1992

Judicial and Administrative Interpretations of the Bona Fide Occupational Qualification as Applied to the Age Discrimination in Employment Act

Tracy Karen Finkelstein

JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS OF THE BONA FIDE OCCUPATIONAL QUALIFICATION AS APPLIED TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT

I. INTRODUCTION

Although America's societal growth and development have always been influenced by a diverse number of social, political, and technological advances, one factor that has remained constant is the age composition of our culture.[1] Today, for the first time, the aging of America's workforce[2] is causing society to examine the role of the older worker.

---

[1] *The Age Wave*, TRAINING & DEV. J., Feb. 1990, at 22, 24. (An interview with Ken Dychtwald).

[2] Jeffrey L. Sheler, *The Aging Worker: Asset and Liability*, U.S. NEWS & WORLD REP. May 4, 1981, at 76. Several demographic changes are occurring which cause the age wave. The first is the "senior boom" caused by breakthroughs in

In light of this change there is growing concern about the effects of ageism, the "'process of systematic stereotyping of and discrimination against people because they are old'."[3] Instead of imposing mandatory retirement upon older workers, or simply failing to hire them, those who are able to contribute should be utilized to their fullest capacity; their experience and productivity could enhance and enrich the workplace.[4] The difficulty in adapting to this change lies in the fact that age has been used as a prediction of behavior and as a benchmark of ability.[5] Our society has failed to realize that there are individual differences in traits and abilities and that chronological age alone should not be used as an arbitrary classification of ability.[6]

---

medicine which have eliminated many of the diseases that in the past have maintained, on the average, a young age of death. One hundred years ago, only three million Americans, or four percent of the population, were over the age of sixty-five. In 1990, more than thirty million people or twelve percent of our population were over sixty-five. For the first time in our history, we are creating a mass society of healthy, active older people. The second demographic current is the "birth dearth." Although there are twice as many women of childbearing age today as there were in their parents' generation, they are bearing only half as many children. The births that would otherwise even out the balance between old and young people are simply not occurring. In addition, the middle-aging of the Baby Boom generation has compounded the effects of the senior boom and the birth dearth. Today most Boomers are in their thirties and early forties. Thus the "leading edge of the boomer generation" will be approaching age fifty, bringing a youth-focused era to an end while beginning the age wave. *The Age Wave*, *supra* note 1, at 24.

[3] James E. Birren & Wendy L. Loucks, *Age Related Change and the Individual*, 57 CHI.-KENT L. REV. 833 (1981) (quoting ROBERT N. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 12 (1975)).

[4] *Hearings on Age-60 Rule for Pilots Before the House Select Committee* (statement of Rep. Roybal), DAILY LAB. REP. (BNA) No. 202 at E-1 (October 18, 1985). Discrimination in employment based upon age not only bars an entire portion of our population from contributing to societal growth, it also results in older workers suffering economic hardship and stigmatization. *Id.*

[5] Birren & Loucks, *supra* note 3, at 849. Because age is an objective index of the passage of time in one's life, it is often used to predict one's functional capabilities; both physical and mental. *Id.* The foregoing conclusion, however, is often tenuous at best. Reliance on age overlooks the fact that one is subject to varying opportunities, experiences, and physiological procedures that affect one's aging pattern. Accordingly, the distinction between "age" and "aging" must be noted. *Id.* Aging consists of concurrent biological, psychological, and social processes. *Id.* Therefore, while age may be used as an index of different human traits, it should not be discounted that each person's capabilities may differ at any given age. *Id.*

[6] *Id.* at 834-35.

Over the past twenty years drastic changes have been made in an attempt to deal with this problem. Statutory enactments, the most significant of which have been Title VII of the Civil Rights Act of 1964[7] and the Age Discrimination in Employment Act (ADEA),[8] as well as court decisions interpreting their application, have been crucial to the development of a fair legal relationship between employers and elderly employees.[9]

Industries that have been particularly susceptible to charges of age discrimination are those in which the very nature of the enterprise presents an inherent risk to public safety.[10] An example is the airline industry, where airlines make it a practice to discriminate against older pilots when making

---

[7]42 U.S.C. §§ 2000 e-1 to 2000 e-7 (1988). Recently, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 122-166, 105 Stat. 1071 (1991) (to be codified at 42 U.S.C. § 1981). The 1991 amendment was established to "respond to recent Supreme Court decisions by restoring the Civil Rights protections that were dramatically limited by those decisions" and to "strengthen existing protections and remedies available under federal civil rights laws." H.R. Rep. No. 102-40, 102nd Cong., 1st Sess., pt. 2, at 1 (1991).

[8]The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34). The Act prohibits age discrimination in employment by employers, labor organizations, and employment agencies. *Id.* § 623.

[9]Judicial decisions involving claims brought under Title VII and the ADEA have been instrumental in addressing many of the problems older employees face. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) (invalidating TWA's employment policy under § 4(a)(1) of the ADEA because it was not applied uniformly throughout the company and resulted in discrimination against older workers); McDonnell Douglas v. Green, 411 U.S. 792 (1973) (establishing proof requirements of a prima facie case of discrimination under Title VII); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) (holding that the employer bears the burden of establishing that its hiring policy falls within the BFOQ defense), *cert. denied sub. nom.* Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975). *Compare* Smallwood v. United Airlines, Inc., 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) (holding that the airline's refusal to employ a 48-year-old pilot violated the ADEA) *with* Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (holding that the airline's refusal to hire a 43-year-old pilot did not violate the ADEA). *See generally* Franklin A. Nachman, *Hiring, Firing, and Retiring; Recent Developments in Airline Labor and Employment Law*, 53 J. AIR L. & COM. 31 (1987).

[10]*See, e.g.*, Western Airlines v. Criswell, 472 U.S. 400 (1985); Trans World Airlines v. Thurston, Inc., 469 U.S. 111 (1985); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied sub. nom.* Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975); Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972).

employment decisions.[11] This situation has arisen as the result of Federal Aviation Administration (FAA) regulations and stereotypical judgments about older people.[12]

This note will examine administrative and judicial standards used to prevent age discrimination in employment decisions. The first section will analyze the ADEA, enacted in response to the growing concern about age discrimination.[13] The second section will discuss the Bona Fide Occupational Qualification (BFOQ) exception to the ADEA's prohibition against age discrimination.[14]

---

[11] Cheryl Hammond Raper, Comment, *Age Discrimination in the Airline Industry: Is Age a Bona Fide Occupational Qualification for the Position of Pilot?*, 55 J. AIR L. & COM. 543, 544 (1989).

[12] *Id.*

[13] Section 621(a) of the ADEA contains a statement of the congressional findings:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a).

[14] ADEA, § 623(a)-(c), (f). This section declares it an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.

Id. § 623(a).

The "Bona Fide Occupational Qualification" (BFOQ) exception declares it "not to be unlawful" for an employer, employment agency or labor organization:

(1) to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification

Finally, the concerns particular to the airline industry regarding its age-related policies will be presented together with the responses of the FAA, the Equal Employment Opportunity Commission (EEOC), and the judiciary in an attempt to clarify and resolve the difficulties inherent in situations where safety is a major concern.

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. History

Congress initially considered the inclusion of a ban on age discrimination in Title VII of the Civil Rights Act of 1964.[15] Although age, due to its distinct nature,[16] was not included in Title VII's prohibitions, Congress requested that the Secretary of Labor formulate a report regarding the problem of age discrim-

---

reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . .

Id. § 623(f).

[15]John A. Obee & Janet C. Cooper, Comment, *Age Discrimination in Employment - the Bona Fide Occupational Qualification Defense - Balancing the Interest of the Older Worker in Acquiring and Continuing Employment Against the Interest in Public Safety*, 24 WAYNE L. REV. 1339 (1978). The prohibition against age discrimination proposed for Title VII was rejected in an effort to assure the rapid passage of a statute covering other types of discrimination, particularly racial discrimination; thus, the "cause was good, 'the timing [was] bad'." LAWRENCE MEIR FRIEDMAN, YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT 14 (1984).

[16]*See* Peter H. Harris, Note, *Age Discrimination, Wages, and Economics: What Judicial Standard?*, 13 HARV. J. L. & PUB. POL'Y. 715, 732 (Spring 1990). Age discrimination is distinct in several ways. First, age is not an immutable characteristic; one's age changes over time. This distinction is important to note in that blacks, for example, have often had fewer educational opportunities in the past, and requiring minimum educational standards unrelated to a particular job would perpetuate the harm caused by past discrimination. Older persons, however, have not faced life-long bias, and in all probability will not be barred from employment opportunities as minorities have. Second, the Supreme Court has acknowledged differences between age and other protected categories in litigation under the Equal Protection Clause. Third, at some point in everyone's life, age may affect the ability to work. Focusing on the aged as a group rather than on an individualized basis only maintains stereotypes and arbitrary classifications of older workers. *Id.*

In addition, various court decisions consider age to be worthy of its own judicial standards in view of the unique aspects of age discrimination. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that age is different from race because the aged do not have a history of blatant, deliberate discrimination and are not an insular minority).

ination in employment.[17] In so doing, the Secretary of Labor determined that discrimination against the older worker was prevalent and that the implementation of a federal policy was the only means of eliminating such practices.[18] As a result, in 1967, Congress enacted the ADEA[19] to promote the employment of older persons based on ability rather than age, to prohibit arbitrary age discrimination in employment, and to help workers and employers overcome the difficulties associated with the impact of age in employment.[20]

The ADEA forbids an employer engaged in an industry "affecting commerce" who has twenty or more employees,[21] from failing or refusing to hire or to discharge an individual because of her age.[22] In 1974, the ADEA was extended to provide protection to employees of state and local governments.[23] In 1978, the ADEA was again amended, this time to cover federal employees and persons age forty through sixty-nine.[24] Finally, in 1986, the upper age limit was abandoned; thus the only restriction on the Act's application is that an individual must be forty years old to be protected.[25]

---

[17] *See* Obee & Cooper, *supra* note 15, at 1339-40.

[18] *See* Marie D. DiSante, Case Note, *Age Discrimination in Employment - Judicial Interpretation of the Bona Fide Occupational Qualification Exception*, 52 J. AIR L. & COM. 773, 779 (Spring 1987). The Secretary of Labor found that there "is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability." *Id. See also* JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 1 (1990) (indicating that the inclusion of the request of the Secretary of Labor to study age discrimination was a compromise between those Congressmen who had wanted a prohibition of age discrimination included in the 1964 Civil Rights Act and those who did not want such a provision in that piece of legislation).

[19] ADEA, *supra* note 8, §§ 621-34.

[20] *Id.* § 621(b).

[21] 29 U.S.C. § 630(b) (1992). This rule resulted from the 1974 amendments to the Act. Initially the Act affected employers with 25 or more employees. With respect to the number of employees, the Act has been interpreted liberally and has been construed to apply to management and supervisory employees. *See* Obee & Cooper, *supra* note 15, at 1341 n.9.

[22] ADEA, *supra* note 8, § 623(a)(1)-(2).

[23] Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. § 630(b) (1982)). The ADEA was amended in 1974 as part of the Fair Labor Standards Amendments of 1974.

[24] 29 U.S.C. § 631(a)-(b) (1982). Prior to the amendments of 1978, the ADEA covered persons from age forty through age sixty-four.

[25] *See* The Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 3(a)(i)), 100 Stat. 3342 (codified as amended at 29 U.S.C.

