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THE RETIREMENT-PLAN EXEMPTION IN THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: WILL THE EXCEPTION SWALLOW THE RULE?

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The concept of mandatory retirement based on age is increasingly being challenged.[1] The deleterious economic, social, and psychological effects of mandatory retirement are well-documented.[2] Nevertheless, the societal trend is toward the imposition of compulsory retirement not only at the traditional retirement age of sixty-five, but even earlier.[3] Indeed, retirement plans encompassing as many as seventeen percent of all covered employees contain provisions permitting forced retirement prior to age sixty-five.[4]

The Age Discrimination in Employment Act of 1967[5] was enacted

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1. *See, e.g., Hearing on H.R. 2588 Before the Subcomm. on Equal Opportunities of the Comm. on Educ. and Labor*, 94th Cong., 2d Sess. (1976) (this bill as well as a number of others have been introduced to delete the present upper age limit of 65 from the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970 & Supp. IV 1974), making its antidiscrimination prohibitions applicable to those 65 and over); 113 CONG. REC. 51256-57 (1967) (remarks of Sen. Young); M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 232-43 (1964); J. PECHMAN, H. AARON & M. TAUSSIG, SOCIAL SECURITY: PERSPECTIVES FOR REFORM 143-48, 227 (1968) [hereinafter cited as SOCIAL SECURITY: PERSPECTIVES]; Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311 (1974).

In part, the rising median age of Americans and a projected drop in the ratio of workers to retirees are motivating such questioning of mandatory retirement. *See, e.g., Population Trends Transforming U.S.*, N.Y. Times, Feb. 28, 1977, § 1, at 1, col. 2; Bixby, *Retirement Patterns in the United States*, SOC. SEC. BULL. 3, 6 (Aug. 1976); The Graying of America, NEWSWEEK, Feb. 28, 1977, at 50-51.

2. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316-17 (1976), where the Court makes a statement to this effect. Justice Marshall's dissent discussed the harmful effects of mandatory retirement. 427 U.S. at 323-24. *See also* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1721, THE EMPLOYMENT PROBLEMS OF OLDER WORKERS (1971) [hereinafter cited as BULL. NO. 1721].

3. SOCIAL SECURITY: PERSPECTIVES, *supra* note 1, at 6; SENATE SPECIAL COMM. ON AGING, ECONOMICS OF AGING: TOWARD A FULL SHARE IN ABUNDANCE, S. REP. NO. 91-1548, 91st Cong., 2d Sess. 2, 15 (1970); *Age Discrimination in Employment, Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. 44 (1967) (statement of Norman Sprague, National Council on the Aging) [hereinafter cited as *1967 House Hearings*].

4. U.S. DEP'T OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1973, at 28-29 (1974). The court in McMann v. United Air Lines, Inc., 542 F.2d 217, 222 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977), estimated the total number of workers involved in such plans to be more than 11 million, but this figure seems high based on the statistics cited in the Department of Labor's 1974 report.

5. 29 U.S.C. §§ 621-634 (1970 & Supp. IV 1974) [hereinafter cited as the ADEA or the Act].

because Congress was concerned about the grim employment situation faced by older workers due to age discrimination.[6] Congressional findings underscoring the purpose of the ADEA delineate the following basic problem areas: older workers are disadvantaged in retaining and regaining employment; the setting of arbitarary age limits regardless of ability has become commonplace; and the incidence of long-term unemployment is disproportionately high for older workers, with a deterioration in skill, morale, and employer acceptability accompanying such unemployment.[7] Thus, the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment."[8]

Employees covered by the ADEA are those between ages forty and sixty-five.[9] It is unlawful for employers to discriminate against persons in this protected age group on the basis of age in matters of hiring, discharge, and the terms, conditions, or privileges of employment.[10]

Several statutory defenses are allowed an employer. One is for bona fide occupational qualifications or for differentiations based "on reasonable factors other than age."[11] Another is to permit the discharge or discipline of an employee for just cause.[12] Finally, there is the defense of the exemption for bona fide retirement plans. Section 623(f)(2) of the ADEA states that it shall not be unlawful for an employer, employment agency or labor organization

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or

6. President Johnson's January 23, 1967, message on older Americans, recommending the ADEA, stated:

> Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who find themselves jobless because of arbitrary age discrimination. Today more than three-quarters of the billion dollars in unemployment insurance is paid each year to workers who are 45 and over. They comprise 27 percent of all the unemployed, and 40 percent of the long-term unemployed.

H.R. REP. NO. 805, 90th Cong., 1st Sess. 2, *reprinted in* [1967] 2 U.S. CODE CONG. & AD. NEWS 2213, 2214.

7. 29 U.S.C. § 621(a) (1970).

8. *Id.* § 621(b).

