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CHARTING COMPLIANCE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

JOHN D. BLACKBURN*

"The principal objection to old age is that there's no future in it."

Anon

Ours is a youth oriented society. A concomitant result of this orientation is that employment discrimination based on age is as much a social tradition in this country as other types of bigotry. Notwith-
standing its often flagrant forms, discrimination against older workers has met with a tacit tolerance by those who decry other more prevalent discriminatory practices. Unsurprising as this is with today's "now generation," it is submitted that this problem of the older worker will gain greater recognition in the future.\(^3\) If the present trend of declining birth rates continues,\(^4\) future generations of younger Americans will be fewer in number. As the number of America's aged increases, this indefensible form of discrimination will not remain untouched.

Federal legislation already exists to combat age discrimination. The Age Discrimination in Employment Act\(^5\) represents the congres-

Other sources of federal and state protection against age discrimination in employment exist as alternatives to the ADEA: Exec. Order No. 11,141, 3 C.F.R. 179 (1964-65 compilation) prohibits federal contractors and subcontractors from specifying maximum ages in their employment solicitations or advertisements, and prohibits age discrimination in the hiring, advancement, discharge, and other terms and privileges of employment. Like the ADEA, Executive Order 11,141 excepts for bona fide occupational qualifications and retirement plans, or where another statute imposes age restrictions. Unlike the ADEA, the Order is not restricted to any particular age group. No enforcement mechanism is provided other than requiring each agency and department head to take “appropriate action” to make announcements and amend procurement regulations to provide notice of the policy.

The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (1976 & Supp. III 1979), prohibits “unreasonable” age discrimination in programs receiving federal financial assistance, including revenue sharing funds. Unlike the ADEA, this act is not limited to any particular age group. Regulations for the act’s interpretation and enforcement have been promulgated by the Secretary of Human and Health Services, and were effective July 1, 1979. See 45 C.F.R. § 90 (1979). The potential far-reaching impact of the act is reduced by 42 U.S.C. § 6103(c)(1), excepting employers, employment agencies, labor organizations, and joint apprenticeship programs from the act—areas covered by the ADEA.

Union members may find it possible to obtain relief from age discrimination in employment through suit against a union for breach of its duty of fair representation. The Labor-Management Relations Act, 29 U.S.C. §§ 141-197 (1976 & Supp. III 1979) [hereinafter referred to as the LMRA], confers representative status on labor bargaining representatives. Flowing from this status is the duty to fairly represent all union members. See LMRA § 8(b), 29 U.S.C. § 158(b) (1976); Vaca v. Sipes, 386 U.S. 171 (1967). A violation of § 8(b) is a union unfair labor practice. Judicial treatment of § 8(b) allows a statutory bargaining representative a wide range of reasonableness in serving the unit it represents, subject to the exercise of good faith in the exercise of its discretion. To prove a § 8(b) violation, an employee must show that the union’s failure to represent was based on bad faith. See Gorshak v. Ex-Cell-O Corp., 6 Empl. Prac. Dec. ¶ 8770 (E.D. Mich. 1973). Some plaintiffs may find the LMRA more advantageous than the ADEA since it does not restrict its protections to a particular age class and does not require notice of intent to sue as a condition to suit.

The fifth and fourteenth amendments to the United States Constitution may be resorted to via 42 U.S.C. § 1983 (Supp. III 1979) whenever state action denies a person due process or equal protection of the law because of age. However, the United States Supreme Court restricted the availability of constitutional relief by refusing to apply strict scrutiny analysis to age discrimination claims. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) discussed in text accompanying notes 28-38 infra.

the express purpose of promoting the employment of older workers on the basis of their ability rather than age, the ADEA prohibits discrimination against older workers by employers, employment agencies and labor organizations.

The Secretary of Labor originally was charged with the Act's enforcement and administration. As a result of the Carter Administration's reorganization efforts, jurisdiction over the ADEA has been shifted to the Equal Employment Opportunity Commission. Under the Labor Secretary's direction, the Wage and Hour Division of the


6. ADEA § 2(b), 29 U.S.C. § 621(b) (1976) provides: "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." See also H.R. REP. NO. 805, 90th Cong., 1st Sess., reprinted in [1967] U.S. CODE CONG. & AD. NEWS, 2213.

The "help" to employers and workers referred to in § 2(b) is provided in the form of studies undertaken by or for the Department of Labor "concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy . . . .," and by fostering the work of state, local, and private agencies in "expanding the opportunities and potentials of older persons." The Secretary of Labor is required to publish and disseminate the results of such studies. ADEA § 3(a), 29 U.S.C. § 622(a) (1976).

Interestingly enough, § 2(b)′s statement of purpose has been utilized to support both expansive and narrow applications of the Act. In Moses v. Falstaff Brewing Corp., 525 F.2d 92, 93 (8th Cir. 1975), the court noted that the ADEA is remedial and humanitarian legislation. "It is to be construed largely to achieve its purpose of protecting older employees from discrimination." Id. In Goger v. H. K. Porter Co., 492 F.2d 13, 15 (3d Cir. 1974), the Third Circuit allowed a terminated employee to bring suit against her former employer in spite of the employee's failure to comply with the ADEA's requirement that she initially seek appropriate state relief. The court emphasized that the common purpose the Act shares with Title VII compelled an interpretation consistent with the broad remedial construction given to that statute by the courts. Such an approach is desirable since it recognizes that from such common legislative molds should come consistency of judicial interpretation. But see Brennan v. Paragon Employment Agency, Inc., 356 F. Supp. 286, 288-89 (S.D.N.Y. 1973), aff'd mem 489 F.2d 752 (2d Cir. 1974) where the district court applied a narrow construction of the ADEA's legislative purpose to dismiss an action by the Secretary of Labor to enjoin the placement of recruitment advertisements restricted to "college students." Although such advertisements discriminate against older workers, the court maintained that the purpose of the ADEA is to protect older workers from the "unreasonable prejudice," which was held not to be presented by the advertisements.


Department of Labor\textsuperscript{10} established interpretative guidelines\textsuperscript{11} which are presently in the process of being adopted with modifications by the EEOC.\textsuperscript{12} However, fourteen years after its enactment, the ADEA is still for the most part judicially underdeveloped.\textsuperscript{13} Earlier cases decided under the Act dealt primarily with its procedural aspects. Only recently has judicial attention focused significantly on the Act's substantive provisions. This embryonic legal development increases the difficulty of employer compliance. Compounding this difficulty are the 1978 amendments\textsuperscript{14} extending the ADEA's protections, which may result in an increase in age discrimination suits.

The purpose of this article is to investigate the operation of the ADEA and to explore the areas of uncertainty that presently exist in an effort to guide the courts in their development of the law.\textsuperscript{15} The 1978 amendments are also considered. Where appropriate, typical business practices are focused upon in an effort to facilitate employer compliance with the Act's principal provisions.

**The Act's Coverage**

**The Protected Group**

The Age Discrimination in Employment Act applies to employers, employment agencies and labor organizations, and it prohibits age discrimination in hiring and all other aspects of employment, referral for employment and membership in unions.\textsuperscript{16} Originally, only persons between the ages of 40 and 65 were protected by the Act.\textsuperscript{17} However in

\textsuperscript{10} [Hereinafter also referred to as DOL].
\textsuperscript{11} See generally 29 C.F.R. §§ 850.1-860.120 (1979).
\textsuperscript{12} See Proposed Interpretations: Age Discrimination in Employment Act, 44 Fed. Reg. 68,858 (1979) (to be codified in 29 C.F.R. § 1625) [hereinafter referred to as Proposed Interpretations].
\textsuperscript{13} The United States Supreme Court has decided only three cases involving the ADEA, two of which involved procedural issues. See Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) (exhaustion of state remedies); Lorillard v. Pons, 434 U.S. 575 (1978) (availability of jury trial); United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) (legality of mandatory retirement plan).
\textsuperscript{15} The procedural problems involved in the ADEA, except where such procedural aspects affect the certain substantive rights, will generally not be discussed in this article.
\textsuperscript{17} ADEA § 12, 29 U.S.C. § 631 (1976). See Hart v. United Steelworkers, 350 F. Supp. 294 (W.D. Pa. 1972), appeal dismissed, 482 F.2d 282 (3d Cir. 1973) (holding that plaintiffs who were union members lacked standing to challenge their union's declaration that they were ineligible to run for union office because they had reached 65 years of age prior to the end of the designated nominating period which was beyond the age protected by the Act); accord, Bevans v. Nugent, 14 Fair Empl. Frac. Cas. 279 (S.D.N.Y. 1976) (holding 37 year old government employee not covered
1978, Congress raised the upper limit to age 70 for all non-federal employees covered by the Act.\(^{18}\)

Although it may be unlawful for an employer to discriminate in its hiring practices by giving a preference to individuals 30 years of age over those within the 40 to 70 limitation, the same employer would not

by the ADEA); Bishop v. Jelleff Assoc., 398 F. Supp. 579 (D.D.C. 1974); Wage and Hour Opinion Letter (June 4, 1970) (declaring that a 33 year old worker who was denied training under an apprenticeship program had no recourse under the Act).

The 40 to 65 age limitation reflected the congressional conclusion that age discrimination was directed most frequently against workers between those ages. See 113 CONG. REC. 31, 252 (1967) (remarks of Sen. Yarborough). When originally introduced, the bill's minimum age limit was set at 45 but was lowered to 40 on the basis that discrimination became evident at that age. See H.R. REP. NO. 805, 90th Cong., 1st Sess. reprinted in [1967] U.S. CODE CONG. & AD. NEWS 2213, 2219, 113 CONG. REC. 31,252, 31,255 (1967) (remarks of Sens. Yarborough and Javits). Most legislative debate centered on the lower age limit because of the practice in the airline industry of retiring stewardesses at age 32. See id. at 2219, 2225-27. The 65 year old maximum age limit seems to have been a general recognition of that age as the traditional retirement age. 113 CONG. REC. 31,255 (remarks of Sen. Yarborough). Originating with Chancellor Otto von Bismark's social security law in 1877, at a time when the average life expectancy was 35 years, the limit first appeared in America with the Social Security Act of 1935, which discouraged working beyond age 65 by limiting the amount of income to be earned while collecting social security benefits. See 47 S. CAL. L. REV. supra note 5, at 1334.


Of those states which have statutes prohibiting age discrimination in employment, 23 do not restrict their coverage by age limits. Of those that restrict coverage to a particular age group, four use the 40 to 65 year old bracket. See GA. CODE ANN. § 54-1102 (1974); WASH. REV. CODE ANN. § 49.44.090 (Supp. 1980); W. VA. CODE 5-11-3 (1979); WIS. STAT. ANN. § 111.32 (1974). Three states and Puerto Rico employ a 65 year old upper limit but have established various lower age limits. See N.Y. EXEC. LAW 296 (3-a) (Supp. 1980) (18 years); OR. REV. STAT. § 659.030 (1979) (18 years); P.R. LAWS ANN. tit. 29, § 151(1) (Supp. 1979) (minimum age depends on industry); TEX. CIV. CODE ANN. tit. 110A, § 6252-14 (1970). Idaho protects employees under age 60. See IDAHO CODE § 44-1602 (1977); Colorado protects workers aged 18 to 60. See COLO. REV. STAT. § 8-2-116 (1973). Louisiana protects employees under age 50 unless the employer's pension plan meets certain requirements. See LA. REV. STAT. ANN. § 23, 893 (1964 & Supp. 1980). Five states protect workers from age 40 to 70. See IND. CODE ANN. § 22-9-2-1 (Supp. 1980); KY. REV. STAT. § 344.040 (Supp. 1980); NEB. REV. STAT. § 48-1003 (Supp. 1980); OHIO REV. CODE ANN. § 4101.17 (1980); R.I. GEN. LAWS § 28-5-6(1) (Supp. 1980).

Another explanation for the acceptance of the age restrictions is § 13 ADEA, 29 U.S.C. § 632 (1976), requiring the Secretary of Labor to report to Congress on the advisability of continuing the age limits, thereby forestalling debate on the issue until a later time. One report from then Secretary Wirtz, submitted in 1968 in the form of a letter to Senator Humphrey and Speaker McCormick, addressed primarily the minimum age restriction and recommended no change in the ADEA's age limits; it indicated that the problem of compulsory retirement was at that time under study and would be included in a future report. BUREAU OF NATIONAL AFFAIRS, [1968] LABOR RELATIONS YEARBOOK 387. This report was not completed. See H.R. REP. NO. 527, 95th Cong., 1st Sess. 2 (1977).

be prohibited by the Act from refusing to hire applicants between the ages of 30 and 39 since they are not within the protected age classification. Similarly, an employer would not be prohibited from indicating a preference for individuals at least 40 but less than 70 years old since those excluded do not fall within the protected class. However, if an employer indicates that the preference is to be granted to individuals between the ages of 40 and 50, it may be violating the Act since under both the DOL's interpretation and the EEOC's proposed interpretations it is unlawful to discriminate on the basis of age among people within the protected group.

Controversial when originally enacted, the ADEA's upper and lower age limits generated much criticism. Most attacks were directed against the policy and constitutional considerations surrounding the 65-year age limit; however, the lower limit also was criticized. The upper age limit was originally selected because it was the customary retirement age. It permitted continuation of mandatory retirement policies for workers reaching age 65. Responding to criticism that mandatory retirement based solely upon age is arbitrary, and that chronological age alone is a poor indicator of ability to perform a job, Congress in 1978 raised the upper limit to age 70 for the private sector, and removed the ADEA's upper age restrictions entirely for federal employees. Although the change should satisfy most critics of the Act's coverage, it represents a compromise between those favoring removal of the upper age limit entirely, and those remaining uncertain of the consequences of changing the original maximum age.

20. Cf. Wage and Hour Opinion Letter (August 7, 1968) (indicating this would be the result even though the Act does not expressly authorize discrimination in favor of the protected group).
25. See note 17 supra.
tutional validity of any upper age restriction upon the ADEA's cover-
age remains an open question. A 1976 Supreme Court case sheds some
light on the probable judicial posture.

