litigation position of a private individual and his attorney's resources versus the legal resources of a large, corporate employer who can defy federal attempts at conciliation is reinforced. Consequently, the rule of McDonnell-Douglas favors plaintiffs. It relieves plaintiffs from the dead weight of ordinary rules concerning burdens of proof and presumptions and puts the burden on the employer to explain away an apparent civil rights violation.

G. Statistical Evidence in ADEA Cases.

Since a plaintiff in an employment discrimination case usually has to build his case out of circumstantial evidence, the proper manner of case construction, where no one-to-one dismissal or refusal to hire has occurred, is to collect statistics about the employer's hiring and firing practices. Statistical evidence in Title VII litigation has been hotly debated in several law reviews in recent years. The acceptable way

275. Id. § 345, at 819-29.
276. This position may be somewhat radical, but it is the logical force of McDonnell-Douglas Corp. v. Green, unless limited by later Supreme Court decisions. The plaintiff in an employment discrimination suit needs special assistance from the theoretical basis of the law in order to have an even chance of winning.
to submit statistical evidence in employment discrimination cases has been to produce statistics which show that any employee has been adversely affected by an employment practice and is a member of the relevant class of persons claiming an injury. This statistical treatment is a single variable relationship. It will be assumed that among the class of persons adversely affected by employment practices, the only indicator is "prohibited activity."

For example, suppose a group of employees present a variety of ages and out of that group, all of those promoted to supervisor were under 40. Wouldn't the employer have violated ADEA if the total number of employees is 100, and the number of supervisor promotions is ten where a simplistic reading of the promotions shows age discrimination? The numbers need to be examined in terms of the other qualifications for disputed positions. In addition, what is the actual median and mean age for the work force? Essentially, employment statistics may be misleading or irrelevant, unless the population is correctly identified, all variables identified and then analyzed by all other relevant variables. In our hypothetical, to be a supervisor, an employee needs five years' work experience, a high school diploma, and a satisfactory or better work rating from his present supervisor. Thus, more questions appear:

(a) How many employees have a high school diploma?
(b) What is the age range of high school diploma holders?
(c) What is the age range of the employee population?
(d) How many employees have a satisfactory or better work rating?
(e) What is the age range of employees having a satisfactory or better work rating?
(f) How many employees have five years' experience?

excellent note by the Harvard Law Review staff which shows the statistical systems used to verify and to dissect statistical evidence in employment discrimination cases. Note, Beyond the Prima Facie Case in Employment Discrimination Law; Statistical Proof and Rebuttal, 89 Harv. L. Rev. 387 (1975).


280. See E. Jones, Conducting Political Research 91-108 (1971) for a description of this measurement technique.

281. Id. at 110-35 discusses the means of describing a two variable relationship.
(g) How many employees have five or more years' experience, a high school diploma and a satisfactory or better work rating?

(h) What is the age range of the group in (g)?

In a valid analysis of the job promotion system all the variables going into the decision have to be matched against age in order to determine whether ADEA has been violated. For instance, what is the correlation between age and possession of a high school diploma? Are younger men more apt to have a diploma than older men? Are younger or older men more likely to have a satisfactory or better work record? Are younger or older men more likely to have at least five years' experience?

Statistical evidence is vitally important to discerning whether a party has been the victim of age discrimination. It is relevant in determining whether a practice is prohibited in the first place. It is also relevant to the issues of "bona fide occupational qualification" and "reasonable factors other than age" which negate violations of the Act. Nevertheless, statistical evidence has not been exploited in ADEA cases. In some instances, single variable statistics have been admitted to prove age discrimination. However, no reported decisions reflect multivariable analysis. Data gathering and sifting, however, is probably beyond the competence of the average attorney representing an ADEA plaintiff. The Labor Department could ascertain and develop this information more readily than any private litigant. Since ADEA

282. Id. at 110-11. Jones says:
“A description of common variation has two main aspects: degree and form. The degree of the relationship involves the amount of covariation or correlation between two variables. If two variables are highly related, then they will vary together and will have a high degree of association. Conversely, if two variables are only minimally related, then they will not vary in common, and there will be a low degree of association. Thus, we first need measures of association, or as they are also called, correlation coefficients.”