9. *Id.* § 631.

10. *Id.* § 623(a)(1). Employers are defined as those engaged in interstate commerce with 20 or more employees. 29 U.S.C. § 630(b) (1970 & Supp. IV 1974). The prohibitions of the Act also apply to labor unions and employment agencies. *Id.* §§ 623(b), 623(c).

11. *Id.* § 623(f)(1). "Reasonable factors other than age" have been deemed applicable to situations where, for example, an employer involuntarily retires older workers during a period of economic retrenchment, but chooses the employees to be terminated in a nondiscriminatory manner. Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970), exemplifies this application. The employer there was able to show that ability rather than age was the determining factor in selecting the employees for retirement. *See also* Price v. Maryland Cas Co., 391 F. Supp. 613 (D.C. Miss. 1975); Gill v. Union Carbide Corp., 368 F. Supp. 364 (E.D. Tenn. 1973).

12. 29 U.S.C. § 623(f)(3) (1970).

> insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . . .[13]

There has not been an abundance of litigation focusing on the retirement-plan exemption of section 623(f)(2). Nonetheless, it is clear that absent such exemption, the forced retirement of an employee under age sixty-five, based on age, would be unlawful even if done pursuant to a retirement plan.[14] Of course, the involuntary retirement of a protected employee who is not covered by a retirement plan would be violative of the ADEA when done solely for age.[15]

Whether the ADEA precludes compulsory retirement based on age of employees under age sixty-five pursuant to a retirement plan will be examined in this article. This issue is currently before the United States Supreme Court.[16] Within the last year, two circuit courts of appeals have construed the section 623(f)(2) exemption, each reaching an opposite conclusion. In *McMann v. United Air Lines, Inc.*,[17] the Court of Appeals for the Fourth Circuit decided that such involuntary retirement of employees based only on the criterion of age was not within the exemption and thus was unlawful under the ADEA.[18] The *McMann* court held that the purpose of the exemption was to protect older employees from refusals to hire them, not to permit compulsory retirement based on age solely because a plan specifies retirement at a pre-sixty-five age.[19] The Court of Appeals for the

13. *Id.* § 623(f)(2). This section is also commonly referred to as 4(f)(2), its designation before codification.

14. This would obviously be age-based discrimination and violate, for example, the prohibitions of 29 U.S.C. § 623(a)(1).

15. Hodgson v. American Hardward Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971). *Hodgson* held that an employer could not involuntarily retire a nonparticipant in a pension plan simply because the company's pension plan and general policy called for mandatory retirement at age 62. The *Hodgson* court gave weight to the interpretative guidelines of the U.S. Department of Labor, 29 C.F.R. § 860.110(b) (1976), which state that the retirement-plan exemption does not apply to employees who are nonparticipants in the plan. In contrast, the guidelines in 29 C.F.R. § 860.110(a) (1976) declare that the Act authorizes involuntary retirement pursuant to a bona fide plan that otherwise meets the requirements of the exemption.

16. McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 1098 (1977). The ADEA would not preclude such forced retirement for employees age 65 and over because such employees are not protected by the Act.

17. *Id.*

18. The *McMann* issue is to be distinguished from the constitutional issue presented in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). In *Murgia* the Court rejected a challenge on equal protection grounds to Massachusetts' policy of mandatorily retiring state troopers at age 50, declining to declare age a suspect classification or government employment a fundamental interest. The Court refused to subject the state policy to strict scrutiny. Accordingly, a public employer's compulsory retirement policies will presumably be insulated from constitutional challenge provided they bear a rational relationship to the employment interest being served. *See* Kelly v. Johnson, 425 U.S. 238 (1976).

19. 542 F.2d at 221.

Third Circuit disagreed, holding in *Zinger v. Blanchette*[20] that forced retirement of pre-sixty-five employees may be permitted by the exemption.

A third court of appeals' case, *Brennan v. Taft Broadcasting Co.*,[21] previously stood alone as the only appellate court construing section 623(f)(2). The Fifth Circuit held in *Taft* that a bona fide profit-sharing plan providing benefits upon mandatory retirement at age sixty did not violate the ADEA. The Fifth Circuit interpreted the exemption most broadly, finding that a plan initiated prior to the ADEA cannot be a subterfuge to evade it and that the exemption's language was so "unambiguous" as to preclude resort to legislative history.[22]

Since legislative history is necessary to arrive at the proper statutory construction of the retirement-plan exemption, the *McMann* and *Zinger* opinions will be the focus of this article. Three basic issues emerge from these two opinions: first, that of determining Congressional intent in providing the exemption; second, the meaning of the phrase, contained in the exemption, "a subterfuge to evade the purposes of this Act;" and third, the significance and effect of the last clause of the exemption, providing that no plan shall excuse the failure to hire any individual.