In *Massachusetts Board of Retirement v. Murgia*, appellee, a state
police officer, was involuntarily retired pursuant to state law upon
reaching age 50 although he had passed all physical and mental exami-
nations just four months before. Responding to his challenge of the
statute's constitutionality under the equal protection clause, a three-
judge district court held the statute void under a rational basis analy-
sis. The court reasoned that in light of the defendant's failure to jus-
tify the significance of selecting 50 as the retirement age, it was
compelled to conclude the statute lacked a factual basis to support its
constitutionality. On appeal, the Supreme Court in a *per curiam*
opinion held that the statute did have a rational factual basis. Drawing
from a legislative commission's report which had concluded that
the nature of police work required "comparatively young men of vigor-
ous physique," the Court found a sufficient factual basis to support a
conclusion that mandatory retirement at age 50 served to further the
statutory purpose of protecting the public.

Significantly, the Court expressly denied the status of suspect clas-
sification for police officers over age 50 and, furthermore, refused to
recognize governmental employment as a fundamental right. By re-
fusing to recognize age as a suspect class, or public employment as a
fundamental right, the Court indicated that any challenge to the
ADEA's age restrictions will not come under strict scrutiny analysis but

29. *Id.* at 311.
30. The equal protection clause of the fourteenth amendment, an express limitation upon
state action, is not expressly obligatory upon the federal government, since there is no correspond-
ing clause in the fifth amendment. This could serve to undermine the utility of applying the
Court's analysis in *Murgia* to a determination of the constitutionality of certain provisions in the
ADEA. However, the nomenclature articulated by the Court in equal protection cases has been
utilized to invalidate unconstitutional discrimination in cases decided under the fifth amendment's
due process clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). That *Murgia* is an equal protec-
tion case should not serve to summarily distinguish its appropriateness to constitutional analysis
of the ADEA. For a discussion of this "substantive due process-equal protection" interchangea-
bility, see M. FORKOSCH, *CONSTITUTIONAL LAW* §§ 441-42 (2d ed. 1969); B. SCHWARZ, *CONSTI-
TUTIONAL LAW* § 9.1 (2d ed. 1979); Singer, *Bringing The Constitution to Prison: Substantive Due
32. *Id.* at 756.
33. 427 U.S. at 314-17.
34. *Id.* at 314 n.7.
35. *Id.* at 312-14.
will be examined under the rational basis standard. 36

Whether the ADEA’s age limits will survive judicial scrutiny under a rational basis analysis depends on a determination that they serve to further the statutory purposes. This calls for an empirical assessment of the age limits as a rational means of fulfilling the Act’s objectives. 37 When viewed in light of the Act’s articulated purpose “to promote the employment of older workers based on their ability rather than age,” 38 even the ADEA’s extended upper age limit will fail to pass constitutional muster if gerontological research should reveal that stereotyped negative attitudes of over-70-year-old workers are unfounded. However, gerontological research presently is in an embryonic stage of development, only recently generating intensive investigation. This should serve to uphold the statute’s constitutionality, particularly in cases involving high risk, public safety occupations such as existed in Murgia.

36. Different constitutional standards have been employed in deciding the validity of legislation under the due process and equal protection clauses. Generally, most legislation falls under the “rational basis” approach, sometimes referred to as “minimum scrutiny.” Under this approach, if a court can imagine any state of facts which justifies the legislative enactment, the statute will pass constitutional muster. There exists a presumption of the statute’s constitutionality, and indeed under this approach most legislation is deemed constitutional. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The Court has applied a more stringent, “strict scrutiny” standard to statutes which deny certain “fundamental rights” or create “suspect classifications.” Although it is not altogether clear what are the essential characteristics for qualification as a fundamental right, such rights are not limited to those specifically enumerated in the Constitution. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a fundamental right to privacy although such right is not specifically enumerated in the Constitution). Suspect classifications generally have been limited to those which discriminate on the basis of an immutable characteristic of birth against those individuals who have experienced a history of intentional discrimination. See McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry). See also United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). If such a fundamental right is denied or a suspect classification created, a court will presume the statute to be unconstitutional unless it can be shown that its enactment was pursuant to a “compelling state interest” and, furthermore, that it is the “least restrictive alternative” for accomplishing its goal. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967). The current Court, while not formally acknowledging it, is presently fashioning a third level of equal protection scrutiny which falls between the extreme approaches of the traditional two-tiered model. Under this current approach, a statute’s constitutionality depends on whether the means or classification is necessary to further the statute’s objective. See Gunther, Forward: In Search of Evolving Doctrines on a Changing Court: A Model for Newer Equal Protection, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]. For further discussion of the various constitutional doctrines as applied to the ADEA, see generally, 47 S. CAL. L. REV., supra note 5, at 1336-46. For an excellent discussion of the constitutional aspects of Massachusetts Bd of Retirement v. Murgia, see Abramson, Compulsory Retirement, The Constitution and the Murgia Case, 42 MO. L. REV. 25 (1977).

37. See Gunther, supra note 36, at 20:

The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means substantially further legislative ends.

There is a line of constitutional case law which has evolved under the equal protection clause which, if applied to any challenge to the ADEA’s age restrictions, should validate their inclusion in the statutory scheme. Referred to by one constitutional scholar as the “step-at-a-time” justification, it serves to validate underinclusive legislative classifications on the following basis:

[T]raditionally a legislature has been allowed to take reform “one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,” . . . and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertance or otherwise, to cover every evil that might conceivably have been attacked. The rationale for this principle rests on the recognition of the imperfections of the legislative process which prevent much more than piece-meal responses to particular problems, and the additional recognition that even where broader legislative action is feasible, a more cautious or experimental course may be chosen for legislative intervention.

An analysis of the ADEA reveals that Congress chose such a cautious course when it included the age limits. Section 13 originally required the Secretary of Labor to submit annual reports on the advisability of continuing the restrictions. As a result of the Carter Administration reorganization, this is now the responsibility of the EEOC. Furthermore, section 3 provides for the performance of research projects for this purpose. Taken together these sections reflect congressional intent to respond to the needs of those excluded from the ADEA’s coverage only after extensive study has been conducted. The ADEA’s 1978 amendments further support this conclusion. As a result of the amendments, section 5 now requires a study to be conducted to examine the effect the amendments have had in raising the upper age limit to age 70, to determine the feasibility of eliminating the 70 years limit, and to assess the feasibility of raising the limitation above 70 years of age. This study was to be provided to the President and the Congress as an interim report no later than January 1, 1981, with a final report due no later than January 1, 1982. In its report on the

44. Id. § 624 (Supp. III 1979).
45. Id.
amendments, the House Education and Labor Committee indicated that additional amendments may be considered if future research reveals that further change is warranted.\textsuperscript{46}

Although the ADEA's recent amendments improve the condition of many older workers, Congress should again consider the repeal of any upper age limit. Regardless of the maximum age limit's constitutional status, the forced retirement of a single worker willing and able to do a job is an injustice. Furthermore, Congress should focus attention upon the Act's 40 year old lower limit, reducing it to the generally accepted age of majority, 18 years. Several states already prohibit age discrimination against persons under age 40.\textsuperscript{47} History has illustrated that age is not always commensurate with ability: Jefferson wrote the Declaration of Independence at age 33; Einstein developed his theory of relativity when he was 26; Byron, Raphael and Shelly each died at 39. The fact is, many of the world's greatest geniuses never saw 40 years. Congress should therefore further amend the ADEA. Any purported age discrimination law which leaves untouched an area of arbitrary age discrimination perpetrated against society's very young and very old reflects a callous indifference to those most hurt by discriminatory practices.

\textit{Covered Employers}

Notwithstanding the limitations on the ADEA's coverage via definition of the protected group, the Act's coverage extends to all non-seasonal employers having twenty or more employees and affecting

\textsuperscript{46} See H.R. Rep. No. 527, 95th Cong., 1st Sess. 7 (1977), where the house committee stated:

The committee has considered removing the upper age limit entirely, but has decided that an increase to age 70 at this time is the best course of action. The age 70 limit is a compromise between some who favor removing the age limit entirely, and others who are uncertain of the consequences of changing the present age 65 limit. Experience with the age 70 limit would give us more data and other facts to better evaluate the pro and con arguments on eliminating mandatory retirement completely. There is also a precedent for the age 70 limit. This has been the age of mandatory retirement for most civil service employees for many years, and the committee knows of no managerial or labor problems as a result of the Federal mandatory retirement age of 70.

The committee expects continuing public and congressional interest in eliminating mandatory retirement. The committee expects to re-assess, in due course, this newly established upper age limit, evaluating experience in the private and public sectors with an eye toward possibly eliminating the upper age limit altogether. To help with this evaluation, the bill would also require a report from the Secretary of Labor on mandatory retirement and the feasibility of eliminating the upper age limit in the Act. The 1967 Act included a requirement for the Secretary of Labor to submit a report on involuntary retirement but this report has not yet been completed. Therefore, this bill would establish deadlines in law for this report. An interim report would be due 1 year after the effective date, and a final report would be required no later than 2 years after the effective date.

\textsuperscript{47} See note 1 supra.
commerce. 48

**State Government Employers.** Under the 1972 amendments, state government employers are now included in its coverage. 49 In two cases decided in 1976, 50 the Supreme Court addressed the issue of whether similar amendments extending the coverage of other federal labor legislation to include state employees violates the federalism principle embodied in the tenth and eleventh amendments to the United States Constitution.

In National League of Cities v. Usery, 51 plaintiffs sought a declaratory judgment that the 1974 amendments to the Fair Labor Standards Act 52 violated the tenth amendment as applied to the states. Significantly, the League did not challenge the amendments as an invalid ex-

48. ADEA § 11(b), 29 U.S.C. § 630(b) (1976) provides:

The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Although § 11(b) does not make reference to seasonal and nonseasonal employers, the probable purpose of the 20 employees for 20 weeks requirement is to exclude seasonal employers from coverage.

An issue not yet confronted by the courts is whether an employer having a fluctuating work force is covered during those times when his force is below the statutory minimum of 20 employees. The plain meaning of § 11(b) dictates that once such a requirement has been met for the 20-week period, the employer is covered for the entire year. Otherwise an employer conceivably could manipulate the number of its employees in order to circumvent the act. The legislative history to § 701(b) of Title VII, see note 5 supra, which contains virtually an identical definition of an employer, indicates that there was some congressional confusion regarding this issue as applied to that act. See Benewitz, supra note 16, at 287-88.


49. ADEA § 11(b) 29 U.S.C. § 630(b) (1976). Although the recent amendments maintain the exemption for federal government employers, they must conform to Executive Order 11,141 which requires the fair treatment of older workers. See note 5 supra.


52. 29 U.S.C. §§ 201-219 (1938) [hereinafter referred to as FLSA].
exercise of congressional powers under the commerce clause, but claimed Congress went beyond tenth amendment limitations when it sought to "regulate directly the activities of States as public employers." De-
claring the amendments unconstitutional, the Court focused on the de-
gree to which they displaced state functions deemed "essential to separate and independent existence." The Court concluded that by requiring the payment of a minimum wage and overtime pay, the amendments served to alter traditional governmental employment practices, forcing the states to restructure their services and operations. Thus, the Court declared that there are limits to Congress's power pursuant to the commerce clause, adopting as the measure of these constitutional limits an "essential function test." Under this test, if the congressional enactment displaces traditional choices regarding how states structure their services, the statute violates the tenth amend-
ment.

Applying this test to the ADEA's coverage of state employees, it is doubtful that the Court would reach the same result as it did in National League of Cities. Unlike FLSA's minimum wage and overtime provisions, the ADEA's requirements should not impose increased costs resulting in the restructure and possible curtailment of existing state services. The ADEA is predicated on the belief that commonly held stereotyped notions of older workers are unfounded; that these workers can provide the same skills and services possessed by their younger counterparts without employers incurring any increased costs. Additionally, the Act provides that where such skills are not possessed by the older worker, and where additional costs to employee benefit plans are incurred by hiring older employees, the employer is permitted to discriminate in favor of younger workers in its hiring practices and its benefit plans. Using a similar analysis, one lower court case recently upheld the ADEA's extended coverage of state employers.

Shortly after deciding National League of Cities, the Court indi-

53. 426 U.S. at 841.
54. Id. at 845.
55. Id. at 846-49. FLSA's overtime provisions, for example, require that premium compensation be paid in cash rather than in compensatory time off. This provision would force many governmental employers to abandon the day-shift routine commonly utilized for firemen.
56. Id.
58. See Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976), where the court refused to set aside its earlier decision that a Little Rock mandatory retirement ordinance for firemen violated the ADEA. The court distinguished National League of Cities by finding that the ADEA does not "significantly interfere" with the allocation of financial resources by state officials. Id. at 1241.
cated that its ruling may not apply to federal laws prohibiting employment discrimination. In *Fitzpatrick v. Bitzer*, the Court upheld amendments extending Title VII's coverage to state employers. In *Fitzpatrick*, retired male employees of Connecticut recovered damages caused by sex discrimination in the State's retirement policy. In affirming the award, the Court found constitutional authorization for Title VII's extended coverage in the fourteenth amendment's enabling clause which authorizes Congress to enforce that amendment by appropriate legislation. The Court rejected the argument that Title VII's amendments violated the eleventh amendment, stating that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of . . . the Fourteenth Amendment." Under this approach, the ADEA's extended coverage also should be upheld, since the ADEA and Title VII share similar statutory objectives. Applying both *National League of Cities* and *Fitzpatrick*, the Utah and North Dakota district courts recently upheld the ADEA's amendments.

**Branches and Subsidiaries.** While the statutory minimum number of employees required to confer "employer" status on a firm seems sufficiently small enough to include all but the smallest enterprises under the Act, a question occasionally arises regarding the status of departments, branches and corporate subsidiaries. It seems clear that all departments and branch offices of a firm will be included in determining whether it meets the statutory minimum. When a corporation is charged for the acts of its subsidiary, currently the degree of control retained by the parent over its subsidiary's practices is the determinative factor in deciding whether an employee of the subsidiary is also the parent company's employee. This "control test" represents the application of common law agency doctrine, and its use is not surprising insofar as the Act defines an employer as including "any agent of such a person."

60. Id. at 456.
62. See Wage and Hour Opinion Letter (July 12, 1968).
64. ADEA § 11(b), 29 U.S.C. § 630(b) (1976). In agency law, control by a principal over the actions of an agent frequently is the articulated "test" for the existence of an agency relationship. See W. Seavey, THE LAW OF AGENCY § 3E (1964) and cases cited therein.