B. Application

To establish a Title VII violation, a plaintiff may proceed under one of two theories: disparate treatment or disparate impact. Disparate treatment involves an employer's treatment of certain employees less favorably than others because of the employee's race, religion, sex, or national origin.[26] Under

---

§ 623(i). The 1986 Amendments removed the age ceiling for applicability of the ADEA for all employees except executives or people in high policy-making positions, faculty of colleges and universities, and firefighters and law enforcement officers. An employer can force a high policy-making employee to retire at age 65, and until 1993, institutions of higher education can retire tenured faculty members at the age of 70. 29 U.S.C. § 631(b), (c), (d). The 1986 Amendments temporarily suspend the ADEA protections for state employed firefighters and law enforcement officers for seven years. During this time the EEOC and Department of Labor were to jointly study physical and mental fitness tests to determine whether they are legitimate measurements of competency. The provision does not apply to litigation that had begun prior to January 1, 1987, and the study is to be completed by the end of 1993. 29 U.S.C. § 623(i).

[26] Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court held that a plaintiff establishes a prima facie case of demonstrating that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425. Once a prima facie case has been established, the burden shifts to the employer to justify the practice. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The employer may employ either the business necessity defense or the job-relatedness defense. Furthermore, the plaintiff may rebut either defense by demonstrating that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in [quality production]." *Albemarle*, 422 U.S. at 425. Although proof of discriminatory motive is crucial in these cases, in some instances it may be inferred from the differences in treatment. *Teamsters*, 431 U.S. at 335-36.

Despite the consistent application of *Griggs*, the Supreme Court, with the help of Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), changed the disparate impact analysis. The decision drastically decreased an employer's burden in defending against a disparate impact claim. Rather than requiring the employer to prove a business necessity for its policy, the employer was merely required to produce evidence of a "business justification." *Id.* at 657. However, the Civil Rights Act of 1991 overturned the *Wards Cove* analysis and reinstated the disparate impact burden of *Griggs*. The legislation provides that one of its purposes is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* . . . and in other Supreme Court decisions prior to *Wards Cove*." Civil Rights Act of 1991, Pub L. No. 102-166, sec. 2(2), 105 Stat. 107 (1991).

The burden of proof in disparate impact cases will now work as follows: The complaining party must demonstrate that a respondent uses a particular employment practice that causes a statistical disparate impact on the basis of

the disparate treatment model, a person who believes he has been discriminated against on the basis of his age must establish a prima facie case by showing "blatant and overt discrimination by the employer."[27] Disparate impact, on the other hand, involves employment practices that are facially neutral but have the effect of denying employment opportunities to members of a protected group at a higher rate than those not belonging to such a group.[28]

The burden of establishing a prima facie case lies with the employee who must demonstrate that: (1) he was within the statutorily protected age group; (2) he was able and qualified for the job; (3) he was discharged or treated adversely; and (4) the employer sought to replace him with a younger person or gave benefits to a younger person.[29] Within the context of the ADEA, a prima facie case means that the plaintiff has to produce enough evidence to shift the

---

race, color, religion, sex or national origin. Once this has been accomplished, the burden shifts to the employer to demonstrate that the challenged practice is "job related" for the position in question and is consistent with a business necessity. A complaining party may also show that it proposed an alternative employment practice which would not have the same disparate impact and that the employer refused to accept the alternative; thus, the employer would then have the burden of demonstrating that the alternative could not have been employed because of business necessity. Section 105(a) of the Civil Rights Act.

[27] JOAN M. KRAUSKOPF, ADVOCACY FOR THE AGING 231 (1983).

[28] *Teamsters*, 431 U.S. at 335-36, n.15. Proof of a discriminatory motive is not required under this theory as it is under the disparate treatment theory. *Id.*

[29] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *McDonnell Douglas* established this structure for employees attempting to prove disparate treatment under Title VII. The case involved an employee who had engaged in disruptive and illegal activities in an effort to protect his discharge. When his employer rejected his application for re-employment, he filed a complaint with the EEOC alleging a violation of Title VII. *Id.* at 794-96. The Supreme Court established that in order to recover under the Civil Rights Act of 1964, the plaintiff has the initial burden of:

> [E]stablishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Many courts have applied the *McDonnell Douglas* test to age discrimination cases under the ADEA. Monte B. Lake, *ADEA: A Review of the Substantive Requirements, Age Discrimination, in* EMPLOYMENT ACT: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 64 (1983). In addition, the EEOC, which is the agency charged with enforcing both Title VII and the ADEA, has determined that it will interpret the ADEA in a manner consistent with Title VII. *Id.* at 36. *See also infra* notes 40, 50, 78, 84 and accompanying text for a discussion of the application of the relationship between Title VII and the ADEA.

burden of production to the defendant. Consequently, the employer is required to show that its actions were taken for legitimate nondiscriminatory reasons.[30] In attempting to do so, the employer may raise the following defenses: (1) that the employment decision was based on a factor other than age; (2) that the employment decision was authorized by the company's seniority system; or (3) that age was a bona fide occupational qualification.[31] Thus, even under the ADEA, an employer may discharge an employee for legitimate business reasons, provided that age is not the true underlying reason for the termination. If the employer fails to satisfy its burden, the plaintiff will prevail.[32]

When implementing the ADEA, Congress realized that, in certain instances, age would be an important factor in hiring due to the particularities and responsibilities of the job. Thus, in instances where a person's age could be reasonably related to her ability to perform a particular job, it may be reasonable for an employer to refuse to hire the applicant or to terminate the employee because of her age. Such justification by employers has become especially prevalent in the protective services and transportation industries;[33] areas in which public safety concerns are of the utmost importance.[34]

III. THE BONA FIDE OCCUPATIONAL QUALIFICATION

A. Background

Congress specifically enumerated certain exceptions to the prohibition of age-based discrimination in the ADEA.[35] Most important, for purposes of this analysis, is the Bona Fide Occupational Qualification (BFOQ) exception. This

---

[30] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (quoting *McDonnell Douglas*, 411 U.S. 792 (1973)). This burden is one merely of the presentation of evidence; therefore, the employer does not have to prove the lack of a discriminatory motive by a preponderance of the evidence. Lake, *supra* note 29, at 64.

[31] ADEA, *supra* note 8, § 623(f). For the relevant language of the BFOQ, *see infra* note 37 and accompanying text.

[32] *Burdine*, 450 U.S. at 254 (if the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains).

[33] *See, e.g.*, Trans World Airlines v. Thurston, 469 U.S. 111 (1985); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). *See also* Meryl G. Finkelstein, Note, *Minimum Physical Standards--Safeguarding the Rights of Protective Service Workers Under the Age Discrimination in Employment Act*, 57 FORDHAM L. REV. 1053, 1054 (1989).

[34] *See* Finkelstein, *supra* note 33, at 1054-55.

[35] *Id.*

exception recognizes that a person's age may be related to her competence in performing the tasks required in certain jobs.[36]

The ADEA provides, in relevant part:

> [T]o take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a work place in a foreign country, and compliance . . . would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such work place is located.[37]

---

[36] Hodgson v. Tamiami Trail Tours, Inc., 4 Fair Empl. Prac. Cas. (BNA) 728, 730 (S.D. Fla. 1972) *aff'd* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (acknowledging that there must be a balance between the ideals of the Act and the knowledge that differentiation based on age is reasonably necessary to the operation of some businesses or to specific positions within some businesses).

[37] ADEA, *supra* note 8, § 623(f)(1). The ADEA also makes it lawful for an employer:

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section -

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29 Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a), because of the age of such individual.

(3) to discharge or otherwise discipline an individual for good cause.

Id. § 623(f). Prior to the enactment of the 1990 law, there was an exemption for employee benefit plans provided that the employer was able to establish that the plan was lawful. Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989). However, the ADEA now covers all employee benefit plans and establishes a minimum standard for employees who waive their rights under the ADEA. Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 103, 104 Stat. 978 (1990).

The BFOQ defense embodies the concept of "business necessity" in that age discrimination may be permissible if the essence of the business' operation would be undermined by not applying the age limitation.[38] To establish a BFOQ, a factual foundation is necessary; a bare assertion that older people are unable to satisfactorily perform the job is not enough since the ADEA does not permit employment discrimination based upon stereotyped characteristics concerning age.[39]

B. The Legislature Intended that the ADEA be Interpreted Broadly and that the BFOQ be Interpreted Narrowly

Based on an extensive set of congressional findings dealing with the adverse effects of arbitrary discrimination in employment,[40] the ADEA states that its purpose is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[41] Almost all legislative statements regarding the goals and ideals of the ADEA encompass the idea that an individual should be judged on her capabilities rather than on broad stereotypes.[42] For example, the House Report for the 1977 amendments states that the "decline of capabilities experienced with age ... varies with individuals as to age and intensity, varies in importance to particular jobs, and may be compensated for by other attributes which often increase with age, for example, experience and judgment."[43] The emphasis is on consideration of each individual and her job.

In 1978 Congress amended the ADEA, reaffirming its mandate that employment decisions should be based on individual assessments and clarify-

---

[38] ADEA, *supra* note 8, § 623(f)(1). The ADEA's BFOQ exception closely parallels the BFOQ defense under Title VII. The major difference between the two is the substitution for the word "age" in the former, for the words "religion, sex, or national origin" in the latter. *Compare* 29 U.S.C. § 623(f)(1) (1990) (ADEA version) *with* 42 U.S.C. § 2000e-2(e) (1989) (Title VII version). The similarities between the two are purposeful. Title VII was the model for the ADEA and many of the ADEA's provisions were "derived *in haec verba*" from it. Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978).

[39] LEE M. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 393-95 (2d ed. 1988).

[40] *See* ADEA, *supra* note 13, § 621(a).

[41] ADEA, *supra* note 8, § 621(b).

[42] Robert L. Fischman, Note, *The BFOQ Defense in ADEA Suits: The Scope of "Duties of the Job"*, 85 MICH. L. REV. 330, 342 (1986).

[43] H.R. REP. NO. 527, 95th Cong., 1st Sess., pt. 1. at 12 (1977); *See* Fischman, *supra* note 42, at 342.

ing the BFOQ exception.[44] In discussing the BFOQ exception, the House stated that "the committee . . . expects that age will be a relevant factor for only a limited number of jobs."[45] In conforming to and maintaining Congressional intent, a court must consider only the job responsibilities of the individual rather than examining the job characteristics of the business or occupation.[46]

Just as the ADEA uses the "reasonably necessary" language, a narrow construction of the BFOQ finds further support in the analogous statutory language of the ADEA contained in Title VII, which also uses the words "reasonably necessary."[47] Both the Department of Labor (DOL) and the EEOC interpretations assert that the BFOQ defense is to be narrowly construed and have limited scope and application.[48] Indeed, a broad application of the BFOQ would endanger the ADEA.

In interpreting the ADEA, courts have emphasized that it is a remedial statute which prohibits a "subtle form of discrimination" and have concluded that Congress intended it be given broad scope.[49] In *Western Airlines, Inc. v.* Criswell,[50] the Supreme Court summarized the language and legislative history of the ADEA and observed that "one empirical fact is repeatedly

---

[44] *See generally* S. REP. NO. 493, 95th Cong., 2d Sess. 1 (1977). Congress wanted to insure that older individuals who wanted to work would not be precluded from doing so solely on the basis of age.

[45] H.R. REP. NO. 527, *supra* note 43, at 12.

[46] Fischman, *supra* note 42, at 341.

[47] 42 U.S.C. § 2000e-2(e)(1) (1964). Title VII provides in part:

> It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in that certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id.

[48] 29 C.F.R. § 860.102(b) (1976) (the DOL's definition of the BFOQ defense); 29 C.F.R. § 1625.6(a) (1988) (the EEOC's interpretation of the BFOQ defense); *See also* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 412 (1985) (after considering the language, Congressional intent, and interpretive guidelines issued by administrative agencies, the Court concluded that "like its Title VII counterpart, the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of age discrimination contained in the ADEA").