THE CASES

McMann v. United Air Lines, Inc.

Plaintiff McMann occupied a managerial position with defendant United Air Lines. McMann elected to join United's voluntary pension plan, which was in existence at the time he was hired in 1944. Both the application that he signed and all relevant documents he later received specified that "normal retirement age" for employees in his classification was sixty. United had never retained employees in McMann's classification beyond age sixty and McMann likewise was forced to retire upon reaching this age. The court thereby treated the plan as one requiring retirement rather than one permitting it at the option of the employer.[23] United offered no justification for McMann's termination other than the plan requirement.

It was conceded that United's plan was bona fide.[24] Nevertheless, the

20. 549 F.2d 901 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3711 (U.S. Apr. 7, 1977) (No. 76-1375).

21. 500 F.2d 212 (5th Cir. 1974). *Taft* has been followed by a number of district courts. *See, e.g.*, Dunlop v. General Tel. Co., 13 Fair Empl. Prac. Cas. 1211 (C.D. Cal. 1976), *appeal docketed*, No. 76-2371 (9th Cir., June 25, 1976); McKinley v. Bendix Corp., 420 F. Supp. 1001 (W.D. Mo. 1976).

22. 500 F.2d at 217.

23. 542 F.2d at 219.

24. *Id.* All three appellate courts dealt with the term "bona fine" in the exemption as denoting a non-fraudulent plan that exists and pays benefits. *See, e.g.*, *id*; Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).

Fourth Circuit held that an employee retirement plan compelling retirement under age sixty-five is unlawful under the ADEA absent economic or business justification.[25] Since United offered no such justification, the court held United's plan to be a subterfuge to evade the Act's purpose,[26] therefore outside the section 623(f)(2) exemption, and in violation of the ADEA. To qualify for the exemption, the employer must prove that there is "some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages."[27]

In concluding that the retirement-plan exemption was inapplicable to McMann's retirement, the court relied on both ADEA legislative history and the meaning of "subterfuge" in section 623(f)(2). As to the former, the court construed the exemption's purpose as being to encourage the employment of older workers.[28] Because the age of some potential employees would make it economically unfeasible for them to participate in existing retirement plans, employers would refuse to hire them. With the exemption, however, employers would be able to hire such older workers but would not necessarily have to assume the economic burden of including them in an existing plan. The *McMann* court concluded from the legislative history "that Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic considerations . . . ."[29]

In interpreting the meaning of "subterfuge" in section 623(f)(2), the court held that even a plan in existence before the ADEA could be a subterfuge if it evaded the purposes of the Act.[30] Involuntary retirement of a long-time employee, based only on age, is a form of age discrimination contrary to the Act's stated purposes of promoting employment based on ability rather than age and of prohibiting arbitrary age discrimination. The Fourth Circuit, therefore, viewed McMann's termination as a subterfuge to evade the ADEA's purposes. Also supporting the court's conclusion that a plan initiated prior to ADEA could be deemed a subterfuge were the House and Senate Reports on the Act, specifying that the retirement-plan exemption was to apply to existing as well as new plans and to the maintenance as well as to the establishment of such plans.[31]

25. 542 F.2d at 220-21.
26. *Id.* at 220.
27. *Id.*
28. *Id.* at 221.
29. *Id.* (original emphasis).
30. The court stated its disagreement with the Fifth Circuit which had held in *Taft* that a plan in existence prior to the ADEA's enactment could not be a subterfuge to evade the Act. *Id.* at 221-22.
31. *Id.* at 221.

The *McMann* court further reasoned that such interpretation of "subterfuge" was the only one possible in light of the proviso in section 623(f)(2) which stated "that no such employee benefit plan shall excuse the failure to hire any individual." Under the proviso, an employer would be required to hire an otherwise qualified sixty-year-old employee even if it had a retirement plan calling for age sixty mandatory retirement. Therefore, to read the exemption as permitting compulsory retirement at age sixty under a retirement plan would, in conjunction with the proviso proscribing a failure to hire, produce an absurd result: an employee retired under a plan would have to be rehired immediately so long as he or she was properly qualified.[32] Since the proviso prohibits a refusal to hire and there is no conceptual difference between involuntary retirement and a refusal to hire,[33] the Fourth Circuit reasoned that the exemption could not logically be read to permit such involuntary retirement.