Title VII's definition of an employer is similar to the ADEA's except that the statutory minimum number of employees is 15, 42 U.S.C. § 2000e(b) (1976). Both the EEOC and the courts take the position that if separate establishments are part of an integrated enterprise, they may be
However, "control" is an all-inclusive term which is vague, meaning so much as to mean nothing. As a "test" it should be discarded. It is more appropriate to consider the concept of control as a useful tool rather than an acid test. One court has suggested that the focus be on a particular type of control: that form of control which a parent company exercises over its subsidiary's personnel practices. At first blush treated as a single employer for Title VII coverage. See, e.g., Williams v. New Orleans S.S. Ass'n, 341 F. Supp. 613 (E.D. La. 1972); Local 293, Int'l Alliance of Theatrical Stage Employees v. Local No. 293-A, Int'l Alliance of Theatrical Stage Employees, 526 F.2d 316 (5th Cir. 1976); United States v. Enterprise Ass'n of Steam Fitters Local 638, 360 F. Supp. 979, 994-95 (S.D.N.Y. 1973), modified sub nom Rios v. Enterprise Ass'n of Steam Fitters Local 638, 501 F.2d 622 (2d Cir. 1974).

Some of the criteria applied in determining whether an enterprise is integrated are interchange of employees and centralized control of labor relations and standards. This approach too has its antecedents in the common law of agency, which recognized that a master could be an association of two or more parties who are employed in a common enterprise, i.e., a partnership. M. FERSON, PRINCIPLES OF AGENCY § 35 (1954). The theory has been applied to hold parent companies liable for the acts of their subsidiaries under the corporate law doctrine of "piercing the corporate veil," where there has been a failure to separately maintain the entities. See generally H. HENN, LAW OF CORPORATIONS §§ 146-53 (1970). Frequently clouded by verbiage about control, the cases reflect a judicial recognition that modern corporations are complex entities frequently consisting of multiple subdivisions.

When applied with regard for statutory objectives, and shorn of verbiage about control, such an approach is useful. However, the courts should not adopt the narrow approach of disregarding the corporate entity only where there is some fraudulent or wrongful abuse. But see Hassell v. Harmon Foods, Inc., 336 F. Supp. 432 (W.D. Tenn. 1971), aff'd, 454 F.2d 199 (6th Cir. 1972) (holding subsidiary to be separate employer for purposes of Title VII where subsidiary was not a "sham," control exercised by parent was exercised in usual way through election of subsidiary's board and officers, the affairs were handled separately, subsidiary constituted separate entity for tax purposes, and parent would not be liable for any of subsidiary's debts). One scholar has maintained that regardless of the enunciated formulas, "liability is imposed to reach an equitable result." E. LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS, 191 (1936). For a rare case of judicial candor on this issue see, In re Clarke's Will, 204 Minn. 575, 578-79, 284 N.W. 876, 878 (1939). The equities which govern the interpretation of fair employment legislation should be the broad remedial objectives of such statutes. Courts should not blindly adopt common law concepts without first recognizing that the context in which they are used dictates that careful consideration be given to legislative policy.

65. See Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973) (district manager of parent corporation could veto subsidiary's hiring decisions and had authority to transfer subsidiary employees). But see Brennan v. Ace Hardware Corp., 362 F. Supp. 1156 (D. Neb. 1973), aff'd, 495 F.2d 1368 (8th Cir. 1974) (holding branch warehouse not to be a separate employer even though labor relations were controlled by local branch, and management decisions in the form of orders, payments, information and advice were rendered by main office). In confronting the issue of who is an "employer" under § 2(2) of the National Labor Relations Act 29, U.S.C. § 152(2) (1976), the courts and the NLRB have struggled with the same question of which type of control is more relevant. An example is the problem of determining whether a private contractor which provides services in governmental facilities is an agent of the facility and therefore exempt from the act as a public employer, or whether it retains its private character and remains subject to the act as a statutory employer. In NLRB v. Howard Johnson Co., 317 F.2d 1 (3d Cir. 1963), the Third Circuit recognized that of the two criteria, control over labor relations was more relevant than control over business operations when it stated, "we think control of the employment relationship is of paramount significance." Id. at 2. In this area the NLRB has vacillated. See Ohio Inns, Inc., 205 N.L.R.B. 528 (1973); Slater Corp., 197 N.L.R.B. 1282 (1972) (stressing control over labor relations); Wackenhut Corp., 203 N.L.R.B. 86 (1973) (emphasizing control over business operations); Servomation Mathias Pa., Inc., 200 N.L.R.B. 1063 (1972) (simultaneously considering the degree of both forms of control).
this seems relevant to the inquiry and certainly makes the concept more concrete. It further insulates from liability a parent company which is otherwise innocent of any wrongdoing on the part of its subsidiary. However, the consequence of such a narrow focus may serve to undermine the purposes of the Act, rendering it mere paper protection for the employees of smaller subsidiaries, if the parent company, despite all efforts to integrate the entities, neglects to retain control over labor relations. Indeed, the usual situation may very well involve the delegation of responsibility over personnel practices to the local firm, while control over business practices is retained by the parent.

Control over labor relations, although an important factor, is not essential to the creation of the employment relation. In most cases it will be an inevitable incident of the relation. Where it does not exist, the economic relationship between parent and subsidiary should take on added importance. When interpreting other labor reform statutes, courts in the past have been guided by economic reality in their decisions to abandon the control test. On occasion, when construing similar social welfare legislation, the Supreme Court has abandoned constraining common law concepts in favor of an approach which recognizes, in addition to economic reality, the underlying statutory purposes to be the guiding consideration. Applying this approach to the ADEA, in a close case the balance should be struck in favor of, rather than against, the Act's coverage in order to fulfill its broad and beneficial purposes. Narrow construction only serves to defeat the ADEA's policy of eradicating age discrimination in employment.

**Employers Engaged in An Industry Affecting Commerce.** In addition to meeting the statutory minimum number of employees, the company must be “engaged in an industry affecting commerce.” This

66. See M. FERSON, PRINCIPLES OF AGENCY § 43 (1954) and cases cited therein.
69. ADEA § 11(b), 29 U.S.C. § 630(b) (1976). Two sections which are correlative to § 11(b) are §§ 11(g) and 11(h), 29 U.S.C. §§ 630(g), 630(h) (1976). Section 11(g) provides:

The term “commerce” means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

Section 11(h) of the ADEA, 29 U.S.C. § 630(h) provides:

The term “industry affecting commerce” means any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the
phrase reaches the fullest breadth of the Constitution’s commerce clause. Thus, if a firm uses or sells goods obtained outside the state where it does business, or serves individuals from outside the state, the Act will apply if all other definitional requirements are met.70

Multinational Corporations. Firms engaged in international commerce may also qualify as an employer under the ADEA. Thus, domestic contractors working abroad are covered as to their local hiring practices for foreign work even though their principal effect may be overseas.71 Similarly, local subsidiaries of foreign firms are covered if they meet the statutory requirements. The Wage and Hour Division had taken the position that if the total number of a firm’s foreign and domestic personnel totals twenty or more, the enterprise constitutes an “employer” under the Act.72

Employment Agencies

Employment agencies are covered by the Act and are prohibited from referring prospective employees on the basis of age.73 Under the Act, any person or agent who regularly undertakes with or without compensation to find employees for an “employer” is an employment agency.74


70. See Wage and Hour Opinion Letter (Sept. 7, 1968); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Two Title VII cases illustrate the scope of the “industry affecting commerce” concept. In Presseisen v. Swarthmore College, 386 F. Supp. 1337 (E.D. Pa. 1974), the court held that because Swarthmore College attracts students and faculty from all parts of the country, the college was engaged in an activity “affecting commerce” under 42 U.S.C. § 2000e(b). In EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975), a small law firm engaged primarily in divorce work was held to be “affecting commerce” because the firm’s business included some probate, corporate and real estate work, and because the firm’s business often required the attorneys to travel out of state.

73. ADEA § 4(b), 29 U.S.C. § 623(b) (1976) provides:

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.

This is virtually identical to Title VII prohibitions against discrimination by employment agencies. See 42 U.S.C. § 2000e-2(b) (1976).

agency. Under both the DOL's interpretations and the EEOC's proposed interpretations, if an employment agency regularly finds employees for at least one covered employer, it is subject to the ADEA with regard to all its activities. Thus, a covered agency can be subject to the Act's provisions even when acting on behalf of a noncovered employer.

There is little case law on the subject of what is an employment agency under the ADEA. As with other sections which are analogous to the provisions of Title VII of the Civil Rights Act, resort may be made to that statute's judicial development in an effort to predict the judicial treatment of the ADEA. Litigation under Title VII concerning the meaning of an employment agency is sparse and has been primarily confined to cases involving the publication by newspapers of sex-segregated help wanted advertisements and the maintenance of college placement bureaus. The concern in these cases has been with the degree of involvement in the referral process in relation to the primary purpose of the enterprise. Thus, where a newspaper merely acted as a conduit in the printing of employment information, it was not considered an employment agency. Where the paper reserved editorial authority to classify copy, however, it was held to have satisfied the statutory definition. Similarly, where the placement activities of a college were merely incidental to its educational function, it was held

74. ADEA § 11(c), 29 U.S.C. § 630(c) (1976) provides:

The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

§ 701(a) of Title VII, 42 U.S.C. § 2000e(c) (1976) is similar:

The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

75. 29 C.F.R. § 860.35(b) (1979); Proposed Interpretations, supra note 12, § 1625.3. See Brennan v. Root, 8 Empl. Prac. Dec. § 9531 (E.D.N.C. 1974) (rejecting employment agency's argument that it was not covered unless the client involved was a covered employer); accord, Brennan v. C/M Mobile, Inc., 8 Fair Empl. Prac. Cas. 551 (S.D. Ala. 1974).

76. See note 73 supra.


not to be an employment agency. However, where there was a significant involvement in the maintenance of a placement bureau which operated as the principal method by which graduates sought employment, the college was held to be an employment agency. The thrust of this approach is the simple recognition that those primarily engaged in referral activity are better suited to bear the burden of compliance.

In contrast to the Act's definition of an "employer," an employment agency need not possess a minimum number of employees to be covered. The Act's definition does not exclude even the smallest business. Neither the statute nor its legislative history discloses the rationale for this distinction.

This distinction raises the question of whether an employment agency charged with discriminating against its own employees must meet the statutory definition of an employer. Under the DOL's interpretations, which the EEOC proposes to adopt, such age discrimination is unlawful even if the employment agency has less than twenty employees and otherwise would not be covered by the Act as an employer. The rationale offered is that the Act prohibits an employment agency from discriminating in its referral practices "or otherwise to discriminate against any individual" on the basis of age. It is reasoned that such an inclusion of other discriminatory practices along with the prohibition against discrimination in employment referral includes acts against the agency's own employees. Under this interpretation, the employees of employment agencies achieve a privileged position under the Act, since by virtue of their employer's status in an employment

83. In Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577, 581 (1970), the court noted that an employment agency under § 4(f) of the ADEA may legally engage in discriminatory referral practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. It concluded that it would be unreasonable to expect a newspaper to make the necessary personnel and procedural arrangements to police its advertisers, whereas firms primarily engaged in referral activity normally maintain such procedures.
84. ADEA § 11(c), 29 U.S.C. § 630(c) (1976). Similarly, Title VII does not require a minimum number of employees for an employment agency to be covered. See 42 U.S.C. § 2000e(c) (1976).
85. 29 C.F.R. § 860.36(c) (1979); Proposed Interpretations, supra note 12, § 1625.3.
86. 29 C.F.R. 860.36(c) (1979). The EEOC's Proposed Interpretations, supra note 12, § 1625.3, do not contain the rationale provided by the DOL's interpretations. In the supplemental information section, the EEOC notes that many deletions were made for stylistic purposes. 44 Fed. Reg. 68859 (1979). Because the same result obtains under both interpretations, it is logical to assume the same rationale has operated upon the EEOC determination.
agency they need not establish the statutory minimum required of other employers.

Although such a literal reading of the Act may be technically correct, such an interpretation serves to read out of the Act the distinction accorded by Congress between employment agencies and employers. It is submitted that the purpose of including employment agencies in the ADEA's coverage is to prohibit age discrimination in referrals and other employment agency activities outside the employer-employee relationship. In confronting this issue the United States District Court for the Southern District of New York rejected the agency's interpretation and held that where an employment agency acts merely as an employer, the agency is not covered by the Act unless it meets the statutory requirements of an "employer."87

Unions

Labor organizations are covered by the ADEA in a variety of ways. They are included in the definition of "persons,"88 and therefore may qualify as an employer or employment agency by virtue of the inclusion of that term in their statutory definitions.89 The definition of "labor organizations" also includes any employee representative.90 Furthermore, they may be covered if they are engaged in an industry affecting commerce, i.e., if they maintain a hiring hall or have twenty-five members.91

Prohibitions and Their Proof

Prohibitions and Requirements in General

The ADEA's prohibitions generally parallel those contained in Title VII.92 Employers are prohibited from discriminating in hiring,

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89. See notes 48 & 74 supra.
91. Id. § 11(e), 29 U.S.C. § 630(e) (1976).
compensation or other conditions of employment against persons between the ages of 40 and 70.93 Any segregation or classification of the employees is unlawful when it is based on age.94 When there has been discrimination in the payment of wages, the employer cannot cure the violation by reducing the higher wage rate.95 Employment agencies are not permitted to refer prospective employees to employers on the basis of age.96 Unions are prohibited from excluding from membership any individual because of age.97 As with employers, they cannot segregate or classify their membership; and like employment agencies they are not allowed to discriminate in their referral activity.98 This latter prohibition primarily is directed to union hiring hall practices prevalent in the construction and shipping industries. It is additionally unlawful for a union to cause an employer to discriminate on the basis of age.99

In addition to the specific prohibitions provided for each covered entity, the ADEA contains certain prohibitions which are common to all. Thus it is a violation of the Act for employers, employment agencies and unions to indicate any preference or age discrimination in a published notice or advertisement.100 Furthermore, covered entities may not engage in retaliatory action against individuals for participating in proceedings or for pursuing rights granted under the ADEA.101

employer practices. See, e.g., COLO. REV. STAT. § 8-2-116 (1973) (only barring the discharge of an employee because of age); IND. CODE ANN. § 22-9-2-2 (Burns 1974 & Supp. 1980) (prohibiting only dismissals or refusals to hire because of age); LA. REV. STAT. ANN. § 23:893 (West 1964) (prohibiting age discrimination in the discharge of employees and in rejecting employment applications); OHIO REV. CODE ANN. § 4101.17 (Page 1980) (forbidding refusal to interview job applicants, and the discharge of employees because of age); and TEX. CIV. CODE ANN. tit. 110A, § 6252-14 (1970) (declaring age discrimination to be against public policy, but only prohibiting state agencies and commissions from denying employment because of age).