[49] Raper, *supra* note 11, at 551. *See, e.g.*, Hall v. United States, 436 F. Supp. 505, 509 (D. Minn. 1977) (stating that given the fact that the ADEA is a remedial statute which prohibits a particularly subtle form of discrimination, the courts must be aware of its goals and act in accordance with them).

[50] 472 U.S. 400 (1985). For a complete discussion of the facts surrounding *Criswell, see infra* notes 247-61 and accompanying text.

emphasized: the process of psychological and physiological degeneration caused by aging . . . 'has established that there is a wide range of individual physical ability regardless of age'."[51] The Court noted that the legislative history of the ADEA indicates that "like its Title VII counterpart, the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition of age discrimination contained in the ADEA'."[52]

In addition, *Criswell* cites a Senate Report describing the BFOQ defense:

> [I]n certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through . . . periodic reviews of current job performance . . . the employee's capability or ability to continue to perform . . . safely . . . .[53]

Congress emphasized that the decision to retire should be "an individual option" and that where a person is physically or psychologically able to continue working, she should not be dismissed on the basis of unsupported misconceptions concerning the effects that aging have on ability.[54] This suggests that Congress intended courts to analyze an employee's particular job duties under the BFOQ defense.

C. EEOC's Interpretation of the BFOQ Defense Under Title VII

Originally, the Secretary of Labor had responsibility for administration, investigation, and enforcement of the ADEA.[55] On July 1, 1978, pursuant to President Carter's plan to consolidate the federal government's equal employment enforcement effort, those functions were transferred to the

---

[51] 472 U.S. at 409. The Court emphasized that many older workers perform at levels equal to or superior to the level of their counterparts. *Id.*

[52] *Id.* at 412.

[53] *Id.* at 415 (citing S. Rep. No. 493, 95th Cong., 2d Sess. 3 (1977), *reprinted in* 1978 U.S.C.C.A.N. 504, 513-14).

[54] Consequently, employers must be cognizant of the requirements of individual jobs when invoking the BFOQ exception, otherwise, it will be so broadly applied that it will contravene the authority requiring a narrow interpretation. *See generally* Charles J. Ryan, Jr., Comment, *The Scope of the Bona Fide Occupational Qualification Exemption Under the Age Discrimination in Employment Act: EEOC v. City of Janesville*, 57 CHI-KENT L. REV. 1145 (1981).

[55] 29 U.S.C. §§ 625-26 (1976). Section 626(6) states that the Secretary, as a prerequisite to bringing suit, must attempt to eliminate the alleged discriminatory practice and must attempt to "effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(6) (1976).

EEOC.[56] When it took over responsibility for enforcing the ADEA in 1981, the EEOC determined that the BFOQ should be interpreted narrowly. The EEOC stated that "[i]t is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed."[57] According to EEOC guidelines, the BFOQ defense does not encompass the refusal to hire an individual because of stereotyped characterizations[58] or an effort to cater to client preferences.[59] The guidelines expressly determine the need for a BFOQ in hiring only where "necessary for the purpose of authenticity or genuineness . . . e.g., an actor or actress."[60]

In accordance with this mandate, the EEOC has recently issued guidelines to its investigative staff. These guidelines were issued in the wake of the Supreme Court's unanimous decision in *UAW v. Johnson Controls, Inc.*[61] They state, in pertinent part, that "policies that exclude members of one sex from a workplace for the purpose of protecting fetuses cannot be justified under Title VII."[62] As a result, individuals who can perform the essential functions of a job must be considered eligible for employment.

---

[56] Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807, *reprinted in* 5 U.S.C. app. at 1366 (1988), *and in* 92 Stat. 3781 (1978).

[57] 29 C.F.R. § 1625.6 (1985).

[58] Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(ii) (1985).

[59] 29 C.F.R. § 1604.2(a)(1)(iii).

[60] 29 C.F.R. § 1604.2(a)(2).

[61] 111 S. Ct. 1196 (1991). For a complete discussion of the case, see *infra* text accompanying notes 118-29.

[62] *EEOC Policy Guidance on Supreme Court's Johnson Controls Decision*, BUREAU NAT'L AFF. DAILY LAB. REP., July 10, 1991, at E-1. (BNA) No. 132 at E-1 (July 10, 1991). The commission identifies such policies as those that exclude all women, all women of childbearing capacity, all women of childbearing age, or all pregnant women from worksites containing potential hazards to developing fetuses. Moreover, once an allegation has been confirmed that a fetal protection policy excludes women, the Commission advises that a violation of Title VII be found, as is evidenced by the following:

> It does not matter whether the employer can prove that a substance to which its workers are exposed will endanger the health of a fetus. It also does not matter whether the employer can prove that it will incur a higher cost as a result of hiring women. Individuals who can perform the essential functions of a job must be considered eligible for employment, regardless of the presence of workplace hazards to fetuses.

Id. at E-1.

Various courts have adopted the EEOC's position that the BFOQ should be strictly construed. In *Weeks v. Southern Bell Telephone and Telegraph Co.*,[63] the defendant based his rejection of a female applicant, for the position of switchman, on the BFOQ defense that women were unqualified to perform a switchman's physically demanding responsibilities.[64] The court noted that the EEOC had interpreted the BFOQ exemption narrowly, rejected the defense, and held that Southern Bell failed to prove it had "reasonable cause to believe . . . that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[65]

A second major decision supporting the EEOC's interpretation was *Bowe v. Colgate Palmolive Co.*[66] In *Bowe*, a Title VII case, federal employees challenged an employer's practice of restricting women from jobs that required lifting weight in excess of 35 pounds.[67] The court rejected the defendant's assertion that this policy constituted a legitimate BFOQ.[68] Rather than rely on *Weeks'* "all or substantially all" test,[69] the *Bowe* court cited the EEOC guidelines focusing on an individual's ability to perform a job and held that the employer must provide a reasonable opportunity for each employee to demonstrate his or her ability to lift 35 pounds.[70]

Although EEOC guidelines do not have the force of law, courts generally give them considerable weight. Both *Weeks* and *Griggs v. Duke Power Co.*,[71] a Title VII case, acknowledged that the administrative interpretation of a statute

---

[63] 408 F.2d 228 (5th Cir. 1969).

[64] *Id.* at 234.

[65] *Id.* at 235. *Weeks* established that an employer must show either that it had a reasonable cause for believing that "all or substantially all" of the members of the classified group would be unable to perform the job safely and efficiently or that it would be impossible or very impractical to deal with the class members on an individual basis. *Id.*

[66] 416 F.2d 711 (7th Cir. 1969).

[67] *Id.* at 715.

[68] *Id.* at 718.

[69] *Weeks*, 408 F.2d at 235.

[70] *Bowe*, 416 F.2d at 718. The Court stated that the company could retain the 35 pound requirement, but that it must be applied equally to men and women. *Id.*

[71] 401 U.S. 424 (1971). For a complete discussion of *Griggs*, *see infra* note 109 and accompanying text.

by its enforcing agency is entitled to "great deference."[72] In recent years however, the Supreme Court has determined that, under certain circumstances, the EEOC guidelines will be accorded limited "persuasive value."[73] In *EEOC v. Arabian Am. Oil Co.*, the EEOC guidelines were considerd to be of minimal value in interpreting Title VII's application to citizens outside the United States.[74] The Court in *Arabian* based its decision on its holding in *General Electric Co. v. Gilbert*, where it addressed the issue of the appropriate weight to be given EEOC guidelines. In recognizing that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations,"[75] the Court determined that the degree of deference afforded "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[76] In its decision the Court looked to certain indicia which included the fact that the EEOC guidelines were pronounced eight years after Title VII's enactment, their position conflicted with earlier interpretations, and the plain meaning of the statute did not support their interpretation.[77]

---

[72] *Griggs*, 401 U.S. at 433-34. The Court held that "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Id.*

One should realize however, that this does not mean that the guidelines must be followed in every situation. At least one court has stated that they should be followed absent a showing that some cogent reason exists for noncompliance, but that they are not strictly binding on the courts. *See* United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). Similarly, another court has determined that "[a]lthough the EEOC's pronouncement does not have the effect of law, . . . it is entitled to a measure of deference unless 'it can be said not to be a reasoned and supportable interpretation' of the Act." EEOC v. Texas Indus., 782 F.2d 547, 551 (5th Cir. 1986) (quoting Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980)).

[73] EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1235 (1991); See General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[74] 111 S. Ct. at 1228.

[75] 429 U.S. 125, 141 (1976).

[76] *Id.* at 142 (quoting Skidmore v. Swift W., 323 U.S. 134, 140 (1944)).

[77] *Id.* at 142-45.

D. Judicial Interpretations Under Title VII and the ADEA

1. Overview of Cases

Despite differences between the ADEA and Title VII of the Civil Rights Act of 1964, courts frequently follow Title VII precedent and procedures when faced with age discrimination cases.[78] This is due in part to the striking similarity between the wording of the ADEA BFOQ exemption and that of the Title VII BFOQ exemption.[79] It has become accepted that once an employee makes chronological age differentials in the workplace, the burden of proof is on the employer to demonstrate that its actions were within the scope of the BFOQ exemption; however, the courts have applied different legal standards and reached different results with respect to what constitutes a legitimate BFOQ.[80]

There has emerged a judicial reluctance to second guess employer judgments with respect to employment policies when the costs of an erroneous selection decision are likely to affect not only employer profits, but also the interests of third parties.[81] An example of such a third party is the general public. Courts will often defer to employers' policies because there is a notion that employers will utilize policies that place the general public's safety first.

The judicial caution underlying this concern is found in *Spurlock v. United Airlines, Inc.*[82] which relied on a "variable business necessity approach."[83] This Title VII race discrimination case involved a challenge to pre-employment test requirements for entry into a flight officer training program.[84] In applying the

---

[78] *See supra* notes 14, 15, 17, 29, 40, 50, *infra* notes 78, 84 and accompanying text for a discussion on the relationship between Title VII and the ADEA.

[79] *See supra* note 40. The legislative histories of the two statutes, along with the EEOC, illustrate that the ADEA be interpreted consistently with Title VII. *See* Lake, *supra* note 29, at 43. However, the "adoption of all Title VII law would be inappropriate because age is a progressive factor which all individuals must eventually face." Lake, *supra* note 29, at 61 n.162.

[80] *See* Obee & Cooper, *supra* note 15, at 1348; Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (holding that an employer's job qualifications must be shown to be "reasonably necessary" to the essence of the business, and that the employer must demonstrate that job applicants over a certain age are incapable of meeting its qualifications); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) (holding that an employer must simply have articulated a factual basis for believing that elimination of its maximum hiring age would increase the potential of harm to its passengers).

[81] SAMUEL ESTREICHER & MICHAEL HARPER, CASES & MATERIALS ON THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP 741 (1990).

[82] 475 F.2d 216 (10th Cir. 1972).

[83] ESTREICHER & HARPER, *supra* note 81 at 741.

[84] *Spurlock*, 475 F.2d at 217. Plaintiff, Spurlock, challenged United Airline's requirement that an applicant meet certain minimum standards such as 500

business necessity doctrine,[85] the court distinguished jobs requiring a small amount of skill and training where the consequences of hiring unqualified applicants are insignificant, from jobs requiring a high degree of skill, where the economic and human risks involved in hiring an unqualified applicant are great.[86] The court pointed out that the airline's flight officers piloted aircraft worth as much as $20 million and transported as many as 300 passengers per flight.[87] Therefore, it was clearly in the public interest to have the most qualified people available to pilot airliners.

In addition, the court warned that subsequent decisions requiring an employer to lower his pre-employment standards for such jobs should be made with the greatest of caution.[88] "An industry with the primary function of managing the safety of large numbers of passengers must be allowed more

---

hours of flight time, a commercial pilot's license and instrument rating, and a college degree. He argued that these requirements had a disparate impact on minorities.