To justify its use of the statutory defense, defendant United pointed to the Secretary of the Department of Labor's published interpretative regulations regarding the exemption,[34] which were issued shortly after the Act became effective. According to the regulations, the ADEA authorizes involuntary retirement irrespective of age pursuant to a retirement plan, provided that such plan otherwise meets the statutory exemption requirements, *i.e.*, is bona fide and not a subterfuge. However, as noted in its amicus curiae brief in support of the plaintiff, the Department subsequently concluded that this interpretation was incorrect because it was based on the erroneous premise that certain involuntary retirement provisions in plans could be related to costs.[35] The Department's present position is basically that mandatory retirement prior to age sixty-five is within the exemption only if it is essential to a bona fide plan's economic survival or has some "legitimate purpose" other than to terminate older workers.[36] The *McMann* court agreed with the Department's view that a change in this matter was justified and permissible since the regulation was, by its own terms, interpretative rather than legislative.[37]

32. *Id.* at 220.

33. *Id.* at 221 (quoting Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. at 229). An early Wage-Hour opinion states that an individual compelled to retire before age 65 is not precluded from applying for re-employment with the same employer, and that the Act requires this employee to "be considered in the same light as any other applicant." Fair Empl. Prac. Man. 401:5217 (Sept. 13, 1968).

34. 29 C.F.R. § 860.110(a) (1976). *See* note 15 *supra*.

35. Brief for the Secretary of Labor, United States Dep't of Labor, as Amicus Curiae, at 19-20, McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976) [hereinafter cited as McMann Amicus Curiae Brief I]. Contemplated revisions of the regulations will reflect the Department's view that provisions calling for involuntary retirement prior to age 65 can never be justified on the basis of cost to the employer. *Id.*

36. *See* Zinger v. Blanchette, 549 F.2d 901, 908 (3d Cir. 1977). *See also* note 54 *infra* for the three criteria delineating the Department's present position.

37. 542 F.2d at 219-20 n.4. In 29 C.F.R. § 860.1 (1976), the Department states that its

Finally, the court in *McMann* observed that its construction of the exemption would not adversely affect the nation's pension plans because any postponement of retirement generally results in cost savings to a plan.[38] According to the court, these savings result because of mortality before retirement and a shorter period during which benefits will be paid to retirees.[39]

Zinger v. Blanchette

Plaintiff in *Zinger*, a staff lawyer of the Penn Central Railroad, was compelled to retire at the age of sixty-four pursuant to the employer's pension policy.[40] Plaintiff challenged the policy on much the same basis as plaintiff in *McMann*: although bona fide, the plan was a subterfuge and thus not within the exemption of section 623(f)(2).[41]

The *Zinger* court, although agreeing with the Fourth Circuit that even a plan existing prior to the ADEA may be a subterfuge to evade the purposes of the Act,[42] came to a different conclusion. The court asserted that there was a clear and crucial distinction between a discriminatory discharge, prohibited by the ADEA, and retirement with a pension. An examination of the ADEA's legislative history convinced the court that Congress chose to legislate only with respect to discharge and not with respect to involuntary retirement with pensions.[43]

The court, acknowledging that any involuntary retirement was in effect a form of age discrimination, reasoned that the section 623(f)(2) exemption nevertheless made such retirement lawful when it was in accordance with a bona fide plan.[44] Similarly, the court admitted that this broad exemption

interpretation may be changed by court decisions or by its own finding, upon reexamination, that the guidlines are incorrect. The *McMann* court stated that it was expressing no opinion as to whether defendant United could use the changed interpretation as a defense under 29 U.S.C. §§ 259, 626(e) (1970). Section 259 excuses an employer from monetary liability if "the act . . . complained of was in good faith in conformity with and in reliance on any written administrative regulation . . . or interpretation, of the agency . . . ." Administrative regulations of both the Fair Labor Standards Act and the ADEA are issued by the Department of Labor.

38. 542 F.2d at 222.

39. *Id.* at 222 n.8 (citing M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 226 (1964)).

40. The company's "Policy of Interim Pensions," adopted prior to the ADEA, stated that the company could elect to retire persons between the ages of 60 and 65 and that such employees would receive interim pensions until age 65, when payments would begin under the Railroad Retirement Act. 542 F.2d at 902.

41. Plaintiff's claim that his premature retirement violated an employee protective order issued by the Interstate Commerce Commission is beyond the scope of this article. *See id.* at 903-04.

42. 549 F.2d at 904-05. *But see* Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974); de Loraine v. Meba Pension Trust, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Steiner v. National League of Professional Baseball Clubs, 377 F. Supp. 945 (1974), *aff'd mem.*, No. 74-2604 (9th Cir. Oct. 15, 1975) (unpublished decision); Dunlop v. General Tel. Co., 13 Fair Empl. Prac. Cas. 1211 (C.D. Cal. 1976).

43. 549 F.2d at 905.

44. *Id.* at 910.