95. Id. § 4(a)(3), 29 U.S.C. § 623(a)(3) (1976). This provision is similar to one found in the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976). Thus an employer who is guilty of paying a 62 year old employee 50¢ an hour less than a 30 year old worker cannot lower the younger worker’s wage, but must raise the wage rate of the older employee until it is equivalent to the younger worker’s. 29 C.F.R. § 860.75 (1976). The Secretary had promulgated regulations interpreting the term “compensation” and giving examples of the conditions of employment which § 4(a) was intended to include. See id. § 860.50.
100. Id. § 4(e), 29 U.S.C. § 623(e) (1976). See also 29 C.F.R. § 860.92 (1979) and Proposed Interpretations, supra note 12, § 1625.4 for examples of prohibited practices.

Certain affirmative requirements also are imposed on all those covered by the Act. Employers, employment agencies and unions are required to maintain a conspicuously posted notice explaining the Act's provisions. Record keeping requirements also have been imposed on all covered entities in order to effectuate the administration of the Act.

**Proof of Violation: The Prima Facie Case**

The Supreme Court has established the essential elements of a prima facie case of employment discrimination in several cases involving Title VII. Although no high court decision exists with regard to the prima facie case of age discrimination, the Court’s decisions within the context of Title VII should serve in cases involving the ADEA. Under Title VII, the requirements of a plaintiff’s prima facie case depend upon whether the individual alleges that he has been subjected to “disparate treatment” because of his race, religion, national origin or sex; or that he has been the victim of a facially neutral practice having a “disparate impact” on his racial or religious group, or on others of his national origin or sex.

The Supreme Court established the elements of a prima facie case
of employment discrimination through disparate treatment in *McDonnell Douglas Corp. v. Green*, a Title VII case involving a refusal to rehire because of alleged unlawful racial discrimination. In *McDonnell Douglas*, the Court affirmed what has been the general understanding under both Title VII and the ADEA that the plaintiff bears the initial burden of establishing a prima facie case of employment discrimination. The Court held that the plaintiff had established such a case where he proved that he belonged to a racial minority; that he applied and was qualified for a job for which the employer was seeking applicants; that despite his qualifications, he was rejected; and that, after his rejection, the position remained open and the employer continued seeking applicants with the plaintiff's qualifications. The thrust of this approach is to require complainants to establish on a comparative basis that they have been denied an employment opportunity which they are qualified to perform. After the plaintiff establishes a prima facie case, the burden shifts to the defendant to state a legitimate, non-discriminatory reason for its action. The Court further added a third stage to this process by holding that the plaintiff is to be accorded a final opportunity to establish that the reason offered by the defendant is a mere pretext.

Where the claim is that a facially neutral employment practice has a disparate impact on a group protected by Title VII, the Court has articulated a different method of establishing the claim. The Court defined the prima facie case on a disparate impact claim in *Griggs v. Duke Power Co.*, a Title VII case involving the legality of an employer's use of a high school diploma requirement and standardized intelligence tests for employee selection. The Court in *Griggs* held that a prima facie case on a disparate impact claim is made by proof that the particular practice operates to exclude a disproportionate number of mem-

107. 411 U.S. at 802. For an example of how the *McDonnell Douglas* prima facie proof can be adapted to a case brought under the ADEA, see Wilson v. Seallest Foods, 501 F.2d 84, 86 (5th Cir. 1974), which held that "a showing that Appellant was within the 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." See also O'Connell v. Ford Motor Co., 11 Fair Empl. Prac. Cas. 1471 (E.D. Mich. 1975).
108. 411 U.S. at 802. See notes 135-40 infra and accompanying text. See also Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972).
109. 411 U.S. at 804.
bers of the protected group from an employment opportunity. Once the plaintiff has established the disparate impact of the practice, the burden shifts to the employer to show that the practice is justified by business necessity.

Both the McDonnell Douglas disparate treatment theory and the Griggs disparate impact theory should be applicable to cases of alleged age discrimination. Three aspects of the cases are important to employers: the role of intent, the use of statistics, and the shifts in the burden of proof in an employment discrimination case.

The Role of Intent. The Court in McDonnell Douglas removed the problem confronting plaintiffs with regard to proof of an employer’s discriminatory intent. Although, as the Court subsequently stated, “[p]roof of discriminatory motive is critical” in a disparate treatment case, plaintiffs need not prove the employer’s subjective discriminatory intent; such an intent can be inferred from the existence of differences in treatment.

When the burden in a disparate treatment case shifts to the em-

111. Id. at 431.
112. Id.
114. Id. One circuit court case decided prior to McDonnell Douglas implies that the plaintiff must prove the employer’s subjective discriminatory intent. In Hodgson v. Earnest Machine Prod., Inc., 479 F.2d 1133 (6th Cir. 1973) (per curiam), the Sixth Circuit upheld a dismissal of the government’s claim because the proof failed to establish that the employer had actual knowledge or had reason to be aware of the complainant’s approximate age. That the court reached this result in light of the fact the complainant was only five months shy of the mandatory retirement age of 65 is indicative that a subjective intent to discriminate was considered essential to the government’s proof.

It can be argued that proof of subjective intent is not required under the ADEA. Whereas Title VII empowers a court to grant injunctions, award back pay, order affirmative action and other equitable relief “[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint,” 42 U.S.C. § 2000e-5(g) (1976), the ADEA has no such language. The inclusion of liquidated damages for willful violations of the ADEA suggests that a subjective intent to discriminate is not to be required for ordinary violations. See ADEA § 7(b), 29 U.S.C. § 626(b) (1976). See also Rogers v. Exxon Research & Eng’r Co., 404 F. Supp. 324, 334 (D.N.J. 1974), vacated on other grounds, 550 F.2d 834 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978) where the court stated that “[t]he term ‘wilful’ . . . must be construed in the civil sense. It therefore applies to violations which are intentional, knowing or voluntary as distinguished from accidental.” However, the differences in statutory language may indicate that for both Title VII and the ADEA purposes, the discriminatory intent necessary to show a prima facie case of disparate treatment is not the same purposeful intent in the constitutional sense of the word as required by the Court in finding a violation of the equal protection clause. That is, under Title VII and the ADEA, the presumption that a person intends the natural and foreseeable consequences of his voluntary actions should be the test of discriminatory intent. Viewed this way, the plaintiff in a disparate treatment case brought under the ADEA must still show discriminatory intent, which may be accomplished by establishing the McDonnell Douglas prima facie case. Hence the provision for liquidated damages for willful violations is indicative that such damages may be awarded where the employer exhibits a discriminatory purpose in a constitutional sense of the word. Cf. Personnel Administrator v. Feeney, 442 U.S. 256, 278-80 (1979).
ployer to articulate a legitimate nondiscriminatory reason for its conduct, proof of intent also is relevant. The ADEA permits employment practices which are determined on the basis of reasonable factors other than age.\textsuperscript{115} A nondiscriminatory intent is relevant evidence of such a factor.

Furthermore, evidence of an employer's intent is permitted when the burden shifts back to the plaintiff to prove the employer's reason to be a pretext. Thus plaintiffs may utilize evidence of intent as proof of the pretextuality of the employer's justification. Facing this possibility, employers will be well advised to watch what is written on employment applications and other personnel records.\textsuperscript{116}

The role of intent in a disparate impact claim is altogether different. In \textit{Griggs}, the Court held that to establish a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only prove that a particular practice disproportionately adversely affects the employment opportunities of members of the protected group.\textsuperscript{117} Proof of discriminatory intent is not required under the disparate impact theory.

\textit{The Use of Statistics}. Statistical evidence will usually play an important role in an employment discrimination suit. In claims brought under the disparate impact theory, statistical evidence may support a showing that an employment practice disproportionately excludes members of the protected group from a job opportunity. In \textit{Griggs}, statistical evidence served to prove the discriminatory impact of a facially neutral employment testing device. The Court held that a statistical profile of a defendant's employee group is competent evidence for establishing a Title VII claim of disparate impact.\textsuperscript{118} Thus in cases involving the use of facially neutral employment practices, statistical evidence is relevant because their use in showing the discriminatory impact of the employment practice serves to establish individual discrimination on the part of the defendant against the plaintiff.

Statistical evidence should also play an important role in claims brought under a disparate treatment theory; however, its use may not

\textsuperscript{116} See Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 821 (5th Cir. 1972), where in holding that the plaintiff had made out a prima facie case of age discrimination under the ADEA, the Fifth Circuit emphasized that plaintiff's proof included interview notes with "too old for teller" written on them.
\textsuperscript{117} 401 U.S. 424, 432 (1971).
\textsuperscript{118} \textit{id.} at 431. \textit{Accord}, New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) (Title VII case).
be determinative in establishing the plaintiff's prima facie case of individual discrimination. The Court in *McDonnell Douglas* elaborated on the role of statistical evidence in proving disparate treatment. Noticeably omitting any mention of the use of statistics with respect to the plaintiff's initial burden, the Court did recognize their utility by the defendant in describing a legitimate nondiscriminatory reason for its conduct, and also by the plaintiff when later proving the pretextual nature of the purported justification. Thus, although it has been generally acknowledged that statistics may be highly significant in cases of employment discrimination, after *McDonnell Douglas* their use in disparate treatment cases should be limited to a support role for the plaintiff's principal evidence.

In *International Brotherhood of Teamsters v. United States*, the company argued "that statistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures." While noting that its case law made it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role in which the existence of discrimination is a disputed issue," and that "[s]tatistics are . . . competent in proving employment discrimination," the Supreme Court nevertheless found that the evidence revealed that this case was not one in which the Government had relied on statistics alone. Testimony by individuals about their personal experiences additionally supported the Government's case. The *Teamsters* dictum may be further limited to cases charging a pattern or practice of employment discrimination.

It is similarly doubtful that a case of individual discriminatory treatment under the ADEA may be made by statistical evidence alone. In *Hodgson v. First Federal Savings & Loan Association*, the Fifth Circuit, citing statistics showing that none of the three defendants' 35 tellers was over 40 years of age, and all but three were in their teens and twenties, pointedly remarked that "statistics by themselves would perhaps support a finding that defendant had violated the Act." However, the court noted that the Secretary did not rest his case on statistics alone but introduced evidence of specific incidents of discrimi-

119. 411 U.S. at 805.
120. 431 U.S. 324 (1977).
121. *Id.* at 339.
122. *Id.*
123. *Id.*
124. 455 F.2d 818 (5th Cir. 1972).
125. *Id.* at 822-23.
natory conduct by the defendant.\textsuperscript{126}

In \textit{Mastie v. Great Lakes Steel Corp.},\textsuperscript{127} the United States District Court for the Eastern District of Michigan held that statistics cannot be used exclusively to prove a prima facie violation of the ADEA. Plaintiffs in \textit{Mastie} had argued that statistics showed that the average age of evaluated employees dropped 1.29 years.\textsuperscript{128} While acknowledging that the Sixth Circuit had approved the use of statistical evidence in claims of individual discrimination, the district court noted that such evidence became significant only where great discrepancies were revealed.\textsuperscript{129} The court further found that institutional, psychological, economic and physiological constraints in employing the aged distort the normal statistical patterns that would be expected in the employment of older persons and thus reduce the reliability of statistics as an indicator of an employer's violation of the ADEA.\textsuperscript{130}

Although statistics may not serve to exclusively establish a prima facie case of disparate treatment, their importance to an employer in articulating a nondiscriminatory reason for its action has been recognized by the Supreme Court. In \textit{Furnco Construction Corp. v. Waters},\textsuperscript{131} the Court reversed the Seventh Circuit's decision that the employer had failed to rebut the plaintiff's prima facie case of disparate treatment on the basis of race; the Court held that the circuit court erred in its treatment of the employer's statistical evidence. The circuit court had held that once a \textit{McDonnell Douglas} prima facie case had been established, statistics of a racially balanced work force were totally irrelevant to the question of motive.\textsuperscript{132} While agreeing that the statistical proof in the case could not have been sufficient to conclusively demonstrate that the employer's actions were not discriminatorily motivated, the Court nevertheless held that the district court was entitled to consider the employer's statistical evidence.\textsuperscript{133} Since de-

\textsuperscript{126} Id.
\textsuperscript{128} Id. at 1319.
\textsuperscript{129} Id. at 1319-20.
\textsuperscript{130} The district court explained:

In particular, the court feels that the following employment restraints operate against older persons in their quest for employment: higher costs of employing older persons, promotion of employees from the employer's own work force, maintaining a proper work force age distribution, the older applicant's inability effectively to find and interview for employment, unwillingness of older persons to accept training for required skills, and the greater physical difficulties encountered by older persons.

\textit{Id.} at 1320.
\textsuperscript{131} 438 U.S. 567 (1978).
\textsuperscript{132} Id. at 579.
\textsuperscript{133} Id. at 580.
fendants may use statistics to meet their burden of proof, employers should maintain a statistical profile of their work force to document the utilization of older personnel.

The Proof Process. Under both Griggs and McDonnell Douglas, once the plaintiff establishes a prima facie case of employment discrimination, the burden of proof shifts to the employer. Under Griggs the burden shifts to the employer to establish that its employment practice is justified by business necessity. Under McDonnell Douglas the burden shifts to the employer to articulate a nondiscriminatory reason for its action. Until recently it was unclear whether the Court's decision required a shifting of the burden of persuasion or merely the burden of production. Most courts read the decisions as requiring a shift of both burdens. In Texas Department of Community Affairs v. Burdine, the Court last term held that in a disparate treatment case "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff." The defendant will rebut the prima facie case by articulating lawful reasons for his actions. "[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Therefore, the defendant bears the burden of production rather than the burden of proving by a preponderance of the evidence the legitimate reasons for the employment action.

The Burdine holding should find ready acceptance by the courts considering cases brought under the ADEA. Even before Burdine, the Sixth Circuit had refused to shift both burdens in an age discrimination case. As a result, employers need not feel compelled to err in favor of older workers in their personnel decisionmaking, since they will not be forced to legitimatize their decisions by a preponderance of the evidence.