[85] *Id.* at 219. In situations involving a facially neutral employment practice, the courts have developed a rule that such a practice can continue despite its discriminatory impact if it can be justified by a business necessity; that is, a legitimate, nonracial business reason for the practice. *Griggs*, 401 U.S. at 431.

This is distinguishable from the BFOQ in that it is court-developed, applicable to facially neutral employment practices, and is applicable to racial discrimination. The BFOQ exception is an affirmative defense that is statutory, applicable to overtly discriminatory employment practices, and is not applicable to racial discrimination. Further, the business justification focuses on the appropriateness of job qualifications rather than on the legitimacy of an automatic exclusion of members of a particular class, and results in a lower threshold for establishing business necessity. *See* Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L. J. 5, 10 (1991).

Prior to the enactment of the Civil Rights Act of 1991, the two theories were also distinguishable in that the burden of proving a BFOQ fell upon the employer, whereas under the business necessity doctrine, the employer merely had a burden of production of evidence. *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (concluding that when an employer asserts that gender is a BFOQ, the Court will hold that employer responsible for showing why "it must use gender as a criterion in employment") *with* Wards Cove Packaging v. Atonio, 490 U.S. 642 (1989) (holding that the plaintiff has the burden of persuasion in disparte impact cases). Thus, in disparate impact cases the plaintiff bears the burden of persuasion. For a discussion of the burdens of proof currently employed, *see supra* note 26.

[86] *Spurlock*, 475 F.2d at 219.

[87] *Id.*

[88] *Id.*

latitude in structuring the requirements which could effect the performance of a primary business objective."[89]

On the other hand, where safety considerations are negligible, employment standards are much less demanding.[90] For example, prerequisites of sales experience and sales motivation for entry into a securities sales representative training program failed to satisfy the business necessity standard.[91]

One case relying upon safety considerations when determining the requirements for establishing a BFOQ defense was *Hodgson v. Greyhound Lines, Inc.*,[92] where a bus company had a policy of refusing to hire new drivers who were 35 years of age or older.[93] Greyhound attempted to justify its policy by claiming that age was a BFOQ and fell within the ADEA exemptions.[94] In so doing, Greyhound asserted that hiring persons over 35 did not provide enough time for the employees to train and gain experience as safe drivers.[95] As a result, the incomplete training, coupled with the deterioration of abilities that occur with age, would seriously undermine passenger safety.[96]

The *Hodgson* Court held that the "essence" of Greyhound's business was the safe transportation of passengers and that an employer need prove only that "it has a rational basis in fact to believe that elimination" of the hiring policy based on age might endanger the life of just one more person than might otherwise occur.[97] In so doing, it reversed the district court's finding that the

---

[89] Chrisner v. Complete Auto Trans., Inc., 645 F.2d 1251, 1262 (6th Cir. 1981) (citing the Tenth Circuit's decision in *Spurlock*). This Title VII sex discrimination case involved the failure to hire plaintiff, a female applicant, as a yard employee, because she did not have the required two years truck driving experience and/or had not completed truck driving school. *Id.* at 1255. The court held, in pertinent part, that the "interest in safety on the roads and highways is sufficiently weighty to warrant finding that [the] experience requirement . . . manifestly related to safe and efficient operation of [transporting automobiles] over the public highways [and constituted a business necessity defense]." *Id.* at 1263 (citations omitted).

[90] *Id.* at 1262.

[91] *Id.*

[92] 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom.* Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975).

[93] *Greyhound*, 499 F.2d at 863.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 863-65.

[97] 499 F.2d at 863.

BFOQ defense was not applicable and adopted the test set forth in *Diaz v. Pan American World Airline, Inc.*,[98] also a Title VII action.

Diaz involved the challenge to an airline's practice of restricting cabin attendant positions to women.[99] In an attempt to justify its policy, the defendant argued that the employment policy constituted a BFOQ because women were better qualified to serve the special psychological needs of its customers and the customers preferred women attendants.[100] The court rejected the foregoing arguments and opined that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[101] The *Diaz* test requires an employer to prove that hiring those within the excepted class would be detrimental to the "essence" of the business operation, e.g. the safe transportation of passengers.[102]

In *Usery v. Tamiami Trail Tours, Inc.*,[103] the Fifth Circuit established a two-pronged test[104] for determining the validity of a BFOQ defense. In *Usery*, an unsuccessful applicant challenged Tamiami's maximum hiring age of forty for intercity bus drivers.[105] The *Tamiami* court based its analysis on the holdings in *Diaz*[106] and *Weeks*[107] when it concluded that a safety-related job qualification would establish a BFOQ when an employer demonstrates that:

> 1. Under *Diaz*, the qualification must be reasonably necessary to the essence of the employer's business; and
>
> 2. Under *Weeks*, there must be a factual basis for believing either
>
> a. that all or substantially all persons over the specified age possess characteristics precluding safe or efficient performance of the duties of the job involved, or

---

[98] 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

[99] *Id.* at 386.

[100] *Id.* at 387.

[101] *Id.* at 388.

[102] *Id.*

[103] The employer must satisfy its burden under both prongs. Reaching the second prong depends upon the employer's ability to satisfy his burden under the first.

[104] 531 F.2d 224 (5th Cir. 1976).

[105] *Id.* at 226.

[106] *Diaz*, 442 F.2d at 385. *See supra* notes 98-102 and accompanying text.

[107] 408 F.2d 228 (5th Cir. 1969). *See supra* notes 63-65 and accompanying text.

b. that individualized assessments of the members of the designated class would be impossible or highly impractical.[108]

Thus, *Diaz* acts in conjunction with *Weeks* in that before an employer can assert that employees of a certain age do not possess the ability to perform certain functions, it must be shown that those functions are essential to the employer's business.

Moreover, in following *Griggs'*[109] holding that an employer can justify a facially neutral employment policy if it is "a business necessity" or "job related", the district court in *Tamiami* narrowed the exception. The court noted that the "touchstone for a BFOQ exemption . . . is a finding that age is a reasonable requirement necessitated by normal business operations and having a manifest relationship to the employment in question." In light of this, at least one commentator has argued that the Fifth Circuit believed that the court in *Greyhound* had misconstrued the applicable test for establishing a BFOQ when it neglected to acknowledge the *Weeks* aspect of the test.[110]

In *Arritt v. Grisell*,[111] the plaintiff applied for a job as a police officer but was denied. The sole reason for the denial was that he was 40 years old and ineligible to take the physical and mental examinations required by law. The law established an 18-35 year age limit for the initial appointment to the position of police officer.[112] The trial court applied the *Greyhound* test,[113]

---

[108] *Tamiami*, 531 F.2d at 236.

[109] 401 U.S. 424 (1971). In *Griggs*, the Court found that an employer's combined use of a diploma requirement and aptitude test was illegal under Title VII. The Court concluded that the requirements were arbitrary and constituted a barrier to employment because they discriminate on the basis of race. In addition, several terms were used from which one can infer that the court envisioned some sort of business justification defense. The Court used phrases such as "business necessity", "related to job performance", and "manifest relationship to the employment in question". *Id.* at 431-32. Courts have treated the BFOQ defense in such a manner as to adopt the job-related business necessity standard and have used this standard to resolve BFOQ questions. James A. Drexler, Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 MEMPHIS ST. U. L. REV. 76, 87-88 (1972). However, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) clearly differentiates the BFOQ defense and the business necessity defense. *See infra* notes 125-27 and accompanying text.

[110] Raper, *supra* note 11, at 561. The Seventh Circuit in *Greyhound* concluded that the *Weeks* and *Diaz* tests were inconsistent. *Greyhound*, 491 F.2d at 861-62.

[111] 567 F.2d 1267 (4th Cir. 1977).

[112] *Id.*

[113] *Id.* at 1271. The Greyhound test articulates that the employer merely had to show a minimal increase in the possible harm that might be caused by the elimination of the hiring policy. *Id.*

however the court of appeals reversed and remanded holding that the proper test was the two-pronged *Tamiami* analysis.[114]

To compound the confusion, in *Orzel v. City of Wauwatosa Fire Dept.*,[115] the Seventh Circuit held that *Greyhound* was the correct analysis. In so doing, it interpreted *Greyhound* to mean that in order to prevail on a BFOQ defense, an employer must show that the challenged policy is reasonably related to the "essential operation" of the business and that there is either a factual basis for believing that all or most of the people above the age limit would be unable to perform the required duties of the job or that it was impossible or highly impractical to determine on an individual basis which employees would be able to perform.[116] This approach has also been adopted by the Supreme Court in *Western Airlines, Inc. v. Criswell*,[117] which appears to be the accepted standard.

The highly publicized Supreme Court decision in *UAW v. Johnson Controls, Inc.*[118] reaffirmed the assertion that the BFOQ defense is an extremely narrow exception to Title VII's bar against discrimination in the workplace. *Johnson Controls* arose out of a class action challenging a battery manufacturer's policy of excluding women of presumed childbearing age from jobs involving exposure to excessive levels of lead.[119] The District Court granted summary judgment for *Johnson Controls* and the Seventh Circuit, *en banc*, affirmed. The Seventh Circuit based its decision upon the finding that the plaintiffs had "'failed to establish that there is an acceptable alternative policy which would protect the fetus'" and thus the company's policy constituted a business necessity.[120]

The Supreme Court reversed, holding that the fetal protection policy was facially discriminatory against women because fertile men, but not fertile women, could choose whether they wished to risk their reproductive health for a particular job.[121] In making the capability of bearing children the criterion for exclusion, "Johnson Controls explicitly classified[d] on the basis of potential for pregnancy;" such classifications are within the realm of explicit sex

---

[114] *Id.*

[115] 697 F.2d 743 (7th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983).

[116] *Id.* at 753.

[117] *See* 472 U.S. 400 (1985). *See infra* notes 247-61 for a complete discussion of *Criswell.*

[118] 111 S. Ct. 1196 (1991).

[119] *Id.* Johnson Controls asserted as their reason for this policy to protect pregnant women and their unborn children. *Id.* at 1197-99. The plaintiffs alleged that the policy constituted sex discrimination under Title VII. *Id.* at 1197.

[120] *Id.* at 1200.

[121] *Johnson Controls*, 111 S. Ct. at 1198.

discrimination.[122] In light of the foregoing, the Court ruled that such treatment could only be justified by a BFOQ defense. Accordingly, the business necessity test used by the Seventh Circuit was deemed inapplicable.[123]

After deciding that the policy was facially discriminatory the Court considered whether the policy came within the BFOQ exception. Johnson Controls argued that its policy fell within the safety exception of the BFOQ under which third party safety concerns may justify a discriminatory policy.[124] The majority rejected this assertion and endorsed the traditional view that a BFOQ defense "is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job."[125]

The Court stated that the third-party concerns raised by the company did not relate to either the female employees' ability to perform the job or to the essence of the business.[126] In accordance with the first prong of the *Tamiami* test, the majority described the "essence" of Johnson Control's business as "batterymaking" and stated that the company's concern for the welfare of future children is not part of the "essence" of its business.[127]

The Court's opinion also endorsed the strict interpretation of *Tamiami*'s second prong, the "all or substantially all" test. Johnson Controls argued that it had to exclude all fertile women in that it is impossible to tell which women will become pregnant while working with lead.[128] The Court however, concluded that the company's "fear of prenatal injury, no matter how sincere,

---

[122] *Id.* at 1203. Although not explicitly stated, Johnson Control's discriminatory policy amounts to disparate treatment discrimination. This conclusion may be inferred from the scope of the opinion. First, the majority finds facial discrimination and immediately proceeds to the BFOQ issue. Second, none of the opinions suggest the potential use of the alternative business necessity approach.