284. There are two generally recognized methods of multivariable analysis, or comparison of more than one variable. The first is analysis of variance (ANOVA). ANOVA is a system by which the average value of the factor to be explained is determined, and a measure of how the several individual observed values vary. Variance is calculated by subtracting the average value from each of the observed values, squaring the difference, adding all of the squared terms, and then dividing the sum by the number of observations. The square root of variance is called the "standard deviation.” E. JONES, CONDUCTING POLITICAL RESEARCH 105-06 (1971). The second method, regressions, is more sophisticated. It evolves from the scattergram by which statisticians calculate the relationship between two variables. A regression line is a line drawn on the scattergram which best describes the data plotted. The measure of association is called the product-moment correlation, or “Pearson’s r”. It varies from plus 1 to minus 1. A perfect correlation is plus 1, a negative value means inverse correlation, and zero represents no correlation. Id. at 125.27. None of this type analysis appears in case reports on the ADEA decisions. Title VII cases, with very few exceptions, do not show any multivariable analysis work. See Dordaneo, supra 871-73 for a brief discussion of what has been done in recent years with relevant population samples and correlation factors.
litigants cannot maintain class actions, frustrating private enforcement of the Act, there is no practical way in which age discrimination can be shown against any broad class of victims.

III. PROPOSALS TO RECONSTRUCT THE ADEA

Since 1967, enforcement of ADEA has been ineffectual. The procedure for conciliation is unsuccessful and time-consuming under present statutes and regulations. The Act has a complicated notice provision which trips amateurs before there is a hearing on the merits, and a system of requiring exhaustion of remedies which requires deferral to state anti-age discrimination agencies and their ineffectual conciliation processes, and to the Labor Department's conciliation processes. Plaintiffs are generally unable to file a Rule 23 class action to enforce the Act; the means of acquiring vital statistical data on employment practices is beyond the means of the average plaintiff, and the theory of the right to recover and the remedies available to an injured party emphasize low-return compensation in the form of back pay, attorney's fees, and in some anomalous cases, an award of double damages if the injured party is not reinstated or hired.285

If the goal of ADEA is to provide a remedy for individuals or members of a class of persons who have been deprived of the civil right of employment based on their chronological age, the Act should be restructured to provide an effective remedy system. If the purpose of the Act, however, was to check the outward manifestation of age discrimination by prohibiting only obviously improper conduct such as advertising job openings with an upper age limitation or creating lists with upper age limits for retention, then the Act has been successful since these obvious forms of age discrimination in employment have largely disappeared since 1967. Unfortunately, a great deal of time, money and effort has been expended to provide very little aid to too few people.

A. Enforcement Theory.

A remedy can be enforced, theoretically, by a number of means. A civil right of action can be created to allow an injured party to sue a wrongdoer for damages, restitution, or equitable relief such as an injunction or an order rescinding a contractual obligation. These remedies defining prohibited conduct as a crime, punishable by fine or imprisonment, can be enforced by an administrative agency which is assigned the task of adjudicating the aggrieved party's rights, subject to judicial review. The remedy might be assignment to an administrative agency for the purpose of mediating and conciliating a dispute without adjudication of any rights, or there might be an enforcement scheme by special legislative actions in favor of an aggrieved party authorizing recovery. As additional alternatives, any combination of

285. The Older American Worker supra note 16, at 1-3.
the above-mentioned enforcement theories can be used in whatever fashion the legislature sees fit. Nevertheless, the review of ADEA which this article represents should show that the district and appellate courts of the United States do not encourage ADEA suits. It may be a constitutional fallacy for the federal judiciary to refuse to expand its size and its outlook to include these cases, but that fallacy seems socially desirable to the federal bench, considering their present workload.

ADEA does not provide for any criminal penalties unless a Labor Department investigation is obstructed. It does not set up an administrative hearing and determination system which frees the courts from work they do not desire to take on. Instead, it opts for conciliation which is ineffective plus private litigation which seems to be only slightly less ineffective than the conciliation program.

The most effective American enforcement system for adjudicating employment disputes yet devised is within the workmen's compensation system. It employs hearing officers to investigate and take evidence in disputed cases, whose findings are reviewed by a panel of hearing officers and ultimately by a court. It encourages settlement by penalizing employers or carriers who do not settle a bona fide claim without resort to litigation. It also operates at a relatively low cost. The National Labor Relations Board, [hereinafter NLRB] while hardly a model of efficiency itself, adopted its administrative enforcement scheme from the common state workmen's compensation laws. The NLRB enforcement scheme is practically designed to obviate the need to go to court for a remedy, except in extreme and unusual situations. This administrative adjudication program is a system best designed to meet the needs of aggrieved parties under the ADEA.

B. Federal-State Relationship. Section 14(b) is ADEA's only sanction to ensure an effective deferral system. If there is redeeming social value in allowing state agencies to adjudicate or to conciliate an aggrieved party's claim of age discrimination in employment, then the Labor Department should be charged with the responsibility of receiving all complaints on age discrimination, and channeling them to appropriate state agencies for relief. If an enforcement system of administrative adjudication becomes part of the ADEA, then such guidance becomes necessary to the system of adjudication.

C. Specific Recommendations. It is clear that the judiciary can do very little to improve ADEA by judicial gloss. To improve the Act, the following revisions should be made by Congress.