134. In Griggs, the Court explained that "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.
135. 411 U.S. at 802.
138. Id. at 1093.
139. Id. at 1096.
140. Id. at 1093.
Establishing the Exception

Notwithstanding the ADEA's prohibitions, the Act provides certain exceptions which if established will exonerate a defendant's actions. Thus it is permissible for an employer to discriminate on the basis of age "where age is a bona fide occupational qualification reasonably necessary to the normal operations of a particular business." Practices based on reasonable factors other than age, and discharges or other discipline of individuals for cause also are allowed. Further allowance is made for discriminatory practices which are pursuant to a bona fide seniority system or an employee benefit plan. In addition to these exceptions, the Secretary of Labor was initially authorized to establish any additional exceptions which are necessary to the public interest. This authority to establish administrative exceptions now

143. Id.
146. Id. § 9, 29 U.S.C. § 628 (1976). Pursuant to § 9 the Secretary of Labor exempted all programs under federal grants and contracts and those undertaken by state employment services the sole purpose of which is to provide employment to persons with special employment problems, which include the long-term unemployed, handicapped persons, members of minority groups, older workers, and youth. 29 C.F.R. § 850.16 (1979).

resides in the EEOC.\textsuperscript{147}

**Age as a Bona Fide Occupation Qualification.** The exception provided to age-based personnel practices where age is a bona fide occupational qualification\textsuperscript{148} is a recognition that the purpose of the ADEA is to prohibit arbitrary age discrimination against those who are qualified to do a job notwithstanding their age; that the Act is not intended to require the employment of those who are not qualified for a particular position. In its guidelines, the Department of Labor issued examples narrowly construing the exception, showing occupations involving the portrayal by actors of young or elderly characters and the hiring of persons to promote products directed toward young or elderly consumers (\textit{e.g.}, the Gerber baby).\textsuperscript{149} The thrust of these guidelines was to focus on the authenticity of the age requirement as an essential element of the job. The EEOC’s proposed interpretations contain a similar provision.\textsuperscript{150}

Since the ADEA’s bfoq provision is virtually identical to that of Title VII, and the ADEA’s interpretative guidelines are similar to the EEOC’s interpretations of Title VII, it is not surprising that courts have applied Title VII precedents when defining a bfoq under the ADEA. Three Fifth Circuit cases, \textit{Weeks v. Southern Bell Telephone and Telegraph},\textsuperscript{151} \textit{Diaz v. Pan American World Airways, Inc.}\textsuperscript{152} and \textit{Usery v. Tamiami Trail Tours, Inc.}\textsuperscript{153} are the principal cases defining a bfoq.

\textsuperscript{147} See note 9 \textit{supra} and accompanying text.

\textsuperscript{148} [Hereinafter referred to as a bfoq].

\textsuperscript{149} 29 C.F.R. § 860.102 (1979). The DOL guidelines additionally state that any federal statute providing a compulsory age disqualification will constitute a bfoq where such disqualification is “clearly imposed for the safety and convenience of the public.” The policy of exempting federal statutory disqualifications has not extended to state protective legislation. The EEOC has taken the position that all such protective laws violate Title VII. EEOC Guidelines, 29 C.F.R. § 1604.2(b) (1979). This position has met with judicial approval. See \textit{Weeks v. Southern Bell Tel. \& Tel.}, 408 F.2d 228 (5th Cir. 1969) (overruling via the Federal Constitution’s supremacy clause the district court’s holding that the burden of proving a bfoq under Title VII was met with a showing of reliance on a state protective law). \textit{See also} Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Czerw v. General Motors Corp., 7 Fair Empl. Prac. Cas. 1322 (N.D. Ohio 1973); LeBlanc v. Southern Bell Tel. \& Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), \textit{aff’d}, 460 F.2d 1228 (5th Cir. 1972) (\textit{per curiam}), \textit{cert. denied}, 409 U.S. 990 (1972); Ridlinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), \textit{rev’d on other grounds}, 474 F.2d 949 (6th Cir. 1972); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

\textsuperscript{150} Under the DOL approach, the inquiry is to ascertain whether the job in question is one that any person of the particular age group excluded can handle. The issue is resolved by answering the following: “Is it absolutely necessary that a person of the particular age in question perform the job?” If so, the guidelines recognize that particular age as a bfoq. If not, the guidelines require the employer to make the employment decision on an individual basis, taking into consideration the qualifications possessed by each worker. For the EEOC approach, \textit{see} Proposed Interpretations, \textit{supra} note 12, § 1625.6.

\textsuperscript{151} 408 F.2d 228 (5th Cir. 1969).

\textsuperscript{152} 442 F.2d 385 (5th Cir.), \textit{cert. denied}, 404 U.S. 950 (1971).

\textsuperscript{153} 531 F.2d 224 (5th Cir. 1976).
In *Weeks v. Southern Bell Telephone and Telegraph*, the plaintiff was denied a switchman position even though her seniority would have entitled her to the job. The company maintained that the position's arduous responsibilities, which included lifting over thirty pounds, rendered women physically unsuited for the job. An EEOC investigation, however, failed to show that the job could not be performed by women in general, and the plaintiff maintained that she was capable of performing the job. Deferring to the Commission's guidelines requiring that individuals be considered on the basis of individual capacities and not on characteristics generally attributed to groups as a whole, the court held that Southern Bell did not meet its burden of proof merely by showing conclusions based on stereotypes; the bfoq exception requires a factual showing that the employer had reasonable cause to believe that all or substantially all women would be unable to perform safely and efficiently the duties of the job. Absent this showing, the employer must individually assess the abilities of each worker. The court in dicta noted that unverified yet reasonable generalizations based on sex may be permitted where it would be impossible or highly impracticable to make individual determinations.

The *Weeks* bfoq formula was elaborated upon in *Diaz v. Pan American World Airways, Inc.*, where a male was denied a job as a flight attendant. The trial court agreed with the airline's contention that the exception should apply because of passenger preference indicating that women were superior to men in the nonmechanical functions of the job, such as attending to the psychological needs of passengers by providing a pleasurable environment. The Fifth Circuit, however, held that the bfoq exception requires the application of a business necessity test, not a business convenience test; this means that sex can constitute a bfoq only where the essence of the business operation would be undermined by not hiring members of one sex exclusively. The court found that the nonmechanical aspects of a flight attendant position were not enough to qualify the job for the exception, since they were not "reasonably necessary to the normal operation of the particular business." The court noted that Pan Am had not sug-
gested that having male attendants would so seriously affect the operation of the business as to jeopardize or minimize the airline’s ability to provide safe transportation.\textsuperscript{162}

Taken together, \textit{Weeks} and \textit{Diaz} establish that before sex can constitute a bfoq, it must be shown that (1) it is impracticable to find members of one sex who possess the abilities which members of the other sex possess, and (2) that those abilities are necessary to the performance of the job. Referred to as the \textit{Weeks-Diaz} formula, in application it is the \textit{Diaz} element which is considered first in the analysis. The initial thrust of the judicial inquiry is to ascertain the business necessity of the qualifications invoked by the employer to justify its discrimination; the \textit{Diaz} element. Once it is established that the qualifications are necessary for job performance, the \textit{Weeks} element must be met to establish that it is impracticable to find members of the excluded class who meet these qualifications; \textit{i.e.}, there may be a factual basis for believing that substantially all persons of a specified sex would be unable to perform safely and efficiently the duties of the job, or it may be impossible or impracticable to determine through medical examinations, periodic reviews of job performance and other objective tests the capacities or abilities of these people to perform the job safely and efficiently.

In \textit{Usery v. Tamiami Trail Tours, Inc.},\textsuperscript{163} the Fifth Circuit had occasion to apply its bfoq formula in an age discrimination case involving an intercity bus carrier’s policy of refusing to hire applicants over age forty for the position of bus driver. Applying the \textit{Weeks-Diaz} formula, the circuit court upheld the lower court’s decision that Tamiami had justified its policy under the exception by (1) showing that it had a factual basis for believing that its business operations (safe transportation) would be undermined by hiring drivers over 40 years of age, and (2) by demonstrating that the individual testing of applicants was impracticable.\textsuperscript{164} The circuit court observed that the \textit{Diaz} requirement that an employer show its employment criteria to be necessary to the essence of its business operations varies with the business involved. Since the carrier’s business was the safe transportation of people from one place to another, the company could invoke the criterion of safe driving ability as the necessary job qualification.\textsuperscript{165} Having established safe driving to be related to the essence of Tamiami’s business operations, the court required the company to establish either that substan-

\textsuperscript{162} Id.
\textsuperscript{163} 531 F.2d 224 (5th Cir. 1976).
\textsuperscript{164} Id. at 237-38.
\textsuperscript{165} Id. at 236.
tially all persons over forty were unable to perform safely and efficiently the duties of intercity bus drivers, or that it was impracticable to ascertain the safe driving abilities of these drivers on an individual basis. Applying the "clearly erroneous" standard of appellate review, the circuit court examined the evidence and upheld the trial court's decision that individual testing was incapable of revealing the physiological and psychological changes with sufficient reliability to meet the carrier's special safety obligations.

Employers seeking to justify their employment policies under the first prong of the Weeks element would do well to compile statistical employment profiles correlating data regarding age and job performance, since a bfoq may be established by a statistical analysis of the employer's work force or by the use of industry statistics if they can be shown to be substantially similar. If this is not feasible, then employers may fall back on the second prong of Weeks. By showing the impracticability of making individual assessments of job capabilities,

166. Id.

167. Id. at 238. See also Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976), holding that forced retirement of an assistant city fire chief and a district chief upon reaching age 62 was not supported by proof of a bfoq since the employer failed to show the relevancy of the age retirement requirement and there was no proof that periodic physical examinations were incapable of detecting degeneration due to age; Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), reversing a lower court finding of a bfoq where a supersonic test pilot was mandatorily retired upon reaching age 52. The Eighth Circuit held that the employer's generalization regarding the safe performance of pilots over 50 years old was insufficient to establish a bfoq where the pilot proved (1) that the effects of aging on pilots is slower than in the general population; (2) that as experience increases, the accident rate for pilots decreases with age; and (3) the Air Force, the Navy, NASA and the FAA do not restrict supersonic pilots in their 50s. Id. at 563-64. The pilot furthermore established that medical technology can predict pilot disabilities with almost foolproof accuracy. Id. at 564. But see Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), involving an intercity bus carrier's policy of refusing to hire applicants over the age of 35 for the position of bus driver. The Seventh Circuit held that because public safety interests and the standard of care imposed upon common carriers required them to exercise a high degree of care in the hiring of drivers, the carrier needed only to show a rational factual basis for its presumption. Under this standard, an employer's presumption regarding the effects of age upon health and safety are valid to support a finding that age is a bfoq where it can be established that such a presumption is predicated upon an objectively arrived at rational basis in fact.

168. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973). See also Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), decided under Title VII and involving an employer's refusal to hire women with pre-school children while hiring fathers of such children. In overruling summary judgment in favor of the employer, the Court held that the district court should hear evidence on the issue of whether conflicting family obligations constituted a bfoq. Id. at 544. The Court implied that some statistical demonstration that women with small children are likely to have greater absenteeism than men might support a different rule for men than women. A concurrence by Justice Marshall rejected this possibility, arguing that Title VII requires employers to be sex-blind except when specific physical characteristics possessed by one sex are necessary for the job. Id. at 544-47.
the employer will be permitted to continue its age-based personnel practice.

It is the second part of the bfoq formula which should be judicially modified. The courts should require that after an employer establishes the impracticability of individual assessment, it must additionally show that its policy is the least discriminatory device for determining job capability, since it may be possible to substitute another generalization which will accomplish the employer's objectives without sacrificing all workers beyond a certain age. This result does not seriously impair an employer's defenses because he may resort to either the bfoq or good cause exceptions. If hiring younger workers is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business, older workers may be discriminated against. If the bfoq exception is unavailable due to a lack of empirical evidence that all, or substantially all, older workers cannot safely and efficiently perform the necessary job functions, the employer should be required to hire the older worker but be permitted to discharge for cause if the employee proves to be ineffective. This approach gives the older worker a reasonable opportunity to prove he can satisfactorily perform the job while further permitting an employer to discharge the employee for cause if the employee fails to satisfy the job requirements.

Reasonable Factors Other Than Age and Good Cause Determinations. Two related exceptions exist where an employment determination is based on “reasonable factors other than age,” or where the discharge or discipline of an employee can be shown to be for cause. Both exceptions represent two sides of the same coin, since every good cause discharge or discipline of an employee will constitute an employment practice based on a reasonable factor other than age. These exceptions reflect a recognition that discriminatory personnel practices must be distinguished from legitimate exercises of employer judgment and control.

These exceptions do not lend themselves to any precise definition of their scope and application. The administrative interpretations reflect a recognition that their scope is difficult to ascertain and that no precise determination is possible. Both the DOL interpretations and the EEOC proposed interpretations suggest that determinations be made on a case by case basis. This would seem to make allowances

169. See Harvard Note, supra note 5, at 408 n.181.
171. See 29 C.F.R. § 860.103(b), (d) (1979); Proposed Interpretations, supra note 12, § 1625.7(b).
for unusual working conditions.\textsuperscript{172} As with the bfoq exception, these exceptions will be construed narrowly, with defendants bearing the proof.\textsuperscript{173}

Although the courts have been no more precise than enforcing agencies in interpreting the exceptions, the case law does provide some guidelines to aid the determination. Judicial construction of the exceptions suggests that their application be governed by a recognition of both the dictates of compelling business conditions and the spirit of the statute. The courts have fashioned a standard that balances an employer's business judgment against the ADEA's remedial purposes. \textit{Bishop v. Jelleff Associates}\textsuperscript{174} is illustrative of this judicial posture.

In \textit{Bishop}, a woman's specialty store catering to a clientele of mature women embarked on a program designed to reduce its personnel. This was necessitated by poor business conditions and excessive payroll expenses. By discharging its older employees and expanding its product line, the company additionally hoped to appeal to a younger market. In terminating one employee, the company gave as its reason the fact that "business was falling off"; another was terminated after being advised that "business was slow." Recognizing that the company's decision to change its image and clientele represented a business decision, the United States District Court for the District of Columbia nevertheless held that the employment decision resulted in age discrimination, which was not in keeping with the ADEA's remedial spirit.\textsuperscript{175}

The court's holding represents a delicate balancing of an employer's business judgment and the ADEA's legislative objectives. The court held "that the statute is not violated in the case of terminations or other employer decisions which are premised upon a rational business judgment not activated by age bias."\textsuperscript{176} This good faith business judgment rule represents an appreciation of what constitutes an appropriate judicial function, and reflects the long-standing tradition of judicial self-restraint. "To conclude otherwise," wrote Judge Green, "would make the federal courts a super board of directors reviewing bona fide management decisions, a procedure Congress clearly did not intend by passage of this Act."\textsuperscript{177} Thus questions of "whether employee layoffs were actually required by business conditions, whether reductions in

\textsuperscript{172} Although the EEOC proposed interpretations are silent on this, the DOL interpretations explicitly recognized allowances for unusual working conditions. 29 C.F.R. § 860.103(d) (1979).