"may be inconsistent with the prohibition against discrimination in hiring and produce the anomaly that a person who has been involuntarily retired by one company before age sixty-five may not be discriminated against in applying for employment at another company."[45]

The essential *Zinger* underpinning was that the retirement plan exemption was a broad one and that a bona fide plan compelling retirement prior to age sixty-five was unlawful only when it was a subterfuge. Further implied in the court's reasoning was that a plan granting substantial benefits cannot be a subterfuge,[46] the court stating that plaintiff's pension was "not unreasonable—certainly not so small as to brand the plan a subterfuge."[47] Similarly, the court noted that "retirement on an adequate pension was generally regarded with favor."[48]

The *Zinger* court relied on several factors to support its view that the legislative history of the ADEA distinguished between discharge and retirement with a pension. Principally, the court interpreted statements made during the Senate subcommittee hearings by Senator Javits, the sponsor of the amendment that ultimately led to section 623(f)(2), and statements made during the subcommittee hearings by Secretary of Labor Wirtz.[49] The court also relied on the fact that the legislative director of the AFL-CIO had tried, without success, to strike the exemption.[50]

The court was impressed with two further factors: (1) the similarity of the final wording of section 623(f)(2) to that of New York and several other state statutes; and (2) the fact that these state statutes and New York's explanatory notes were introduced in the record at the Senate subcommittee hearings.[51] The *Zinger* court noted that New York's explantory notes stated that a retirement plan providing for compulsory retirement was lawful when it pre-dated the enactment of the statute.[52]

Finally, the court disregarded the revised position of the Department of

45. *Id.* at 909.

46. A federal district court and the Wisconsin Supreme Court arrived at similar definitions of subterfuge, though each used reasoning differing both from each other's and from that of the *Zinger* court. The court in Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330 (D. Hawaii 1976), straining to give effect to the Department of Labor's original guidelines, could find no other meaning of subterfuge that would make sense of the exemption and relate it to the ADEA's prohibitions against age discrimination. The Wisconsin Supreme Court's decision in Walker Mfg. Co. v. Industrial Comm., 27 Wis. 2d 669, 135 N.W.2d 307 (1965), was based on the Wisconsin Fair Employment Act, which made it unlawful "to deprive the victims of earnings which are necessary to maintain a just and decent standard of living." The court judged that the pension benefits were sufficient to prevent such deprivation. *Id.* at 686, 135 N.W.2d at 316.

47. 549 F.2d at 909.

48. *Id.* at 905.

49. *Id.* at 906-07.

50. *Id.* at 907 & 907 n.10. *See also* note 88 *infra*.

51. *Id.* at 907.

52. *Id. See also* text accompanying note 83 *infra*.

Labor,[53] giving effect instead to the Department's initial interpretation contemporaneous with the ADEA's effective date, which distinguished between retirement with and without a pension.[54] The Third Circuit believed the Department's present position incorrect because it ignored the legislative history and the distinction between discharge and retirement with a pension.[55]

In sum, *Zinger* held that Congress had clearly exempted bona fide plans that were not a subterfuge from the ADEA's prohibitions and that it was the court's duty to uphold such legislative decision-making. The court followed what it perceived as the letter of the law, despite resulting inconsistencies with other elements of the statute and despite contrary policy considerations, such as the increasing age of the population and the stability of the social security system. Such considerations, the court stated, should be left to Congressional consideration.[56]

Brennan v. Taft Broadcasting Co.

Taft[57] involved the issue of whether a profit-sharing plan which called for normal retirement at the age of sixty fell within the section 623(f)(2)

53. *See* text accompanying notes 34-36 *supra*.

54. 29 C.F.R. § 860.110(a)(b) (1976). The *Zinger* court examined the Department of Labor's current position, which states that mandatory retirement prior to age 65 is lawful only if the mandatory retirement provision meets three criteria:

> (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional and (3) is essential to the plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the plan for the sole urpose (*sic*) of moving out older workers . . . .

549 F.2d at 908. It found nothing in the written statute limiting the exemption to these criteria. *Id.* at 909.

55. 549 F.2d at 908. In support of its position, the *Zinger* court cited the Supreme Court's discounting of a changed EEOC guideline in General Elec. v. Gilbert, 429 U.S. 125 (1976).