[123] *Id.* at 1204. This is evidenced by the fact that the Court placed the burden of proof on the employer to establish the existance of a BFOQ. *Id.* A BFOQ analysis would have been rejected if the Court had followed the *Wards Cove* analysis and placed the burden of proving a business necessity on the plaintiff.

[124] *Id.* at 1205.

[125] *Id.* at 1205-07. The Court's argument was supported by the Pregnancy Discrimination Act of 1978 (PDA) (codified at 20 U.S.C. § 2000e(k)), which concludes that, with respect to Title VII, discrimination based on pregnancy is explicit sex discrimination. *Id.* at 1203.

[126] *Johnson Controls*, 111 S. Ct. at 1207-08. This is in contrast to *Criswell*, where the safety concerns were central to the purpose of the employer's business, that being the safe transportation of passengers.

[127] *Id.* at 1207. The opinion also states that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire their parents."

[128] *Id.* at 1208.

does not begin to show that substantially all of its fertile women employees are incapable of doing their jobs."[129]

As a result of *Johnson Controls*, employment policies that exclude members of one sex from the workplace in order to protect fetuses cannot be justified under Title VII. It is irrelevant whether the employer can prove that a substance to which its workers are exposed will endanger the health of a fetus. Nor does it matter whether the employer can prove that higher costs will be incurred as a result of hiring women. All individuals who are able to perform the essential functions of a job must be considered eligible for employment regardless of the presence of hazards to fetuses.

Thus, the judiciary that began interpreting the concept of "business necessity" under the fairly lenient standard of *Griggs* has formulated an analogous, yet more stringent standard for the BFOQ exception under *Criswell* and more recently under *Johnson Controls*.

2. Summary of Tests

Courts have developed two tests for determining whether an employer's BFOQ defense is valid under the provisions of the ADEA. The first, the *Greyhound-Diaz-Spurlock* test, has generated much criticism.[130] Under this test, an employer will meet its burden of establishing BFOQ defense if it can show that a "minimal increase in the risk of harm" will occur if the employment policy is eliminated.[131]

In making public safety the focus of its decision, the *Greyhound* court unequivocally rejected *Weeks* because it did not have a public safety component.[132] This conclusion, however, may be erroneous in that it is a misinterpretation of the two cases.[133] With its business essence requirement, *Diaz* acts in conjunction with *Weeks* by initially eliminating any BFOQ claim where the employer cannot establish that the job qualifications in question are related to the essence of the employer's business.[134]Although Greyhound

---

[129] *Id.* at 1208. However, the Court acknowledged that the "all or substantially all" element of the BFOQ "is somewhat academic in light of our conclusion that the company may not exclude fertile women at all." *Id.*

[130] *See generally* Irving Kovarsky & Dr. Joel Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 894-901 (1974).

[131] *Greyhound*, 499 F.2d at 863.

[132] Obee & Cooper, *supra* note 15, at 1355.

[133] Raper, *supra* note 11, at 561.

[134] *Tamiami*, 531 F.2d at 235 & n.27. In rejecting the conclusion that the *Diaz* and *Weeks* tests were inconsistent, the Fifth Circuit noted that:

> [T]he *Diaz* requirement of a correlation between the job description and the essence of the business operation is a condition precedent to the application of *Weeks'* BFOQ exception to the ban on hiring discrimination. As such,

demonstrated that its job qualifications were reasonable and necessary to the safe transportion of passengers, the inquiry should have been taken one step further. Without proving that older workers in general would be unable to meet their job requirements, little has been established. It has been suggested that Greyhound's reliance upon *Diaz* was merely an attempt to sidestep *Weeks*.[135]

In realizing that *Diaz* alone would be insufficient to justify Greyhound's hiring policy, the defense relied on *Spurlock v. United Airlines, Inc.*[136] As noted previously, the court in *Spurlock* found that when a job involves a high degree of skill and risk of injury, an employer carries a lesser burden when justifying its pre-employment standards. *Greyhound* focused more on the risk factor and did not attempt to demonstrate that the duties of a bus driver involved a high degree of skill.[137]

One must also realize that the *Spurlock* test is not as stringent as *Greyhound*; *Spurlock* does not exclude all members of a protected group nor does it totally disregard individual ability.[138] Although Greyhound was able to demonstrate that its job qualifications were related to the essence of the employer's business, it did not demonstrate that older workers in general would be unable to meet the job requirements.[139] Consequently, the *Greyhound* test results in the total exclusion of the protected class with no flexibility allowed for individual testing.

The second test, the *Tamiami-Weeks* test, is more deeply rooted in Title VII precedent than is *Greyhound*. However, it too has been subjected to criticism in that, like *Greyhound*, it eliminates an entire protected class from emplolyment consideration.[140] This test posits that an employer meets its burden if it can

---

Diaz affirms and elaborates on the *Weeks* rationale ... [*Diaz*] represented to discriminate on the basis of job description not related to the essence of the employer's business.

[135] *See* Obee & Cooper, *supra* note 15, at 1355.

[136] *See supra* notes 82-89 and accompanying text for a discussion of the case.

[137] *Greyhound*, 499 F.2d at 864.

[138] Obee & Cooper, *supra* note 15, at 1356.

[139] *Greyhound*, 499 F.2d at 863-64.

[140] Obee & Cooper, *supra* note 15, at 1356. This facet of the test has been criticized in that, while *Tamiami* appears to follow *Weeks*, it has "violated *Weeks*' spirit by shifting the focus from the individual measurement of the person to the employer's determination of how much effort, time, and money would be expended in the selection process." *Id.* The "all or substantially all" portion of the *Weeks* test is concerned with the capabilities of the applicants. Yet in footnote five of the *Weeks* decision, the court refuses to acknowledge the particular characteristics of protected individuals in an attempt to reconcile its holding with that of the *Bowe* court. *Weeks*, 408 F.2d at 235. The court in *Bowe* upheld a discriminatory policy because of the employer's highly complicated seniority system which would have had to undergo comprehensive revisions

demonstrate the impossibility and impracticality of testing older applicants to determine which individuals would pose a minimal risk or no risk at all if hired.

Read in conjunction, if a test existed which could determine on an individualized basis, an older worker's capabilities in performing a particular job, then *Greyhound* and *Tamiami* would be satisfied.[141] The primary difficulty lies in the conflict between those who assert that the functional age of an individual, that is, her ability and capacity to perform a job, can be determined by medical testing, and those who assert that medical testing cannot detect functional age or the degenerative physical changes brought about by the aging process.[142]

IV. THE BONA FIDE OCCUPATIONAL QUALIFICATION IN THE AIRLINE INDUSTRY

A. Airlines and the Impact of Safety Considerations

The transportation industry is unique in that, unlike many employers, thousands of people depend on it daily for safe and efficient travel. In particular, the airline industry's success depends on passengers' continued assumption that flying is one of the safest forms of transportation. If passengers are unsure of the safety of air travel, they might choose another means of reaching their destination. Consequently, like the bus company in *Greyhound*, safety is of the utmost concern for the airline industry.

The Federal Aviation Act[143] states that "[i]n prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of

---

if women were allowed to transfer into the heavy lifting classifications. However, the court did reject the lifting requirement itself as a valid BFOQ. *Bowe*, 416 F.2d at 718. *See supra* notes 66-77 and accompanying text. Thus, it is enigmatic that the *Bowe* holding, which was to form the basis for the *Weeks* court's footnote five and the holding in *Tamiami*, was reversed by the Seventh Circuit.

This test has also been criticized in *Tamiami* when the court noted that great deference should be shown to the reasonable safety standards set by employers, no matter how stringent they may be. Thus, once an employer demonstrates that safe transportation is the essence of its business, the court will lower the employer's burden when proving that its policies are necessary to insure safety. This reduced scrutiny poses a potential danger in that an employer may set strict qualifications so as to eliminate the entire class of older workers from employment. Obee & Cooper, *supra* note 15, at 1356.

[141] Obee & Cooper, *supra* note 15, at 1357-58. This would eliminate from consideration those applicants who posed a minimum risk, thus allowing applicants who posed no risk to be hired. In promulgating such a test, much disagreement which exists between the courts would be eliminated.

[142] *Id.* at 1358. *See, e.g., Tamiami*, 531 F.2d at 237-38; *Greyhound*, 499 F.2d at 863-64.

[143] 49 U.S.C. § 1421(b) (Supp. V 1987).

Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . . ."[144] Thus, Congress has recognized that the airline industry must operate with the highest possible degree of care. Because of the large number of people presently participating in air travel and the losses that would be incurred in the event of an accident, airlines must be meticulous in all tasks pertinent to passenger safety. It is possible that the airlines themselves are in the best position to determine what policies should be implemented to attain the highest level of safety. Consequently, at least one court has concluded that great deference should be given to an airline's determination of the safest possible standards for operation.[145]

With the establishment of the BFOQ, Congress recognized that, in certain instances, safety considerations which result in discrimination may outweigh an employee's challenge to the discriminatory practice.[146] For example, if the essence of the business' normal operation involves public safety, and if the employer's restriction on age is the only means by which to further these goals, then the employer may establish a BFOQ.[147]

Similarly the Department of Labor has implemented various regulations regarding the utilization of the BFOQ exception. The Labor Department has stated that:

> [A] BFOQ defense permits federal statutory and regulatory compulsory retirement provisions imposed to protect public safety without reference to the individual's ability to perform the job.[148]

---

[144] *Id.*

[145] *See* Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1987), *cert. denied*, 102 S. Ct. 1770 (1982). The Court noted that "the airline industry is one in which safety is of the utmost importance," and the "staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact." *Id.* at 101. It further held that "the 'safest' possible air transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer." *Id.* at 101.

[146] *See Tamiami*, 531 F.2d at 235 (an employer's burden may be met if it establishes that some members of the otherwise protected class "possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class").

[147] *See* Raper, *supra* note 11, at 565, citing 29 C.F.R. § 1625 (1988). Section 1625 notes that "[i]f the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." *Id.* § 1625.6(b).

[148] *Johnson*, 745 F.2d at 993, citing 29 C.F.R. 860.102(d) (1983) ("[t]he BFOQ regulation recognizes that the BFOQ defense permits federal statutory and

> [Thus,] the government body responsible for interpreting the ADEA recognizes that a BFOQ defense does not have to relate solely to the employee's age and ability to perform the job assigned.[149]

Therefore, public safety is recognized as a concern which may justify the application of the BFOQ defense to a claim of age discrimination.

In establishing a BFOQ defense based upon safety concerns, an employer must satisfy the two-pronged test set forth in *Tamiami*.[150] It appears that this standard tracks Title VII precedent in which policies having a disparate impact must be justified by a showing of business necessity.[151]

---

regulatory compulsory retirement provisions imposed to protect public safety without reference to the individual's ability to perform the job").

[149] *Johnson*, 745 F.2d at 993.

[150] *Criswell*, 472 U.S. at 416. The Court held that "[e]very Court of Appeals that has confronted a BFOQ defense based on safety considerations has analyzed the problem consistently with the *Tamiami* standard." *Id.* For a discussion of the two-prong test, *see supra* notes 103-08 and accompanying text. In addition, the Court found that:

> An EEOC regulation embraces the same criteria. Considering the narrow language of the BFOQ exception, the parallel treatment of such questions under Title VII, and the uniform application of the standard by the federal courts, the EEOC, and Congress, we conclude that this two-part inquiry properly identifies the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety.

Id. at 416-17.

[151] Although some courts tend to group together the BFOQ and business necessity tests, *Johnson Controls* believed that they ought to be treated distinctly. UAW v. Johnson Controls, Inc. 111 S. Ct. 1196 (1991). *See also* Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981); EEOC v. Marathon County, 26 FEP Cases 1736 (W.D. Wisc. 1981); BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 292 (1976). The business necessity defense only comes into play where an employment practice is facially neutral but has a discriminatory impact. For a discussion of the business necessity defense, *see supra* note 85.