\textsuperscript{173} \textit{Id.} § 860.103(e); Proposed Interpretations, \textit{supra} note 12, § 1625.7(e).


\textsuperscript{175} \textit{Id.} at 594.

\textsuperscript{176} \textit{Id.} at 593.

\textsuperscript{177} \textit{Id.}
personnel contribute to rather than alleviate poor sales, and whether an executive in conflict with management is an able businessman are not the kind of judgments the courts are permitted or required to make.\textsuperscript{178} However, the court tempered its recognition of an employer's business judgment by cautioning that "where business judgment exceeds those instances set forth above, and reductions are predominantly of older workers for no apparent, rational reason other than age, . . . the spirit of the statute has been violated."\textsuperscript{179}

The precise issue presented in \textit{Bishop} was whether economic reasons may fall under the reasonable factors other than age exception. In practical terms, the issue is whether an employer may respond to economic reversals by firing older workers because of the increased labor and benefit expenses of employing them, and whether an employer may hire only young workers to attract a younger clientele.\textsuperscript{180} Although both \textit{Bishop} and the agency interpretations prohibit economic reasons from serving as reasonable factors other than age,\textsuperscript{181} courts construing a similar exception to the Equal Pay Act have held otherwise.\textsuperscript{182}

Where, as in \textit{Bishop}, an employer uses economic reasons for discriminating against older workers, two factors, age and the economic justification, underlie the employment decision. The employment decision is not based just on the factor other than age (the economic reason), but on age as well. Indeed, age is the determining factor. The fact that an employment decision is also based on some economic benefit does not change the fact that it is based on age. Under \textit{Bishop}, economic reasons may not serve as reasonable factors other than age where the economic benefit derives from the age discrimination.\textsuperscript{183} Economic reasons may prompt an employer's business judgment to reduce personnel, but any reduction in force should not result in blindly terminating only older workers. All employees should be individually evaluated in the process.

In deciding whether an individual personnel determination is based on a reasonable factor other than age, courts rely heavily upon whether the employer used ordinary, objective and valid criteria. In

\begin{itemize}
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{Id.} at 594.
  \item \textsuperscript{180} \textit{Id.} at 585.
  \item \textsuperscript{181} 29 C.F.R. § 860.103(h); Proposed Interpretations, \textit{supra} note 12, § 1625.7(f).
  \item \textsuperscript{183} 398 F. Supp. at 590.
\end{itemize}
*Stringfellow v. Monsanto Co.*,\(^{184}\) the discharge of older workers was held to be based on reasonable factors other than age where the discharge decisions were pursuant to an employee evaluation plan which utilized eighteen criteria (one of which was productivity, and none of which was age) derived from publications of the American Management Association and other similar recognized sources. Similarly, the discharge of a 50-year-old chemist was upheld in *Gill v. Union Carbide Corp.*\(^{185}\) because "management, in a careful and intelligent manner, undertook to establish a system to evaluate the qualifications of each employee."\(^{186}\) Interestingly enough, Union Carbide's evaluation standards included age and length of service as employment factors; however, neither was used adversely in evaluating employees, but only operated to their benefit. Even if age is unlawfully used in making a preliminary decision to discharge an employee (e.g., by a foreman), such a discharge has been upheld as valid where the final employee evaluation was made by someone without knowledge of the employee's age (e.g., a manager).\(^{187}\)

Although relying upon employer use of employee evaluations, courts permit the employee to prove such criteria to be mere pretext for discriminating on the basis of age. Thus in *Hodgson v. Ideal Corrugated Box Co.*,\(^{188}\) an ADEA violation was found where, among other things, the employer had asked three foremen to satisfy impossible production goals and used their failure as a pretext for dismissing them.

In summary, employers seeking to justify job reductions or other employment practices on the grounds that such practices were decided on the basis of reasonable factors other than age would do well to retain any records serving to explain the underlying business justifications for their employment policies, and furthermore utilize procedures designed to explain the basis of individual employment decisions. Employee evaluations may be used if they are based on objective, job-related criteria, and age is not adversely used in the evaluation.

**Bona Fide Seniority Systems.** Section 4(f)(2) of the ADEA provides that it is not unlawful to observe the terms of any bona fide seniority system which is not a subterfuge for evading the purposes of the Act.\(^{189}\) To be "bona fide," under the administrative interpretations, a

\(^{186}\) Id. at 367-68.
\(^{187}\) Id.
seniority system must use length of service as the primary criterion in differentiating between the employment opportunities of younger and older employees, although merit, capacity or ability may also be considered.\textsuperscript{190} Because a normal seniority system gives greater rights or more favored treatment to those employees with longer service (usually older employees), a system that gives those workers fewer rights or less favored treatment is considered to be a subterfuge for circumventing the Act.\textsuperscript{191}

To qualify for the exception under the agency interpretations, the essential terms and conditions of the seniority system must be communicated to the affected employees, and the system must be shown to apply uniformly to all affected employees regardless of age.\textsuperscript{192} If a seniority system is applied equally to all workers, that is strong evidence that the system is bona fide.\textsuperscript{193} The seniority system need not be plant-wide to be bona fide—occupational, departmental or company-wide systems are also acceptable.\textsuperscript{194}

The DOL took the position that a seniority system which had the effect of perpetuating age discrimination which may have existed before the ADEA’s effective date would not qualify for the exception.\textsuperscript{195} The EEOC proposes to delete this from its interpretations,\textsuperscript{196} presumably in recognition that the position conflicted with \textit{International Brotherhood of Teamsters v. United States},\textsuperscript{197} where the Supreme Court held that an otherwise valid seniority system was not rendered invalid merely because it had the effect of “locking in” pre-Act discrimination by the employer. In a seven-to-two decision, the Court stated that a facially neutral seniority system which perpetuates pre-Act discrimination is invalid only if the seniority system itself had its genesis in discrimination—that is, if the system itself, although facially neutral, was intended to discriminate.\textsuperscript{198} \textit{Teamsters} is arguably determinative of the legality of such seniority systems under the ADEA, because of the identical nature of the ADEA’s seniority exception with the senior-

\begin{itemize}
  \item \textsuperscript{190} 29 C.F.R. § 860.105(a) (1979); Proposed Interpretations \textit{supra} note 12, § 1625.8(a).
  \item \textsuperscript{191} 29 C.F.R. § 860.105(b) (1979); Proposed Interpretations \textit{supra} note 12, § 1625.8(b).
  \item \textsuperscript{192} 29 C.F.R. § 860.105(b) (1979); Proposed Interpretations \textit{supra} note 12, § 1625.8(c).
  \item \textsuperscript{194} 29 C.F.R. § 860.105(a) (1979).
  \item \textsuperscript{195} \textit{Id.} § 860.105(b).
  \item \textsuperscript{196} See Proposed Interpretations, \textit{supra} note 12, § 1625.8.
  \item \textsuperscript{197} 431 U.S. 324 (1977).
  \item \textsuperscript{198} \textit{Id.} at 346 n.28.
\end{itemize}
ity provision of Title VII.\textsuperscript{199}

Perhaps because of this similarity between the ADEA and Title VII, the EEOC's Proposed Interpretations provide that a seniority system that classifies workers on the basis of race, color, religion, sex or national origin in violation of Title VII will not be considered to be bona fide under the ADEA.\textsuperscript{200} This proposed interpretation is supported by a supplemental statement that it is the EEOC's posture that its proposed interpretations of the ADEA be construed consistently with Title VII.\textsuperscript{201} However, in the area of seniority systems, this use of Title VII may result in less than maximum protection for the older worker.

\textit{Bona Fide Benefit Plans.} Section 4(f)(2) also excepts from the ADEA's coverage age discrimination based on any bona fide employee benefit plan.\textsuperscript{202} An employer is not required to provide older workers with the same pension, retirement or insurance benefits that are provided to younger workers, as long as any differential is in accordance with a bona fide employee benefit plan. However, an employer is required to incur the same amount of cost in providing benefits for both older and younger workers. That such an amount will buy less benefits for an older worker (\textit{e.g.}, insurance) does not in itself violate the Act.\textsuperscript{203} Varying benefits under a bona fide benefit plan when such benefits are determined by a formula involving age and length of service requirements is also permitted under the Act.\textsuperscript{204} The purpose of this exception is to remove the disincentive for hiring older employees that is associated with the higher costs of providing benefits to older workers.

Before the 1978 amendments, much of the litigation involving this exception concerned whether the provision authorized the involuntary retirement of workers within the protected age categories where the retirement was pursuant to the terms of a retirement or pension plan.\textsuperscript{205} The Department of Labor had interpreted the exception as authorizing

\textsuperscript{199} Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1976) provides:

[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

\textsuperscript{200} Proposed Interpretations, \textit{supra} note 12, § 1625.8(d).

\textsuperscript{201} Id.


\textsuperscript{204} Id.

\textsuperscript{205} \textit{See, e.g.}, United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977); Zinger v. Blanchette,
such mandatory retirement so long as the plan’s sole purpose was not just to move out older workers.\textsuperscript{206} A principal change made by the 1978 amendments was the inclusion of explicit language making clear that the Act prohibits involuntary retirement because of age of any employee within the protected age group, even though pursuant to a bona fide employee benefit plan.\textsuperscript{207}

A Survey of Typical Business Practices in Tension With the ADEA

The following discussion analyzes the legality of several common personnel practices affected by the ADEA. A functional or life-cycle approach is undertaken. Thus, the discussion focuses upon pre-employment and post-hiring practices.

Pre-employment Protection: Help Wanted Advertisements and Recruitment Restrictions

Pre-employment protection takes the form of prohibitions against discriminatory advertising, recruitment practices and interviewing techniques.

Help-Wanted Advertisements. It is unlawful under section 4(e) to indicate any preference, limitation, specification or discrimination based on age in any employment notice or advertisement.\textsuperscript{208} The greatest amount of litigation in this area has been over the use of certain terms and phrases in help-wanted advertising.\textsuperscript{209}

549 F.2d 901 (3d Cir. 1977), \textit{cert. denied}, 434 U.S. 1008 (1978); Brennan \textit{v. Taft Broadcasting Co.}, 500 F.2d 212 (5th Cir. 1974).

206. 29 C.F.R. § 860.110(a) (1979).

207. The exception originally read, in part, as follows:

\textit{(f)} It shall not be unlawful for an employer, employment agency or labor organization—

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\textit{(2)} to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . .


As a result of the 1978 amendments, the following final clause was added to the original provision:

\textit{[A]nd no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified . . . because of the age of such individual.}


209. Although most advertisements will be printed, and section 4(e) only refers to any advertisement printed or published, word-of-mouth advertising has been held unlawful in several Title VII cases. Although such advertising is neutral on its face, it can perpetuate past discrimination, because such ads normally do not reach those groups discriminated against. \textit{See}, \textit{e.g.}, United
The administrative interpretations construe section 4(e) as prohibiting such terms and phrases as “young,” “boy,” “girl,” “college student,” “recent college graduate,” “age 25 and 35,” “age 40 to 50” and “age over 50 to 65.” Phrases such as “retired person” or “supplement your pension” are prohibited when used to discriminate against others within the protected group. The phrase “state age” is not in itself a violation of the Act, but it will be “closely scrutinized” in order to ascertain whether the request is for a valid purpose. Educational requirements such as “college graduate” or specifications for a minimum age less than 40 are not prohibited, and an individual seeking employment through advertising may specify his own age. Several courts have followed these interpretations and have found the use of such language to violate the ADEA.

One district court, in Brennan v. Paragon Employment Agency, Inc., however, has explicitly refused to follow these interpretations, calling them “wholly lacking in reasonableness.” The United States District Court for the Southern District of New York found such ads seeking “college students,” “girls,” “boys,” and “June graduates” encouraged young persons . . . to turn from idleness to useful endeavor,” and were based on “reasonable factors other than age.”


Even though a newspaper advertisement is clearly discriminatory, the newspaper cannot be prohibited from including the ad. Such a prohibition has been deemed protected as commercial speech by the first amendment, and relief must be sought from the party placing the ad. Pittsburgh Press Co. v. Commonwealth, 14 Empl. Prac. Dec. ¶ 7744 (Pa. Commw. Ct. 1977).

210. 29 C.F.R. § 860.92(b) (1979); Proposed Interpretations, supra note 12, § 1625.4(a).
211. Id.
212. Id. § 860.92(d); Proposed Interpretations, supra note 12, § 1625.4(b).
213. Id. § 860.92(c).
214. Id. § 860.92(e).

These courts awarded injunctive relief. The Hughes Personnel court also awarded damages to the job applicants in the amount of the employment agency’s potential profit resulting from job placements through the improper advertisement. The Western Textile Co. court held the Secretary of Labor entitled to a compensatory fine to reimburse him for costs and expenses in investigating the defendant’s operations and in prosecuting the civil contempt action (for violation of a prior restraining order and injunction).