1. ENFORCEMENT SCHEME. An ADEA complaint should be adjudicated administratively, in a manner similar to state workmen's compensation law adjudications. The aggrieved party should file a charge or complaint with the Labor Department with a short and plain statement describing the alleged violation. A copy of the complaint
should be mailed to the employer and to any responsible state agency. The Labor Department or state agency should attempt an informal settlement by conciliation during a cooling off period between commencement of the charge and hearing date.

2. **HEARING PROCEDURE.** The aggrieved party should be given a hearing date by the Labor Department before a compliance officer. The officer should be able to swear witnesses, take evidence, and issue a subpoena enforceable in a district court by contempt. This official also should be empowered to make investigations to determine relevant employment data relating to age discrimination and the employer without waiting for the adversary process to develop the data.

3. **EVIDENCE OF AGE DISCRIMINATION.** The hearing officer should be permitted to relax the rules of evidence to deal with the situation in summary fashion. Evidence may be put on record by the aggrieved party, the employer, and by the hearing officer. It must include, however, relevant statistical evidence provided by the employer to the hearing officer on the specific hiring, retention, promotion, or other activities which the aggrieved party alleges are discriminatory. Naturally, both sides may offer their own interpretations of the statistical materials, or may offer different statistics.

4. **REVIEW.** A hearing officer would have to make findings of fact and conclusions of law. These findings would be reviewable by the district court in a manner similar to that presently in use for review of orders and decisions in a bankruptcy proceeding. District court review orders would in turn be appealable as in ordinary civil litigation, and subject to certiorari jurisdiction of the Supreme Court.

**D. Remedies Available to Litigant.** An aggrieved party should be permitted to submit evidence to the hearing officer showing his losses, economic, psychological and physical, which proximately resulted from the alleged discriminatory act. Consequently, an award by the hearing officer might include any or all of the following:

(a) Back pay from the date of offense to the date of reinstatement;

(b) Fringe benefits from the date of offense to the date of reinstatement;

(c) Damage for pain and suffering proximately flowing from the discriminatory act;

(d) Attorney's fees and costs;

(e) Reinstatement;

(f) Any other appropriate relief.

**E. Enforcement of Award.** An award by the hearing officer would not, like any judgment or award, be self-executing. If the employer does not perfect an appeal to the district court within the time limits
suggested by the statute, then the aggrieved party may apply to the court for an enforcement order against the employer or his insurance carrier. The employer would pay attorney's fees and costs for such an order. Similar enforcement provisions would protect a litigant's rights on appeal.

F. **Defenses to Liability.** The employer would have the burden of proving a defense to liability by the preponderance of evidence before the hearing officer. The present defenses to liability are appropriate and should not be increased nor diminished. The aggrieved party will have the burden of presenting a prima facie case by some probative evidence following the rule of *McDonnell-Douglas*.

1. **Bona Fide Occupational Qualification.** If the employer can show that chronological age is an essential consideration in determining occupational qualifications for the particular job at issue, then the employer has established a bona fide occupational qualification defense.

2. **Bona Fide Retirement Plan.** An employer may be permitted to retire an employee before the upper age limit prescribed by the Act if the employee is physically or mentally unable to perform his duties. In all other cases, the defense of "bona fide retirement plan" would drop out of the present remedy structure.

3. **Essential Business Purpose Rule.** The present "reasonable factors other than age" defense is analytically a version of the essential business purpose rule. If a practice which discriminates against someone within the protected age group is the result of a purposeful employee review following a cut-back or a periodic performance review which is regularly conducted on all employees, then an employee within the protected age group may be discharged if he is unqualified for retention on the same basis as any other employee.

G. **Penalties.** The only penalty in the present Act is the double damage award upon finding a willful violation of the Act. One penalty has already been suggested, the award of attorney's fees to an aggrieved party who needs to apply for an enforcement order. However, to make ADEA more effective, further penalties should be imposed.

1. **Failure to Post Notice.** If an aggrieved party establishes that the employer failed to post notice of employee rights required by law, then the employer must pay, in addition to the award of back pay, fringe benefits and other damages; a sum equal to one-fourth the employee's average annual wage or salary, exclusive of fringe benefits, or $2,500, whichever is greater.

2. **Willfull Violation of Act.** If an aggrieved party establishes that an employer violated the Act intentionally, then the amount of all damages awarded by the hearing officer will be doubled.
Conclusion.

While none of the structural changes suggested for ADEA will guarantee that the social and legal norms behind the Act will be enforced, most of the current obstacles to enforcement will have been removed. After a decade of experience with the present Act, changes are clearly necessary. The program of remedial action and enforcement suggested above may not be a totally successful program. It could be underfunded and passively enforced. However, no structural obstacles will defeat enforcement of the Act. That is probably about as much as any reformer can hope to achieve.