In fact, the Department of Labor's position is obviously a secondary issue. If the Court finds that the ADEA's legislative history supports the Department's present interpretation, it will accord full weight to this interpretation. Conversely, if it finds that the Department's first interpretation was correct because of the legislative history, it undoubtedly will reverse the Fourth Circuit in *McMann*. Two minor points about the Department's position, however, should be made. The Court has said that "the considerable discretion possessed by the Secretary [of Labor] as the one responsible for the actual administration of the Act should not be understressed." Idaho Sheet Metal Workers, Inc. v. Wirtz, 383 U.S. 190, 205 (1966). How the Court views this discretion in *McMann* will depend on whether it finds that Congress intended the exemption to be narrowly construed, permitting involuntary retirement with a pension only when a cost justification exists in the plan itself. Second, the Court made explicit in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), that a court may properly use administrative rulings and interpretations for guidance but that such interpretations are not controlling. The following criteria were enunciated in *Skidmore* as to the weight to be given such administrative judgments: thoroughness, validity of reasoning, and consistency with earlier and later interpretations. *Id.* The Department of Labor now says that its contemporaneous interpretation was incorrect because it was based on a fallacious assumption concerning cost factors in pension plans. If one accepts this premise and that it is more in accord with congressional intention, then two of the *Skidmore* criteria are fulfilled, *i.e.*, thoroughness and valid reasoning. The third criterion is not satisfied, however, because it is inconsistent with the ruling issued contemporaneously with the ADEA's enactment.

56. 549 F.2d at 909.

57. 500 F.2d 212 (5th Cir. 1974). The Secretary of Labor was the appellant in this case.

exemption. The employee there unsuccessfully offered to waive his plan benefits in order to secure a later retirement and also unsuccessfully applied for rehiring just before his retirement.

The Fifth Circuit held that a profit-sharing plan fell within the section 623(f)(2) exemption;[58] that a plan established prior to the Act could not be a subterfuge;[59] and that an employer was not obliged to rehire an otherwise qualified employee recently retired under that employer's mandatory retirement system.[60] As to the last point, the court, noting the proviso in the exemption that no plan shall excuse the failure to hire any individual, reasoned that "[i]f retired employees must be rehired immediately, the right to insist on compliance with a plan is an illusion."[61]

The Fifth Circuit was the only appellate court to find that the section 623(f)(2) exemption was clear and unambiguous in allowing mandatory retirement of plan employees prior to age sixty-five and declared that legislative history could not be used to override such unambiguous language.[62] Thus the court was unpersuaded by legislative-history indications that the exemption had been intended to protect plans which would, without the exemption, become too costly for an employer to continue.[63] The court further held that a case-by-case judicial scrutiny of the costliness of retirement plans presented insuperable practical difficulties.[64]

As the Fourth and Third Circuits pointed out, *Taft's* finding that a plan initiated prior to the ADEA could not be a subterfuge to evade the Act, and thus was always within the exemption, was not supported by legislative history.[65] Furthermore, *Taft's* conclusion that the exemption's language was so clear and unambiguous as to preclude resort to legislative history was clearly erroneous. Significantly, Judge Tuttle, dissenting in *Taft*,[66] and the *McMann* and *Zinger* courts did not perceive the statutory language as being plain and lucid. Moreover, the assertion that resort to legislative history was

58. *Id.* at 215. Since no shares could accrue to any employee over age 60 under the *Taft* plan, the company would save money by retaining such employees.

59. *Id. See* text accompanying notes 30-31 and 42 *supra* for the opposing views of the *McMann* and *Zinger* courts.

60. 500 F.2d at 218.

61. *Id.*

62. *Id.* at 217.

63. *Id.* at 216.

64. *Id.* at 217.

65. *See* text accompanying notes 31 and 42 *supra*.

66. In a forceful dissent, Judge Tuttle said that "[t]he language of the statute creating an exemption, if, in fact, it really does create an exemption, is not artfully worded." 500 F.2d at 220. He also stated that the statutory language only calls for an employer "to observe" the terms of a plan and that this is not synonymous with permitting an employer to "enforce" or "carry out" the terms. Moreover, the narrow construction rule is appropriate in dealing with an exemption to a statute and, according to Judge Tuttle, a party relying on an exemption has the burden of establishing that it clearly falls within the "terms and spirit" of the Act. *Id.* (quoting Phillips Co. v. Walling, 324 U.S. 490, 493 (1945)).

excluded by the statutory language has been contradicted in other cases.[67] Because of *Taft's* lack of legislative-history analysis, the remainder of this article will concentrate exclusively on the *McMann* and *Zinger* opinions.

ANALYZING THE CASES

Legislative History

The House and Senate Reports on the ADEA, basically identical, and the legislative history clearly support the *McMann* court's conclusion regarding the section 623(f)(2) exemption. These reports state: "This exemption serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans."[68]

Senator Javits, sponsor of the amended version of the exemption, reiterated this explanation in his individual views which were included in the Senate Report. He stated there that the absence of the provision exempting the observance of bona fide plans "might actually have discouraged employers from hiring older workers because of the increased costs involved in providing certain types of benefits to them."[69]

During the Senate floor ADEA debates, both Senators Yarborough, the principal sponsor of the bill, and Javits underscored the retirement-plan exemption's meaning. Senator Javits said:

> The amendment relating to . . . employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time, it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers.[70]

Senator Javits repeated this interpretation during the debates in response to pointed questioning, affirming this construction of the exemption.[71]

67. The Supreme Court has said that "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to legislative history no matter how 'clear the words may appear to be on superficial examination.'" Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943). *See also* McMann v. United Air Lines, Inc., 542 F.2d 217, 221 (4th Cir. 1976). For a thorough critique of *Taft*, *see* Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 242-46 (1974).