217. Id. at 289.
218. Id. It should be noted that the court’s pronouncements in Paragon Employment regarding the use of such phrases are dicta since the plaintiff’s complaint failed to allege that the defend-
Still another court has attempted to strike a middle ground between these two lines of cases. In *Hodgson v. Approved Personnel Service, Inc.*, the Fourth Circuit held that the discriminatory effect of an advertisement is determined not by the use of certain “trigger words,” but by the context in which the words are used. The court gave the example of the phrase “recent grads”: when used to appeal to broad categories of individuals in an informative manner, as to available services, this phrase would not be violative of the Act, but such language could not be used in relation to a specific job.220

Thus, advertisements should be carefully worded so as not to exclude potential job applicants in the protected age group. Phrases such as “young,” “boy” or “girl” and “recent college graduate” are likely to be found violative of the Act. However, statements of educational requirements and those such as “not under 18” are not prohibited,221 and one court has found the phrases “junior executive,” “first job,” “to work with young office group,” “athletically inclined” and “All-American type” not to be violative since they do not indicate an age preference.222 An advertisement may use the language “state age,” but it will be closely scrutinized to ascertain the purpose of such a phrase.223 To be clearly within the law, advertisements should avoid any language that could be construed as indicating, directly or indirectly, preferences, limitations or specifications based on age. Including the following language may help to show the lack of discriminatory preference: “The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 70 years of age.”224

ant-employer met the requirements of an “employer” under the ADEA set out in 29 U.S.C. § 630(b); this caused the complaint to be dismissed for failure to state a claim.
219. 529 F.2d 760 (4th Cir. 1975).
220. *Id.* at 765-66. See also *Hodgson v. First Fed. Sav. & Loan Ass’n*, 455 F.2d 818 (5th Cir. 1972), which refused to hold an advertisement for a “young man” was itself a violation of the Act.
221. 29 C.F.R. § 860.92(c) (1979).
223. 29 C.F.R. § 860.92(d) (1979); Proposed Interpretations, supra note 12, § 1625.4(b).

Such a suggestion follows from a DOL regulation, 29 C.F.R. § 860.95(a) (1979), concerning job applications, which suggests including this language on a job application which requires the applicant to state his age, in order to inform the applicant such information will not be used for a discriminatory purpose.

It should be noted however, that in a Title VII case, *Hailes v. United Air Lines, Inc.*, 464 F.2d 1006 (5th Cir. 1972), the court held that inclusion of the phrase “United is an Equal Opportunity Employer” would not neutralize the discriminatory effect of an advertisement for a stewardess placed in the “help wanted female” column of a newspaper without a corresponding ad in the “help wanted male” column. Thus, it is not unreasonable to believe that a court will closely scrutinize language such as “state age” to ascertain if a discriminatory preference is present even though a self-imposed anti-discriminatory phrase is included in the ad.
Recruitment Restrictions. Recruitment of employees may be undertaken by contacting employment agencies and educational institutions. The following paragraphs focus on the legality of placing age-biased orders with employment agencies and an employer's limiting recruitment to certain educational institutions. This discussion also examines the situation where an employer seeks to justify hiring younger workers because of customer preference.

(I) Biased Orders to Employment Agencies. Section 4(b) of the ADEA prohibits an employment agency from failing or refusing to refer for employment, or from classifying or referring for employment, any individual on the basis of age. An employment agency is subject to this prohibition even when acting under the direction of a noncovered employer.

One case has been decided based on this provision of the Act concerning biased orders to employment agencies. In *Brennan v. Hughes Personnel, Inc.*, an employer had placed with the defendant employment agency a job order specifying that applicants were required to be between the ages of 28 and 35. The employment agency then placed advertisements for such employees in a newspaper, and eventually refused to refer three applicants to the employer because of their age. The court held that the employment agency had violated section 4(b) of the act and awarded the applicants' damages, measured by the agency's potential profit resulting from job placements achieved by the improper advertisements.

An employer placing a biased order with an employment agency may also be found to have violated the Act. In *Hodgson v. First Federal Savings & Loan Association*, the defendant had a job order on file with an employment agency that specified females within the age limits of 21 to 24. The court found this to be evidence of the defendant's discriminatory policy.

No section of the ADEA specifically covers this practice by an employer. Section 4(e) of the Act prohibits an employer from printing or publishing (or causing to be printed or published) any notice or advers-
tisement relating to employment indicating any preference, limitation, specification or discrimination based on age.231 Thus, under a strict, literal reading, the Act would not prohibit an employer from placing a job order discriminating against older workers if such an order were not printed or published in a notice or advertisement.232 Indeed, the court in Brennan v. Hughes Personnel233 held that an employment agency’s files may contain age characteristics about the applicants without violating the ADEA (even though the same information, if published, would violate the Act), which seems to support the position that an employer may specify an age limit to an employment agency as long as such a restriction is not published. However, the court was referring to age information collected for permissible purposes, and not used to “classify” or “refer” applicants.234 In addition, the court in Hodgson v. First Federal Savings and Loan Association hinted that an employment agency maintaining age preferences in job orders would violate the Act.235

It would seem that the use of age limits in job orders, even if not published in an advertisement or notice, violates the intent of Congress in passing the ADEA,236 since the employer is still basing its hiring decisions on the applicant’s age, which is prohibited by other sections of the Act.237 It is suggested that in order to fulfill the purposes of the Act, the same criteria be used in evaluating job orders to employment agencies as are used in evaluating advertisements. Employers should avoid wording which would violate the advertising prohibitions in writing job orders, and employment agencies should refrain from requesting age preferences on job orders and from accepting job orders with questionable wording.

(2) Recruitment Limited to Certain Institutions. Employer recruitment of new employees at colleges, universities and technical schools, where the great proportion of students are younger than the protected age group, is commonplace, and it is not unusual for companies to hire their greatest number of new employees from such institutions. Only one case under the ADEA deals with such a practice. In

231. See notes 208-24 and accompanying text supra.
232. It could, however, be argued that a job order is a “notice.”
234. Help wanted notices and advertisements, and job applications may require an applicant to state his age as long as the information is for a permissible purpose. Such a request will be “closely scrutinized” to determine its purpose. See 29 C.F.R. § 860.92 (1979).
235. 455 F.2d 818, 822 n.11 (3rd Cir. 1972).
Mistretta v. Sandia Corp.,\textsuperscript{238} the court held that an employer which concentrated on college recruiting for its new employees and did not actively recruit those in the protected age group did not violate the Act. The court found nothing inherently suspicious about campus recruiting, since the labor market would be expected to consist of recent graduates looking for jobs rather than from the older population which would tend to be already established. In addition, the court refused to infer discrimination from the fact that ninety percent of the company’s new employees were younger than the protected age group, since that was not significantly different from what was to be generally expected in the marketplace. Finally, the court noted that there was no evidence to show whether older applicants were less successful than applicants in general in obtaining employment with the defendant.

The result in this case is different from Title VII cases dealing with this issue. In United States v. Georgia Power Co.,\textsuperscript{239} for example, the court held that recruiting only at particular scholastic institutions (as well as word-of-mouth hiring), although neutral on its face, operated as a “built-in-headwind” to blacks, unjustified by business necessity. Although the employer company was not enjoined from recruiting on all college campuses, it was not allowed to continue to recruit from all-white institutions while maintaining a racially imbalanced work force, and was required to supplement college recruitment with affirmative steps to employ blacks.

The ADEA and Title VII cases can be distinguished. It is not unreasonable for employers to recruit on college campuses, especially if they are in need of people with technical skills, where the pool of applicants is likely to be large, well-trained and in one place. Such a recruitment practice might indeed be the only way in which an employer could carry on large scale interviewing.\textsuperscript{240} In addition, the Mistretta v. Sandia Corp. court found no evidence of past or present discrimination against older workers,\textsuperscript{241} while in the Title VII cases, employers had a past history of racial discrimination. However, other courts might be more willing to infer discrimination from a high percentage of young new employees or an imbalanced work force and follow the Title VII cases in requiring employers to

\textsuperscript{238} 15 Fair Empl. Prac. Cas. 1690 (D.N.M. 1977).
\textsuperscript{239} 474 F.2d 906, 925 (5th Cir. 1973).
\textsuperscript{240} Contrast the lack of business necessity in interviewing at only all-white schools. See id. Although there is no business necessity exception in the ADEA, practical considerations may be used to justify a practice and rebut the plaintiff’s prima facie case. See Hodgson v. First Fed. Sav. & Loan Ass’n, 455 F.2d 818 (5th Cir. 1972).
\textsuperscript{241} 15 Fair Empl. Prac. Cas. 1690, 1696 (D.N.M. 1977).
take additional active measures in order to recruit older, protected workers. Following the suggestion of the court in *Georgia Power Co.*, employers should widely advertise openings in newspapers and periodicals and give public notice that they are an equal opportunity employer. Notices in professional journals would especially be likely to reach older, trained employees interested in a new job. And of course, employers must be careful not to discriminate in the actual hiring of employees once an initial recruitment contact has been made. Employers must be able to show that older workers have the same chance as younger workers in finding out about and obtaining employment. In such ways, employers may be able to avoid charges of discrimination in recruitment and hiring.

(3) *Hiring Younger Workers Because of Customer Preference.* No case has been decided dealing directly with the refusal to hire older workers because of customer preference. However, such a refusal would certainly violate Congress' intent to "promote employment of older persons based on their ability rather than age." To allow such a practice perpetuates the stereotypes of older workers which the ADEA was meant to remedy.

There are ADEA cases that deal with the firing of older workers in order to project a youthful image. In *Bishop v. Jelleff Associates*, the court recognized that the employer's decision to change its image and clientele was a business decision but held that firing older workers merely because they were older violated the ADEA. In *Schulz v. Hickcock Manufacturing Co.*, the employer tried to reverse its financial losses by advancing a "youth movement," but again, the court held that firing older workers simply because they were older was impermissible. The refusal to hire older workers simply because of age is indistinguishable from the firing situation.

The situation has been directly dealt with under Title VII. EEOC interpretations will not allow the bfoq exception to be applied to a situation where the refusal to hire a person is because of co-worker, employer, client or customer preference. The hiring of only women as airline flight attendants on the grounds of customer preference was re-

242. 474 F.2d at 926.
246. However, it has been held that if there are valid grounds for discharging an employee, the fact that the employer also felt a younger employee would enhance the business' image is not a violation of the ADEA. *See*, Brennan v. Reynolds & Co., 367 F. Supp. 440 (N.D. Ill. 1973).
jected in *Diaz v. Pan American World Airways, Inc.*248 One EEOC decision249 has held the hiring of only female nurses in a nursing home where seventy-five percent of the patients were women to violate Title VII even though the female patients preferred female nurses. The Commission indicated that ability to perform the job and not customer preference should control the hiring decision.

Even though a business directed at a youthful market must hire an older applicant if he or she is best qualified for the job, if the employee proves to be ineffective (using a standard applied to all of the business' employees), he or she may be fired even if the ineffectiveness is due at least in part to the person's age.250 Unsatisfactory job performance based on fairly applied standards qualifies for the "good cause" exception to the ADEA.251 Thus, while older workers must be given an opportunity to prove themselves on the job, an employer will not be required to retain a worker who is unable to effectively do the job.

**Interviewing Techniques**. Job interviews continue to play an important role in the hiring process. Although they are often initially conducted by a personnel officer, it is not uncommon for prospective employees to be interviewed by potential supervisors and co-workers in subsequent interviews. Thus, it is likely that people who are untrained in personnel and legal matters may become involved through the interview process in decisions affected by the ADEA. What follows is a discussion of the more commonly expressed concerns of those who are involved in this part of the hiring process.

(1) *Asking Prospect's Age*. Both the DOL interpretations and the EEOC proposed interpretations take the position that an employer may request a job applicant to state his age or date of birth.252 Such a request is not a per se violation of the ADEA, but because it may deter older persons from applying, it will be closely scrutinized to assure it is done for a permissible purpose.253 To inform applicants that the purpose of the request for their age is not discriminatory, the administrative interpretations suggest that the following language accompany the request: "The Age Discrimination in Employment Act of

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248. 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).
250. Id. The EEOC noted that Title VII would not be violated if it could be shown that all patients (male and female) were prejudiced against male nurses, and that such prejudice made it impossible for the male nurses to perform essential duties.
251. See notes 170-88 supra and accompanying text for a discussion of reasonable factors other than age and discharge for cause.
252. 29 C.F.R. § 860.95(a) (1979); Proposed Interpretations, supra note 12, § 1625.5.
253. Id.
1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 70 years of age." Though not required, such a notice will be evidence in the employer's favor if a request for age is ever questioned. It should be noted that a person advertising for employment may volunteer his age. Similarly, an employee should be allowed to volunteer his age on an application or in an interview.

It is not unreasonable to allow employers to ask an applicant's age. Unlike references to race, which generally must be deleted, the age of an applicant is difficult to conceal. Information as to previous work experience indicates at least the applicant's approximate age, and the employer must know the age of his employees for purposes of various benefit plans, such as insurance and pensions. At the same time, the administrative interpretations provide some protection for the applicant against discrimination by requiring that such information be used only for permissible purposes. The precise meaning of "closely scrutinized" has yet to be delineated.

(2) Questionnaire and Testing Requirements. Reliance upon ability tests to distinguish the qualified from the unqualified applicants is common. Indeed, an entire industry has developed around the use of standardized tests for employment as well as educational purposes. When an applicant fails to qualify for a job because of the applicant's inability to pass the prospective employer's test, the possibility exists for the employer to justify its refusal to hire on the ground that the decision was based on a factor other than age.

However, both the DOL interpretations and the EEOC proposals adopt the approach that has been judicially developed in dealing with the discriminatory use of tests under Title VII. Under this approach, where an outwardly objective employment criterion, e.g., a test, nevertheless has an adverse impact upon persons in the protected group, the criterion must be shown to be related to the essential job requirements. Under Title VII, this requirement that such tests be job-re-
lating translates into a requirement that the tests be validated.

Under the administrative interpretations of the ADEA, an employer may use unvalidated physical or mental examinations so long as they do not adversely impact upon older workers. However, where the use of such tests results in a disproportionate number of failures in the 40 to 70 age group, job validation will be required. Employers should be cautioned about the likelihood their tests will have an adverse impact on older applicants. The administrative interpretations point out that the recent increase in the use of tests in primary and secondary schools has given birth to a generation of test-wise applicants who may have an advantage over their older counterparts who, despite considerable job experience, may not perform as well on tests because as a result of their age they are further removed from their schooling.

(3) Writing on an Application. An employer who writes remarks on an application during or after an interview may, if not careful, violate the ADEA. In Hodgson v. First Federal Savings & Loan Association, an interviewer had written "too old" on his notes at the end of the interview. Disbelieving the interviewer's explanation that the note really meant "too heavy" (another application had the notation "heavy girl—may make teller"), the court held the defendant had not met its burden of justifying its refusal to hire plaintiff after the plaintiff had made out a prima facie case. In Brennan v. Ace Hardware Corp., the interviewer had written "Age?" on one application of an applicant older than 50, and "too old" on another. The court found this to be a violation of the Act.