At least one author has noted that in adopting the business necessity test of Title VII, the EEOC's guidelines (§ 1625.6(b)) misallocate the burden of proving business necessity by placing it on the employers. Lake, *supra* note 29 at 42. In the past, the burden of proving the final element of the business necessity test, the availability of less discriminatory practices, properly rested with the plaintiff. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

B. The Federal Aviation Administration's Age Sixty Rule

The Federal Aviation Administration has promulgated a regulation that is commonly referred to as the "Age Sixty Rule."[152] This rule provides that "when an individual has reached his sixtieth birthday [he] may not serve as a pilot of an aircraft engaged in air carrier operations under Part 121 of the Federal Aviation Regulations.[153] [This] rule [however], does not prohibit pilots from serving in other capacities within the airlines, . . . such as flight instructor.[154] The Age Sixty Rule was adopted on December 1, 1959 "to promote aviation safety and in recognition of the statutory duty of air carriers to provide the highest levels of safety."[155]

The very nature of this rule has caused it to be the subject of frequent scrutiny and litigation.[156] However, "in each challenge, the [a]gency has been upheld."[157] In 1979 Congress "carefully examined the basis for the rule and in light of its concern that safety could be compromised by its amendment, it left the rule [in tact]."[158] Further, a study conducted by the National Institute on Aging (hereinafter, NIA) was ordered to determine whether there was a continued need for the rule.[159] The 1980 study found "no feasible alternatives to the rule." It determined that the physical and psychological effects of aging adversely affected an individuals ability to perform at the highest level of safety and thus necessitated a policy of across the board age discrimination.[160]

> In 1984, the FAA and the Federal Air Surgeon [determined] after [extensive] review, that there are simply no medical or performance tests which afford a [sufficient] reliable [means] for predicting . . . pilot

---

[152] For a discussion regarding the evolution of the standard of proof, *see supra* note 26 and accompanying text. *See also* 14 C.F.R. § 121.383(c) (1989).

[153] *Id.*

[154] *Id.*

[155] *Statements Before House Select Committee on Aging on Age-60 Rule for Pilots, Daily Lab. Rep.* (BNA) No. 202 at E-1 (Oct. 18, 1985) (quoting Anthony J. Broderick, Associate Admin. for Aviations Standards).

[156] *Id.*

[157] *Too Old to Fly at 60? The FAA Should Consider Changing a Rule Barring Pilots Age 60 and Over From Flying,* (from the N.Y. TIMES), THE LOS ANGELES DAILY J., Jan. 2, 1990.

[158] *See Statements Before House Select Committee on Aging on Age-60 Rule for Pilots,* (statement of Anthony J. Broderick), *supra* note 155.

[159] *Id.*

[160] *Id.*

> disabilities, . . . [and therefore], airline pilots should not be permitted to serve past [the] age [of] sixty.[161]

In the years following the adoption of the Age Sixty Rule, "the FAA . . . has been [unable] to find an alternative approach to the rule that [it is] confident will protect the American travelling public."[162] There are several safety reasons which support this rule:

> [F]irst, there is a deterioration of many functions with age; second, aging is accompanied by an increased frequency of sudden or insidious incapacitation or death from various disease processes; and third, despite scientific advances that have occurred, there is still no way to predict, with [reasonable] accuracy, the presence or onset of a number of medical problems in an individual aging pilot or to detect and measure all of the possible declining physiological . . . functions.[163]

Thus, several factors related to flight safety have proven difficult to measure.[164] Flight safety was the concern underlying the Age Sixty Rule and thus could not be ignored.[165]

The FAA's report demonstrated that the older the pilot the greater the accident rate.[166] Furthermore, technology is not avanced enough to identify those pilots who can safely perform the duties under Part 121 past the age of

---

[161] *Id.* (quoting Matthew J. Rinaldo).

[162] *See Statements Before House Select Committee,* (quoting Anthony J. Broderick), *supra* n. 155. *See, e.g.,* Aman v. Fed. Aviation Admin., 856 F.2d 946 (7th Cir. 1988); Baker v. Fed. Aviation Admin., 917 F.2d 318 (7th Cir. 1990), *cert. denied,* 111 S. Ct. 1388 (1991).

[163] *Id.* These factors relate to loss of ability in performing highly skilled tasks at a rapid pace, to resist fatigue, to perform competently in stressful environments, to maintain physical stamina, and to apply experience and judgment in emergency situations. *Id.*

[164] *Hearings on Age-60 Rule for Pilots Before the House Select Committee on Aging,* (statement of Anthony J. Broderick), *supra* note 155.

[165] *Id.*

[166] *Id.* (statement of Anthony J. Broderick, regarding "[t]he influence of Recent Flight Time, Total Flight Time and Age on Pilot Accident Rates.")

sixty.[167] Until such procedures are established, the Age Sixty Rule must remain in effect.[168]

At least one court has held that the FAA's interpretation, once articulated, will be entitled to considerable deference.[169] Such deference, however, should in no way lighten the burden on the FAA to establish that its decision is logically connected to a "sustainable reading of its mandate."[170]

Contrary to this position however, is the Supreme Court's decision in *Western Airlines Inc. v. Criswell*.[171] The *Criswell* Court asserted that although the FAA's Age Sixty Rule shall be considered "relevant evidence in the airline's BFOQ defense, it is not to be accorded conclusive weight."[172]

Under 14 C.F.R. § 67, to be eligible to pilot a civil aircraft, a current medical certificate must be issued as well as an airman's certificate.[173] The medical certification demonstrates that an individual has met the particular minimum physical and mental criterion that is required of all pilots while the airman's certificate attests to the pilot's aviation skills. In recent years the FAA has shown an increased willingness to issue medical certifications, under § 67.19 of the

---

[167] *Id.* This study has been criticized however: "[T]he Flight Time Study has serious flaws." 59 U.S.L.W. 2313 (Nov. 27,1990). The primary criticism being that the "data for pilots under age 60 includes millions of relatively safe air carrier miles flown, miles that because of the Age-60 Rule were unavailable to pilots over age 60." Next, since all pilots in a 10-year age cohort are combined into a single statistic, a single point represents pilots age 60-69. In all probability, "more exemptions from the Age-60 Rule would likely be granted to pilots under 65 than pilots over that age." Thus, "the cumulation of accidents caused by pilots in their late 60's, with accidents caused by pilots in their early 60's, may tend to distort the study." 53 U.S.L.W. 2313.

[168] *Hearings on Age-60 Rule for Pilots Before the House Select Committee on Aging*, (statement of Anthony J. Broderick), *supra* note 155. The airline industry and labor spokesmen appear to be in agreement with the FAA, as is evidenced by a recent statement by a spokesman for the Air Transport Association that "[w]hile we understand age 60 is an arbitrary figure, we have seen no compelling evidence to change it." Don Phillips, *Study Has Good and Bad News For Airline Pilots Over 60*, WASH. POST, Sept. 18, 1990, at A2. A spokesman for the Air Line Pilots Association supported the foregoing in noting that there is "nothing conclusive" to show whether experience or age is more critical after age 60. *Id.*

[169] Aman v. Fed. Aviation Admin., 856 F.2d 946 (7th Cir. 1988).

[170] *Id.* at 957.

[171] 472 U.S. 400 (1985).

[172] *Id.* at 418.

[173] 14 C.F.R. § 67.3(c) (1986). Medical certificates are issued by the FAA after the applicant for the certificate is examined by a designated medical examiner pursuant to §§ 67.13, 67.15, 67.17 (1987).

regulation, to pilots otherwise disqualified by episodes of heart disease or alcoholism.[174] Approximately 1,300 of these special certificates have been issued to those qualifying under either category.[175] However, no pilots have been granted an exception from the age restriction.[176]

Many interpret this policy as revealing the arbitrariness and inconsistency of a rule that excludes those from piloting simply because of age; even though they may be the most qualified.[177] Part of the rationale for the exemption is to allow the FAA flexibility in the application of the rules.[178] However, this rationale is undermined by the fact that the Age Sixty Rule was adopted because the FAA knew of no other way to determine the extent of deterioration in physical and psychological capacity that accompany age.[179] Excluding a sixty year old pilot in perfect health, while allowing a younger pilot who suffers from cardiovascular disease to direct an aircraft is enigmatic.[180]

The FAA admits that there is no hard evidence that a sixty year old airline pilot is at a greater risk of physical or mental impairment than one who is thirty

---

[174] *GAO Finds Government Granted No Exceptions to Mandatory Age-60 Retirement Rule For Pilots, Daily Lab. Rep.* (BNA) No. 232 at A-12 (Dec. 5, 1989). 14 C.F.R. § 67.19 refers to the special issue of medical certificates. At the discretion of the Federal Air Surgeon, a medical certificate may be issued to an applicant who does not meet the required physical and mental standards and thus would otherwise not be eligible to become an authorized pilot. The applicant must show that "the duties authorized by the class of medical certificate applied for can be performed without endangering air commerce during the period in which the certificate would be in force."

[175] *GAO Finds Government Granted No Exceptions to Mandatory Age-60 Retirement Rule For Pilots, supra* note 174.

[176] *Id.*

[177] *Id.* (quoting House Aging Committee Chairman Edward Roybal (D-Calif), who requested the study of the FAA Regulation by the General Accounting Office, "[t]he GAO report demonstrates how the time is long overdue for a rethinking of the rationale and basis for the rule").

[178] *Id.*

[179] *Id.*

[180] Some may not find such an application of the rule to be troubling in light of the Office of Technology Assessment's 1990 report. The agency concluded that there is only a slight chance that a commercial airline crash would result from a pilot's sudden incapacitation due to, for example, a heart attack. *See* Phillips, *supra* note 174, at A2. Since a co-pilot and, at times, a flight engineer are present, pilot accidents are usually due to "mental error rather than the pilot's incapacitation or impairment." Moreover, the data indicates that after age 59 a subtle deterioration in cognitive functioning may occur but that those pilots who may be deemed as high risks cannot be identified at that point in time. *Id.*

years old.[181] Yet, the Agency is reluctant to abandon the blanket provision because a case by case determination could be costly and inefficient.[182] However, it was reported that the FAA planned to fund a study on the relationship between age and accident rates in fiscal year 1991;[183] this may mean that the FAA is willing to consider other alternatives to the Age Sixty Rule.

Meanwhile, a divided panel of the United States Court of Appeals for the Seventh Circuit recently upheld the Age Sixty Rule; the opinion, however, was far from an unequivocal endorsement.[184] The court in *Baker v. Federal Aviation* concluded that the FAA order "is supported by substantial, albeit not compelling evidence," but adds that the Agency "should not take this as a signal that the Age Sixty Rule is sacrosanct and untouchable. Obviously, there is a great body of opinion that the time has come to move on."[185] In his dissent, Judge Will states that the "rigid" FAA rule, and the Agency's refusal to grant an exemption to it, means that every pilot "regardless of his physical condition or experience becomes a significantly greater safety hazard" on his or her sixtieth birthday. "The evidence in this case does not warrant that conclusion. Nor does everyday, ordinary good old common sense."[186]

Although the FAA regulation will certainly be considered by a court in determining whether an employer is justified in discriminating on the basis of age due to safety considerations, it does not automatically establish such a defense.[187]Thus the FAA appears to establish that age is a BFOQ for pilots in

---

[181] *See GAO Finds Government Granted No Exceptions to Mandatory Age-60 Rule for Pilots, supra* note 174. In fact, a report released by the Office of Technology Assessment found that pilots over the age of 60 have an accident rate twice as high as pilots in their 50's, but have a lower accident rate than pilots in their 20's and 30's. *See* Phillips, *supra* note 168.