68. H.R. REP. NO. 805, 90th Cong., 1st Sess. 4, *reprinted in* [1967] 2 U.S. CODE CONG. & AD. NEWS 2213, 2217 [hereinafter cited as H.R. REP. NO. 805]; S. REP. NO. 723, 90th Cong., 1st Sess. 4 (1967) [hereinafter cited as S. REP. NO. 723].

69. S. REP. NO. 723, *supra* note 68, at 14 (individual views of Sen. Javits).

70. 113 CONG. REC. 31254-55 (1967).

71. *Id.* at 31255.

Senator Yarborough explicitly agreed with Senator Javits' construction and expanded upon it when he said that:

> [I]t means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement . . . . This [provision] will not deny any individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement or insurance plan.[72]

During the House floor debates, Representative Smith observed that it was important to pay heed to the stated purpose of the exemption, as it had been explained in the House Report, because the language of the exemption was otherwise unclear.[73] Representative Daniels noted that the exemption "would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits."[74]

Significantly, the original wording of the exemption, as drafted by the administration prior to its Committee revisions, provided:

> Sec. 4(f). It shall not be unlawful for an employer, employment agency or labor organization—(2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of the Act.[75]

This language would clearly have permitted the forced early retirement of persons under age sixty-five pursuant to retirement plans. Yet this plain language was deleted, indicating it was not Congress' intent to permit this.[76]

72. *Id.* Senatorial concern was also expressed during the floor debates about both the plight of those over 65 and those airline stewardesses forced to retire in their thirties, neither group being covered by the ADEA. *Id.* at 31256-57 (remarks of Sen. Young); *id.* at 31253 (remarks of Sen. Yarborough). No concern was expressed, however, that the retirement-plan exemption contained a broad loophole regarding involuntary retirement. Perhaps this was because no such concern existed given the committee report and the statements of Senators Javits and Yarborough.

73. *Id.* at 34745.

74. *Id.* at 34746.

75. *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 3 (1967) [hereinafter cited as *1967 Senate Hearings*].

76. The *Zinger* court reached a different conclusion regarding the language change, viewing the difference as unimportant. The court found support for this in the fact that

In arguing that the administration's version should be amended, Senator Javits described his suggested amendment as having the purpose of facilitating hiring.[77] Senator Smathers betrayed a similar concern that the bill would otherwise make it difficult for older workers to get jobs because they would have to be given the same pension rights as younger workers.[78] Numerous spokesmen for business testified that existing plans and other fringe benefits would be disrupted under the contemplated bill.[79]

This concern principally focused on problems of increased costs as well as the possible harmful effect on the hiring of older workers. Pension plans generally excluded workers hired at ages like fifty-five and sixty and health and insurance schemes often differentiated on the basis of age. Thus, absent the exemption, such plans would have violated the bill's prohibitions against discriminating as to the terms and conditions of employment and would have caused increased costs on the part of employers attempting to avoid such violations.

In the hearings before the House subcommittee, Secretary of Labor Wirtz elaborated on the bill's effect on pension plans in response to questioning by Representative Burton. Secretary Wirtz explained that the bill "specifically recognizes those plans that are worked out for rational reasons, so long as they do not result in differentiation just on the basis of age where there is not justification in fact."[80]

While legislative history thus squarely supports the *McMann* conclusion, the only real backing of the *Zinger* holding in the floor debates is Senator Yarborough's introduction into the Congressional Record of the fact that New York and fourteen other states had an exemption for retirement plans similar in wording to the ADEA exemption.[81] The *Zinger* court put a great deal of emphasis on the introduction of the New York statute and explantory notes during the Senate subcommittee hearings, correctly finding that the New York interpretative ruling states that an employee may be involuntarily retired pursuant to a pension plan formulated before the effective date of New York's statute.[82] However, the *Zinger* court overlooked the fact that the same explantory notes specify that compulsory retirement prior to age sixty-five pursuant to a plan enacted after the statute's effective date will occasion the following procedure: The employer will have "to

Secretary Wirtz had testified that the change did not go to "substance" but instead involved "matters going to clarification." 549 F.2d at 907.

77. *1967 Senate Hearings, supra* note 75, at 3.

78. *Id.* at 29.

79. *See, e.g., id.* at 112 (remarks of Mr. Obadal, U.S. Chamber of Commerce); *1967 House Hearings, supra* note 3, at 62-63 (remarks of Mr. Pestillo, U.S. Chamber of Commerce).