However, writing on applications is still recommended. It has been suggested that an interviewer should keep a written record of an interview, detailed enough to support a valid reason for possible rejection of the applicant. Employers should use a form which lists job-related factors such as past responsibilities or reasons for leaving past employment, which provides greater uniformity and lessens the chance of discriminatory treatment. Thus, validly made employment decisions may be substantiated if challenged.

260. 29 C.F.R. § 860.103(f) (1979); Proposed Interpretations, supra note 12, § 1625.7(d).
261. Id.
262. 455 F.2d 818 (5th Cir. 1972).
263. 495 F.2d 368 (8th Cir. 1974).
264. The plaintiff lost the case, however, on a procedural issue.
266. Id.
Post-hiring Practices

The ADEA's protections remain after an applicant has been hired. Employers need to be cognizant of the consequences of certain post-hiring practices under the Act. The following discussion focuses on: post-hiring inquiries by an employer, decisions relating to apprenticeship and training programs, work assignments, promotion/demotion decisions, and compensation and benefit plans.

Post-hiring Inquiries. While an employer will normally have a record of an employee's age at the time the employee starts work, a situation may arise where a post-hiring inquiry is necessary—for example, to gather data in defense of an age discrimination suit. Such post-hiring inquiries should be governed by the same principles that apply to age inquiries prior to hiring.268 Here also, notice of the ADEA's protection should be given to workers at the time of the inquiry to avoid any detrimental effect.

In applying Title VII, the EEOC recognizes that data on the race, sex or national origin of employees can be useful or even necessary (e.g., for reporting purposes or to permit evaluation of personnel programs). The Commission recommends that such data be kept as a running total rather than individually, if feasible, and that such data be kept separate from other employment data.269 This approach may not be feasible in situations affected by the ADEA; for while employee benefits are granted without regard for race, sex or national origin, they are often properly based on age. Therefore, the separate running total concept cannot be readily used.

Apprenticeship and Training Programs. In promulgating interpretations for the implementation of the Act, the Department of Labor had taken the position that apprenticeship programs are not affected by the ADEA, since participation in such programs has traditionally been limited to young people as an extension of the educational process.270 However, two Wage and Hour Opinion Letters contrasted sharply with this view.271 In one such letter, the Department of Labor held that the

268. See notes 252-56 and accompanying text supra.
269. EEOC General Counsel Opinion Letter, October 12, 1966.
271. See Gillan, The Federal Age Discrimination in Employment Act Revisited, 9 CLEARING-HOUSE REV. 761, 768 (1976), which argues that the interpretation is an erroneous interpretation of the ADEA.
Act did not protect a 33-year-old worker who was denied entry into an apprenticeship program not because the ADEA does not apply to apprenticeship programs, but because a 33-year-old is outside the unprotected group.\textsuperscript{272} A second Opinion Letter held that even indirect restraints on entry into training programs because of age are prohibited.\textsuperscript{273} The proposed EEOC interpretations are silent on the subject.\textsuperscript{274}

There is also some question as to whether apprenticeship and training programs may not be covered by the Act because they fall under the reasonable factor other than age exemption. There may be little or no chance of recouping the expense of training an older employee, especially if such worker is due for retirement within a short time. Requiring an employer to admit older persons to apprenticeship and training programs when there is a high probability the costs will not be recovered is unfair to the employer and a waste of resources. On the other hand, the probability that an employer will not be able to recoup expenses may often be difficult to calculate (e.g., if an employee is 40 years old as opposed to 69); any time a worker is trained, there is a chance the costs will not be recovered (e.g., if the worker were to quit, become disabled or die); and there is a danger that such a defense could be used as a pretext. Despite these arguments, courts following \textit{Mastie v. Great Lakes Steel Corp.}\textsuperscript{275} would find that higher costs of employing older workers would constitute "reasonable factors other than age" as long as consideration of employment costs was made on an individual basis as opposed to a general assessment. Such a solution seems to be a reasonable approach to the issue and would protect those older workers still able and willing to provide their employers with years of service.

Employment decisions related to training may be found to be a violation of the ADEA. In \textit{Coates v. National Cash Register Co.},\textsuperscript{276} it was held that a decision to discharge an employee was based on lack of training, but that since training was directly related to age, the plaintiff was indirectly discharged because of age. Thus, a lack of training cannot form the basis of an employment decision when that deficiency is created by age discrimination. The plaintiff's remedy included an accelerated training schedule.

\textsuperscript{272} Wage and Hour Opinion Letter (June 4, 1970).
\textsuperscript{273} Wage and Hour Opinion Letter (March 13, 1970).
\textsuperscript{274} See Proposed Interpretations, \textit{supra} note 12.
It should be noted that age limits on entry into apprenticeship programs have been found to be unlawful under Title VII, where they perpetuate the effects of past racial discrimination and have no business justification or necessity.277

**Work Assignments and Job Classifications.** Section 4(a)(2) of the ADEA makes it unlawful for an employer 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.”278 Because of such broad language, the prudent employer should avoid any job classification which even hints of age discrimination, unless sure an exception applies. Each job classification should be analyzed, as to what skills and abilities are required, and then each employee should be evaluated individually as to whether his or her capabilities meet that particular job's requirement. Stereotypes based on age should be avoided. In *Morelock v. NCR Corp.*,279 for example, a facially neutral seniority system that created a senior and a junior classification was held to be bona fide under the ADEA, because the classifications were based on skill and ability and not age. In addition, the motive for creating the two classifications was economic, the senior and junior labels connoted job responsibilities and not age, and employees both over and under 40 were in each classification at all times.280

An employer may lawfully favor an older employee by excusing him or her from more strenuous job assignments, since the Act speaks of adverse effects on employment status because of age. In accommodating older employees, however, an employer must not discriminate against other workers in the protected group.281 For example, a contract assigning a particular type of work to steamfitters over 50 years of age was found to violate the ADEA, even though its purpose was to guarantee work for older workers who had difficulty finding jobs, because the plan would tend to deprive steamfitters ages 40 to 49 of em-

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277. See James v. Stockhan Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), which held that the company's investment in a lengthy apprenticeship training program was not a business necessity that would constitute a valid defense.


279. 586 F.2d 1096 (6th Cir. 1978).

280. A Title VII case, Taylor v. Goodyear Tire and Rubber Co., 5 Empl. Prac. Dec. 8545 (N.D. Ala. 1972), also stressed the need to adequately analyze each job and then each female employee's capabilities in order to see if any of the female workers could perform the jobs classified as "heavy" (as opposed to "light").

281. 29 C.F.R. § 860.91 (1979); Proposed Interpretations, supra note 12, § 1625.2(a).
Employment opportunities.\textsuperscript{282}

Furthermore, an employer may not assign a job to an older worker that he or she is clearly unable to perform and then discharge the employee for failure to perform his duties.\textsuperscript{283} It would also appear, that by analogy to an EEOC decision concerning race, job classification based on employee preference to work with others of the same age would not be allowed.\textsuperscript{284}

\textit{Promotion and Demotion Decisions}. The broad language of section 4(a)\textsuperscript{285} prohibits employers\textsuperscript{286} from considering an employee’s age in promotion, demotion and upgrading decisions. The Department of Labor had interpreted the phrase “terms, conditions or privileges of employment” found in section 4(a)(1) to include advancement, promotion and demotion.\textsuperscript{287} However, the EEOC’s proposed interpretations have deleted this interpretation.

In several cases, plaintiffs have been successful in attacking their demotion or failure to receive a promotion because of age discrimination. In \textit{Marshall v. Board of Education},\textsuperscript{288} for example, the application of plaintiff, a guidance counselor, for the position of principal was not considered because of the fact he had only one year left before mandatory retirement. The ADEA was held to be violated, and the plaintiff was awarded back pay at the principal’s salary for the entire year, as well as adjusted pension payments and pre-judgment interest on the back-pay award. An injunction was also issued against the use of age or remaining years of service\textsuperscript{289} in his evaluation.

The court in \textit{Polstorff v. Fletcher}\textsuperscript{290} held that NASA had violated the Act when the plaintiff proved that despite his education, training and experience to fill several positions opened during a reorganization

\begin{thebibliography}{99}
\bibitem{282} See Wage and Hour Opinion Letter (May 1, 1970).
\bibitem{283} See note 188 supra and accompanying text.
\bibitem{284} In EEOC Decision No. 72-1684, 5 Fair Empl. Prac. Cas. 962 (1972), it was held no defense to a Title VII suit charging segregation that black employees preferred to work with other black employees, and had actually voted to maintain segregation. Another Title VII case, \textit{Weeks v. Southern Bell Tel. & Tel. Co.}, 408 F.2d 228 (5th Cir. 1969) disallowed the defense that state law required job classification by sex. Similarly, any state statutes requiring jobs to be classified by age would not be a defense under the ADEA.
\bibitem{286} Id. § 4(c), 29 U.S.C. § 623(c) (1976) (prohibits labor organizations from engaging in similar activities).
\bibitem{287} 29 C.F.R. § 860.50(c) (1979).
\bibitem{288} 15 Fair Empl. Prac. Cas. 368 (D. Utah 1977).
\bibitem{289} Id. at 373. Since nearly every promotion involves an expense for an employer, \textit{e.g.}, in training the employee for his or her new job, employers are naturally reluctant to promote an older employee when it is doubtful the expense will be recouped due to the employee’s impending retirement. See note 275 supra and accompanying text.
\bibitem{290} 452 F. Supp. 17 (N.D. Ala. 1978).
\end{thebibliography}
(during which plaintiff's job had been downgraded), he was not allowed to fill them because of his age. It was also found that, in violation of the ADEA, younger employees could have job descriptions rewritten as protection against termination and downgrading. In order to help prove his case, plaintiff used statistics which compared the percentages of workers over and under age 55 affected by reductions, downgrading and separations. At least one other plaintiff successfully used statistics to cause a reasonable suspicion that age was a factor in promotion, showing that while the mean age of non-supervisory employees had increased over the past ten years, the mean age of those promoted to supervisory positions had decreased.

In *McCrikard v. Acme Visible Records, Inc.*, the plaintiff was able to show an ADEA violation after she was demoted and certain of her responsibilities were reassigned to a younger employee who later received a larger salary than she had received. However, the plaintiff lost the case on a procedural issue.

Not all courts, however, have found age discrimination where an older employee has been demoted or passed over for promotion. In *Magruder v. Selling Areas Marketing*, the court emphasized the plaintiff's failure to prove that age had been a determining factor in her demotion after she had received repeated warnings of her unacceptable job performance and inability to improve. The court pointed out that the decision to demote could validly be based on individual assessments of "abilities, capabilities, or potential." Other courts have held that either the plaintiff failed to make out a prima facie case that age was a factor in the employer's action, or that the employer had met its burden of showing its actions were not motivated by age.

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291. Mistretta v. Sandia Corp., 15 Fair Empl. Prac. Cas. 1690 (D.N.M. 1977). *Cf.* Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123 (5th Cir. 1977), in which plaintiff's statistics were held insufficient to demonstrate age discrimination individually and generally since plaintiff never proved he was qualified for the job, nor that he had been informed in any way that age was a factor in promotion or that he had not been promoted because of his age.


293. *See also* Gray v. New England Tel. & Tel. Co., 16 Fair Empl. Prac. Cas. 77 (D.N.H. 1977) (plaintiff failed to meet the Act's filing requirements and unsuccessfully argued his position's downgrading and the effects of his transfer were continuing violations).


295. *See, e.g.*, Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123 (5th Cir. 1977); LaRue v. General Tel. Co., 545 F.2d 546 (5th Cir. 1977).

296. *See, e.g.*, Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978) (employer's elimination of plaintiff's position and offer of a lower position motivated by "economic realities of the time"); Blizzard v. Fielding, 17 Fair Empl. Prac. Cas. 146 (D. Mass. 1977), *rev'd on other grounds*, 572 F.2d 13 (1st Cir. 1978) (held plaintiff's failure to be promoted was based on employer's views on department organization and employee's interview and work assignment performance, not age or sex, even though plaintiff was the only person to pass a competitive examination for the posi-
Thus, in order to avoid age discrimination charges arising out of promotion, demotion and upgrading decisions, employers should base these decisions on an individual assessment of an employee's abilities and skills and of each job's requirements, not on stereotypes or subjective non-job related criteria.297

Compensation Rates. Whether a practice of paying lower wages to older workers is allowed depends on whether the differential is based on a reasonable factor other than age.298 Some employers may wish to base pay rates simply upon productivity. The DOL took the position that factors such as the quantity or quality of production were reasonable factors other than age if there was a valid relationship to the job requirements and the same criteria were applied to all employees regardless of age.299 This interpretation has been deleted in the EEOC's proposed interpretations. Although the status of productivity-based pay rates is less certain as a result of the EEOC's proposals, such a practice should continue to qualify for the exception.

With regard to compensation and benefits in general, employers should not rely on informal, unwritten policies. While an informal plan is valid if it nevertheless is an established plan and its terms have been communicated to all affected employees, proof of this is difficult for informal plans. Therefore, a compensation and benefits plan should be written and distributed.

Conclusion: Federal Age Discrimination Law—A Questionable Civil Right

Fourteen years ago Congress sought to alleviate the plight of older workers with the passage of the ADEA. Eleven years later, Congress sought to strengthen this commitment by extending the upper age limit five years and disqualifying involuntary retirement plans from the exception accorded to benefit and retirement plans under the Act. As a result of the recent reorganization of federal equal employment opportunity enforcement and administration, the EEOC has issued proposed interpretations that adopt with some modification the interpretations of the DOL.

The question that persists throughout this development of federal

298. See notes 170-88 supra and accompanying text.
anti-age discrimination law is whether any real protection against age discrimination has been accorded to workers. The Act is by its very nature limited in scope: only persons between 40 and 70 enjoy its protections, employers are permitted to take age into account where age is a bona fide job requirement and employers need not provide older workers the same benefits that are provided to younger workers. Added to this is a judicial approach to the ADEA that is narrower in interpretation than the judicial approach to Title VII. This narrower view is, however, far from being judicial hostility to the Act. The difference in judicial approaches can be explained on the basis of certain basic differences between age discrimination and other forms of discrimination. For example, racial discrimination is a reflection of a hatred of a particular race. Age discrimination, on the other hand, is more the result of misconceived notions about the employment abilities of older workers.

This article has attempted to guide the courts and employers as they chart compliance under the ADEA. As the case law begins to develop in greater detail the substantive provisions of the Act, the difficulty of charting such compliance should be reduced.