[182] *GAO Finds Government Granted No Exceptions to Mandatory Age-60 Rule for Pilots, supra* note 174.

[183] *Id.* The study is being conducted by the Hilton Corporation and is due to be completed in October of 1992. Telephone Interview with an attorney at the Department of Transportation who wished to remain anonymous (Nov. 7, 1991).

[184] Baker v. Fed. Aviation Admin., 917 F.2d 318 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1388 (1991). (A 2 to 1 decision involving a request by 30 pilots to overturn the Age-60 Rule).

[185] *Id.* at 322.

[186] *Id.* at 326.

[187] *See Criswell*, 472 U.S. 400, 418 (1985). In *Criswell*, the Supreme Court stated that:

> Although the FAA's rule for pilots, adopted for safety reasons, is relevant evidence in the airline's BFOQ defense, it is not to be accorded conclusive weight (citation omitted). The extent to which the rule is probative varies

the airline industry. However, the regulation is not conclusive evidence in and of itself.

Other courts have begun to question the legitimacy of the rule and its strict application. In 1988, *Aman v. Fed. Aviation Admin.*[188] was decided by the Court of Appeals for the Seventh Circuit. In *Aman*, current and former airline captains sought review of an FAA order denying a petition for exemption from the Age Sixty Rule under 49 U.S.C. 1486(a).[189] The Seventh Circuit noted that potential flight problems stemming from age may be offset by the increased experience of an elder pilot.[190] The advances in medical science which would permit more precise individual testing might justify revocation of the umbrella provision.[191] In essence, while one Court of Appeals has held that the FAA's rule has not constituted an abuse of discretion in the past, as medical technology develops to a point where individual testing is feasible, it may become one.[192] If the Age Sixty Rule was to be retracted, the airline industry would find itself without a means of justifying age as a BFOQ for the position of commercial airline pilot.

For the time being, age will be considered a BFOQ in instances involving public safety. However, an employer must meet rigorous proof requirements to establish that a safety based BFOQ is warranted. An employer must be certain that it does not rely solely on the FAA Age Sixty Rule to establish such a defense for certain aircraft employees. It is apparent that the courts will not tolerate an employer's attempt to circumvent the goals of the ADEA by alleging that safety considerations justify a policy of age limitation.

C. *Broad Judicial Interpretation*

Many courts have had the opportunity to examine the airlines assertion that age limitation policies establish a BFOQ. What has resulted are conflicting decisions which have amounted to two different tests for determining what

---

with the weight of the evidence supporting its safety rationale and "the congruity between the . . . occupations at issue."
Id.

[188] 856 F.2d 946 (7th Cir. 1988).

[189] *Id.* at 946-47.

[190] *Id.* at 957.

[191] *Id.* at 948. At the time of adoption the Age-60 Rule in 1959, the FAA noted that "medical science may at some future time develop accurate, validly selective tests which would safely allow selected pilots to fly in air carrier operations after age 60." 24 Fed. Reg. 9772 (1959).

[192] Gray v. FAA, 594 F.2d 793, 795 (10th Cir. 1979) (although the court held that at the time, the FAA's policy of denying all exemptions to the Age-60 Rule was not an abuse of discretion, it noted that "[a]t some point, the state of the medical art may become so compellingly supportive of a capacity to determine functional age equivalents in individual cases that it would be an abuse of discretion not to grant an exemption").

employers must establish in order to be successful in an age discrimination suit where their defense is based upon a BFOQ.[193] One line of cases suggests that employers may establish a valid BFOQ by demonstrating that the elimination of the age policy involved would increase the risk of harm to the public.[194] Under this standard, any increase in safety risk due to the employment of older persons, no matter how minimal, would be sufficient to establish age as a BFOQ.[195]

Such an example may be observed in *Murnane v. American Airlines, Inc.*,[196] where the forty-three year old plaintiff applied for the position of flight officer when the airline maintained a policy of refusing to hire anyone over the age of thirty.[197] The position of flight officer was the lowest of three cockpit positions, the other two being co-pilot and captain.[198] American's policy was to train the subordinate crew members for the eventual goal of captaincy; all crew members were hired with this concept in mind.[199] The promotional process took an average of fourteen to twenty years,[200] and American forbade anyone from establishing a permanent career in either of the subordinate positions.[201] Evidence at trial showed that "pilot error" accounted for 90% of all aviation accidents but that the incidence of accidents decreased as the pilot gained experience.[202] Since a pilot's experience would increase as he got older, the increased age of a pilot was a benefit to safety.[203] Thus, the best way to minimize pilot error was to require a long training period.[204]

---

[193] Lake, *supra* note 29, at 39.

[194] This test was formulated in *Hodgson*, 499 F.2d at 859. *See supra* note 97 and accompanying text.

[195] Lake, *supra* note 29 at 39.

[196] 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[197] *Id.* at 99-100.

[198] *Id.* at 99.

[199] *Id.* Thus American had an "up or out" policy whereby it was required of all flight officers to advance to the position of Captain, and no one was "hired by American without this goal in mind." Consequently, if a flight officer or co-pilot had received the maximum amount of training needed for a position and was not qualified at that time to advance to the next position, then American would terminate that person. Therefore, this policy did not allow for a career as a flight officer or co-pilot.

[200] *Murnane*, 667 F.2d at 100, n.2.

[201] *Id.* at 99.

[202] *Id.* at 100.

[203] *Id.*

[204] *Murnane*, 667 F.2d at 101.

The D.C. Circuit held that the policy was a BFOQ because the maximization of safety was reasonably necessary for the normal operation of the airline and that the safe transportation of its passengers was the essence of American's business.[205] American successfully justified its discriminating policy by establishing that an age lower than forty resulted in experienced pilots remaining in the position of captain for a longer period of time before they were required to retire.[206] Emphasis was placed on the fact that the hiring policies may result in the death of one less person than if American was required to abandon or modify the policy.[207] The opinion also stated that courts do not possess the expertise with which to supplant an employers' judgments in a case presenting safety as the critical element.[208] In addition, the court determined that the airline industry was to be accorded "great leeway and discretion" when determing how the industry may be operated safely.[209]

In *Johnson v. American Airlines, Inc.*,[210] the Fifth Circuit agreed with the District of Columbia in *Murnane*.[211] The plaintiffs were American Airlines' captains who wished to remain working as flight officers beyond their sixtieth birthdays.[212] American's evidence showed that its policy against placing former pilots in the flight engineer's position improved crew coordination and prevented the danger of "back seat driving."[213] The defense was also related to American's "up or out"[214] policy previously discussed in *Murnane*. The court concluded that American had promulgated a BFOQ defense and that safety factors weighed heavily in favor of supporting American's on the job training and recoupment of investment in pilot training.[215]

Because pilots must retire at age sixty, while flight engineers may choose to continue working, pilots approaching age sixty often attempt to "downbid"[216]

---

[205] *Id.*

[206] *Id.*

[207] *Id.* at 101.

[208] *Murnane*, 667 F.2d at 101.

[209] *Id.*

[210] 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1029 (1985).

[211] Note that the two cases differ in that *Johnson* did not involve a refusal of initial employment, whereas *Murnane* did.

[212] *Johnson*, 745 F.2d at 991.

[213] *Id.* at 991, 994. "Back seat driving" occurs when a senior airman who has been placed in a subordinate position, mentally or physically resumes his former role as Captain during emergencies.

[214] *See supra* note 199 and accompanying text.

[215] *Murnane*, 667 F.2d at 101.

[216] Oftentimes, a Captain may remain with the airline only by obtaining the status of flight engineer through the bidding procedures advanced by the

for a position as a flight engineer. Resolution of this issue has met with increased difficulty in that some collective bargaining agreements prohibit downbidding.[217] In *Trans World Airlines v. Thurston*,[218] TWA permitted flight engineers to continue working past the age of sixty but did not automatically allow captains to transfer to flight engineer status after being forced to retire under the Age Sixty Rule.[219] A pilot approaching the age of sixty could bid for a position as flight engineer, but if no vacancy occurred before his sixtieth birthday, he was forced to retire.[220]

The plaintiffs alleged that the policy violated the ADEA because a pilot who was displaced for any reason other than age, such as a medical disability, could "bump" less senior flight engineers and did not have to resort to the bidding system.[221] The Supreme Court found that TWA's transfer policy discriminated on the basis of age against those pilots who could not find a vacant flight engineer position.[222] The BFOQ defense did not apply in this instance because being under the age of sixty was not a BFOQ for the position of flight engineer.[223]

Thurston is distinguishable from *Murnane* and *Johnson* in that the Court in *Thurston* did not address the establishment of a BFOQ for flight engineer when that position was used as the first step of a training program in which the goal was the position of captaincy.[224] Moreover, the Supreme Court noted that the airline employed a great number of persons who were over sixty years old and thus TWA could not effectively make such an argument.[225]

---

airline. The procedure requires a Captain, prior to his sixtieth birthday, to submit a bid for the position of flight engineer. When a vacancy occurs it is given to the most senior Captain. If no vacancy opens prior to his sixtieth birthday or a pilot lacks sufficient seniority to bid for the vacancy, the Captain must retire. *See* Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

[217] Nachman, *supra* note 9, at 39.

[218] 469 U.S. 111 (1985).

[219] *Id.* at 116.

[220] *Id.*

[221] *Id.* at 116-17. A Captain with a medical disability could automatically displace a flight engineer with less seniority without having to depend on the availability of a vacancy.

[222] *Id.* at 121-24.

[223] *Thurston*, 469 U.S. at 123.

[224] *See* Raper, *supra* note 11, at 576.

[225] *Thurston*, 469 U.S. at 121.

D. Narrow Judicial Interpretation

A second line of cases sets forth a more stringent two-part BFOQ test based on the *Weeks*[226]*-Diaz*[227] line of cases. In *Houghton v. McDonnell Douglas Corp.*,[228] a pilot who had been transferred to another position challenged McDonnell Douglas' reduction of its pilot staff on the basis of age. The employer argued that declining production rates required this reduction.[229] After the plaintiff refused the transfer, and when no other acceptable position could be found, he was discharged.[230] Based upon the evidence presented, the court determined that McDonnell Douglas was not entitled to a BFOQ defense.[231] The court noted that although the aging process occurs at diverse rates among different individuals and that there may be no functional test for determining individual capacity, in general, (1) the employee had been given physical exams and was found to be in such exceptional health that it was 99.9% certain he would not have a heart attack or stroke in flight; (2) the aging process occurs more slowly and to a lesser degree among professional pilots; and (3) statistical studies reveal the accident rate among professional pilots decreases with age.[232]

Applying the *Weeks* test, as interpreted by *Tamiami*, the court held that the employer failed to meet its burden of demonstrating that all or substantially all older pilots are unable to perform safely the duties of test pilot, or that some older pilots possess physical traits unascertainable except through reference to a pilot's chronological age, which would preclude safe and efficient job performance.[233] Based on the slower aging process among pilots, medical technology's ability to detect a disabling physical condition in a test pilot with absolute accuracy, and the reduced accident rate among professional pilots, no BFOQ exemption was justified.[234]

---

[226] *Weeks*, 408 F.2d at 228; *see supra* notes 65-67, 111-13 and accompanying text.

[227] *Diaz*, 442 F.2d at 385; *see supra* notes 103-07, 110 and accompanying text.

[228] 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1978).

[229] *Id.* at 562-63.

[230] *Id.*

[231] *Id.* at 563-64.

[232] *Id.* Evidence was brought in to show that the primary cause of accidents among pilots was erroneous judgment and with respect to the fatalities suffered by the employer in flying accidents, all of the pilots were in their 30's. *Id.* at 563.

[233] *Houghton*, 553 U.S. at 564.

[234] *Id.*

This two-part test was applied one week after the *Murnane* decision[235] by the Fourth Circuit in *Smallwood v. United Airlines*.[236] However, the court in *Smallwood* reached an opposite conclusion.[237] In *Smallwood*, the challenge was to United's rule denying employment to pilot applicants over age thirty-five.[238] The plaintiff applied for the position of flight engineer at forty-eight years of age, after having acquired ten years of flight experience with another airline.[239]

The airline claimed that safety would be adversely affected if it were forced to hire pilots over the age of thirty-five, in that it would hamper its "crew concept" - the safe and efficient operation of its three man crews in a coordinated manner.[240] It also argued that it would raise significantly the average age of pilot personnel thus disproportionately increasing the chance of medical emergencies. In addition, hiring older pilots would cause economic detriment.[241]

Based on the evidence presented, the Court of Appeals found that United had failed to meet its burden of showing a BFOQ and that economic considerations could not serve as the basis for a BFOQ.[242] The Fourth Circuit concluded that the second prong of the two-part test had not been met because United did not show that substantially all pilots hired within Smallwood's age range would be unable to perform efficiently.[243] Moreover, the court concluded that United's medical tests were sufficiently advanced to determine which of the potential pilots may cause a safety risk.[244]

The court did not refer to the decision in *Murnane*, thus leading one to speculate as to the interpretation and reconciliation of the two cases. The *Smallwood* court may have been influenced by United's attempt to base its BFOQ on economic justifications,[245] while the *Murnane* court saw American's

---

[235] 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[236] 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

[237] *See supra* notes 205-09 and accompanying text.

[238] *Smallwood*, 661 F.2d at 306.

[239] *Id.*

[240] *Id.*

[241] *Id.* at 306-07.

[242] *Smallwood*, 661 F.2d at 308. For a discussion of the two-part test which an employer must fulfill in order to establish a BFOQ defense, see *supra* notes 109-14 and accompanying text.

[243] *Smallwood*, 661 F.2d at 308-09.

[244] *Id.*

[245] *See* Belinda Reed, Comment, *Age Discrimination of Airline Pilots: Effects of the Bona Fide Occupational Qualification*, 48 J. AIR L. & COM. 383, 402 (1983).

similar policy as providing only incidental economic benefits to an otherwise valid BFOQ.[246]

In 1985, the Supreme Court addressed the applicability of the BFOQ defense to mandatory retirement for flight engineers in *Western Airlines, Inc. v. Criswell*.[247] Prior to their sixtieth birthdays, the plaintiffs, who were commercial carrier pilots, sought to evade mandatory retirement under the Age Sixty Rule by bidding on flight engineer positions.[248] The Supreme Court, in a unanimous decision for the plaintiffs, noted that the flight engineer did not operate flight controls unless the captain and first officer became incapacitated, and that the FAA refused to establish a mandatory retirement age for flight engineers, as it had for pilots and first officers.[249]

The heart of Western's contention was that the proper standard of proof for the BFOQ defense was whether there existed a factual and rational basis for it to believe that the use of flight engineers over the age of sixty would increase the probability of risk to its passengers.[250] Justice Stevens, writing for a majority of the court, found that the airline's evidence was not sufficient to allow such deference on the issue of safety.[251] The standard for establishing a BFOQ was "reasonable necessity" and not "reasonableness".[252]

The Court expressly recognized that Congress, the federal courts, and the EEOC had consistently applied the two-pronged inquiry promulgated by *Tamiami*[253] when evaluating the BFOQ exception.[254] In support of its determination, the court noted that the two-part test was "implicitly endorsed" by way of the 1978 amendments to the ADEA,[255] that "every Court of Appeals that has confronted a BFOQ defense has analyzed the problem consistently with the *Tamiami* standard,"[256] and that the EEOC has "embrace[d] the same criteria."[257] It also stated that "this two-part inquiry properly identifies the relevant considerations for resolving a BFOQ defense to an age-based

---

[246] *Id.*

[247] *Criswell*, 472 U.S. 400.

[248] *Id.* at 404-05.

[249] *Id.* at 403-04.

[250] *Id.* at 422.

[251] *Criswell*, 472 U.S. at 419-21.

[252] *Id.* at 419.

[253] 531 F.2d 224 (5th Cir. 1976); *see supra* notes 109-14 and accompanying text.

[254] *Criswell*, 472 U.S. at 416.

[255] *Id.* at 415.

[256] *Id.* at 416.

[257] *Id.* For a discussion of the EEOC's interpretation of the BFOQ *see supra* notes 57-7 and accompanying text.

qualification purportedly justified by consideration of safety."[258] "This adoption of the *Tamiami* standard in a unanimous [court] decision [deems *Criswell* a crucial case] where a . . . BFOQ defense . . . rest[s] squarely on the [basis] of public safety."[259] "In neither *Thurston*[260] nor *Criswell* was the (Age 60 Rule) directly challenged;" and the Court, by not remarking on the credibility of the rule may be demonstrating its willingness to accept the rule's validity.[261]

E. A Modified Judicial Interpretation

A modified version of the *Weeks-Diaz* test was applied by the District Court in *Tuohy v. Ford Motor Co.*[262] In *Tuohy*, a private company pilot was discharged when he reached sixty years of age. The defendant claimed that the FAA's Age Sixty Rule allowed it to terminate pilots in its private air transportation system and stressed the importance of safety in air transportation.[263] The court held that the FAA's determination that it is not possible to use factors other than age to predict the likelihood of incapacitation constituted an absolute defense to the age discrimination claim.[264] In addition, the court urged that the first two prongs of the first tier of the BFOQ defense be made more flexible when safety factors are involved so that the public interest may be considered.[265] The court concluded that where safety factors are involved, employers need only be "reasonable" in their decisions to utilize general age limitations.[266]

---

[258] *Criswell*, 472 U.S. at 416-17.

[259] Max J. Schott, Note, *Civil Rights - A Company's Policy Requiring the Retirement of Certain Employees Under the Age of 70 for Reasons Allegedly Attributable to Public Safety Must Satisfy the Two-Prong Test Established in* Tamiami *Before it can Qualify as a Bona Fide Occupational Qualification Under the Federal Age Discrimination in Employment Act*, 36 DRAKE L. REV. 213, 229 (Winter 1987).

[260] 469 U.S. 111 (1985).

[261] *Id. See also* Schott, *supra* note 259, at 229.

[262] 490 F. Supp. 258 (E.D. Mich. 1980).

[263] *Id.* at 260, 262. The policy rested on the Age-60 Rule as codified in 14 C.F.R. § 121.383(c). Even though Ford's air operations are not directly controlled by 14 C.F.R., Ford had adopted a majority of the safety regulations contained therein. In addition, Ford claimed that it did not have the medical capabilities to determine whether an individual pilot would be subject to a disabling medical condition while in flight, thus it adopted the Age-60 Rule.

[264] *Id.* at 264.

[265] *Id. But see* Houghton v. McDonnell Douglas, 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1978); *see supra* notes 228-34 and accompanying text.

[266] *Tuohy*, 490 F. Supp. at 264. The District court was reversed and the case remanded since the operator failed to establish that its mandatory retirement age of sixty was reasonably necessary for normal conduct of business, so as to

The EEOC has further complicated this area by determining that an airline's burden of proof does not end after satisfying the two-part test. The EEOC has developed a third, and perhaps even a fourth BFOQ test.[267] Section 1625.6(b) of the Commission's interpretive guidelines[268] state that employers asserting a BFOQ defense have the burden of establishing that (1) the age limit is reasonably necessary to the essence of the business, and, either, (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

The last sentence of § 1625.6(b) provides that "if the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with a less discriminating impact."[269] It is unclear whether the latter test must be satisfied in addition to the other three elements or whether it is a separate analysis in and of itself. If it is an additional prong, employers would find it much more difficult to establish a BFOQ in cases that deal with issues of public safety, even though several courts have been willing to hold employers to a more lenient standard in such cases.[270]

V. CONCLUSION

The courts have not concluded with any certainty which factors justify use of the BFOQ defense in the airline industry. It is clear however, that if the airline discriminates for economic reasons[271] or to avoid a perceived increase in the chance of medical consequences in flight,[272] then the airline will not have established a BFOQ defense. In addition, if the airline can prove that its discriminatory policy is part of a legitimate training program designed to produce the most experienced and capable pilots,[273] the employee challenging

---

qualify as a BFOQ. Thus, it was not enough that an employer be merely reasonable in establishing its policy. Tuohy v. Ford Motor Co., 675 F.2d 842 (1982).

[267] *See* Lake, *supra* note 29, at 42.

[268] *See* 46 Fed. Reg. 47727 (1981).

[269] *See* Lake, *supra* note 29, at 42-43.

[270] *Id.* This standard has been adopted from Title VII cases in which employer practices having a disparate impact must be justified by demonstrating a business necessity.

[271] *See supra* notes 228-34 and accompanying text.

[272] *See supra* notes 196-208 and accompanying text; Johnson, *supra* notes 210-15 and accompanying text.

[273] *Murnane*, 667 F.2d at 100; *Johnson*, 745 F.2d at 994.

the policy may have to look elsewhere for employment. The considerations of the passengers who depend upon safe air transportation outweigh the right of an individual to maintain his piloting career for as long as he may desire.

The Supreme Court's unanimous decision in *Criswell* advocates strict construction and stringent scrutinization when an employer attempts to establish a BFOQ justification. The standard in *Criswell* is the most rational and appropriate of those the various courts have seen fit to apply. Inherent in this standard is an attempt to balance the rights of the employers, employees, and the general public while ensuring that those who have been discriminated against on the basis of age will somehow be compensated. Consequently, according to the ADEA, employers who attempt to enforce any sort of mandatory retirement policy involving employees who are under the age of seventy should expect to come under strict judicial investigation. For these reasons, employers should examine the underlying purposes of their policies.

Prior to the enactment of the ADEA, older workers were not protected against age discrimination. Thus, employers were able to fire or force retirement on employees solely because of their age.[274] The ADEA has been used to combat such inequities by balancing the interest of the older worker against that of the employer.[275] In invoking the BFOQ exemption, employers are able to use age as a factor in their discriminatory policies if they can establish a legitimate business necessity.

By allowing such an exception in the airline industry, the courts are attempting to balance the rights of older workers against the right of the general public to receive safe air transportation on commercial airlines. The airline industry has been able to justify discrimination because the overriding concern for public safety outweighs the goals of the ADEA and the interests of older workers.

Although the courts have handled the BFOQ enigma to the best of their ability, members of the transportation industry and members of the general public are still struggling with the problems inherent in the defense. A joint study by the Department of Transportation and the FAA, in conjunction with a team of medical experts, is necessary to address the safety concerns in transportation and to determine if and when functional age is a determinable factor in job performance. The findings should be analyzed in order for conclusions to be drawn as to how to test individuals' functional capabilities with regard to particular jobs. Employers would then be able to implement minimum physical and psychological standards as well as a policy of regularly testing employees over the age of sixty. In utilizing such a program, employees would be required to meet objective, age neutral criteria directly related to the duties of a particular job.

---

[274] *See* Lake, *supra* note 29, at 35.

[275] *See* Lake, *supra* note 29, at 36.

If such a study is not produced, the courts will necessarily be forced to: (1) adopt a standard which gives deference to the employers' policy decisions[276] or (2) vacillate between different applications of the BFOQ without setting any uniform standards.

TRACY KAREN FINKELSTEIN

[276] However, simply upholding an employer's judgment regarding the relationship between age and ability to perform a particular job is inconsistent with the ADEA's purpose of eliminating the stereotyping of older workers and/or promoting their employment. This could conceivably open the floodgates for use of the BFOQ exception where the essence of a business involved qualities associated with youth such as in the protective service's area. Moreover, *Criswell* mandates that "[e]ven in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision." 472 U.S. at 423.