80. *1967 Housing Hearings, supra* note 3, at 14.

81. 113 CONG. REC. 31253 (1967).

82. *1967 Senate Hearings, supra* note 75, at 251.

justify the reasonableness of the specified compulsory retirement age in relation to (1) the employer's overall employment policy and (2) the particular occupational category to which it applies."[83]

Since the *Zinger* court itself concluded that the ADEA does not, unlike New York, treat plans differently that were created before its enactment from those created thereafter, the example of the New York statute as sustaining the *Zinger* court's conclusion is weakened. Furthermore, Representative Matsunaga noted during the ADEA floor discussion that most state laws were not very effective.[84] A Senate committee recently characterized such state laws as "more loophole than law,"[85] further showing that excessive court reliance on state experiences is unwarranted.

The *Zinger* court's conclusion receives a modicum of further support from certain rather casual statements made by Senator Javits and Secretary Wirtz during the hearings. For example, when Senator Javits introduced to the subcommittee his idea of amending the administration's version of the retirement-plan exemption, he recommended "that a fairly broad exemption be provided for bona fide retirement . . . systems which will facilitate hiring rather than deter it . . . ."[86] Secretary Wirtz also referred to the various ADEA exemptions as being "broad,"[87] and testified at the Senate hearing that "[i]t would be my judgment . . . that the effect of the provision . . . is to protect the application of almost all plans which I know anything about . . . . It is intended to protect retirement plans."[88]

83. *Id.* at 251-52. There have been no recorded judicial constructions of the New York statute's retirement-plan exemption.

84. 113 CONG. REC. 34743 (1967).

85. SENATE SPECIAL COMMITTEE ON AGING, DEVELOPMENTS IN AGING: 1972 AND JANUARY-MARCH 1973, S. REP. NO. 93-147, 93d Cong., 1st Sess. 67 (1973).

86. *1967 Senate Hearings, supra* note 75, at 28.

87. *Id.* at 39.

88. *Id.* at 53. The legislative director of the AFL-CIO. Mr. Biemiller, testified during the Senate hearings that the administration bill would

> permit involuntary retirement of employees under 65. We do not believe that the safeguard which this provision purports to contain restricting this possibility to cases where it is done 'under a retirement policy or system where such policy or system is not merely a subterfuge . . .' is adequate to prevent serious abuse of this provision.

Id. at 98. Similar views were expressed by another AFL-CIO representative, *see 1967 House Hearings, supra* note 3, at 411, 418. The *Zinger* court was impressed by the fact that the AFL-CIO representatives had unsuccessfully attempted to have the provision allowing for separation under retirement policies stricken. 549 F.2d at 907. But it is clear from Mr. Biemiller's language that he was referring to the provision in the administration's bill, which, as previously explained, underwent considerable revision. Mr. Biemiller's comment also may be construed as the extreme position of an advocate. When he spoke of serious abuse being possible, he understandably could have been concerned that the provision, as then written, would lead to misapplication and misunderstanding. The *Zinger* court also pointed to the fact that the ADEA requires the Secretary of Labor to make a study of "institutional and other arrangements giving rise to involuntary retirements" and to report his findings and recommendations to Congress. 29 U.S.C. § 624 (1970). This study is yet to be completed. The Third Circuit saw this study as evidence that, despite congressional awareness of the retirement problem, it had chosen to await further information before legislating on the subject of age requirements in retirement

However, such cavalier and obviously vague comments cannot overcome the strong historical evidence that the section 623(f)(2) exemption was intended to help older employees obtain employment, not hurt them by permitting them to be terminated. The exemption was meant to enable employers to hire older employees without encountering the staggering economic consequences that would have ensued if such workers were required to be covered by existing retirement plans. Without the exemption, employers may well have been disinclined to hire older workers—law or no law—or to retain their retirement plans. With the exemption, employers were able to do both, for the ultimate benefit of older employees.

At the risk of being trite, it might be said that which was enacted as a shield should not be used as a sword. Section 623(f)(2) was enacted to protect older employees against refusals to hire them. It should not be used to permit such employees to be compulsorarily terminated based on age. While the *McMann* decision is in accord with the exemption's purpose, the *Zinger* holding is a serious subversion of it.

Statutory Construction

One starts with the obvious premise that the ADEA is a remedial statute. As such, it should be liberally construed[89] in order to give effect to the underlying purposes which Congress sought to achieve by the legislation.[90] As the Supreme Court has previously declared, any exemption from such remedial legislation must be narrowly construed.[91] "The exemption . . . was not intended to swallow the rule."[92]

The *McMann* decision is in accord with these established rules of statutory construction, whereas the *Zinger* holding is not. The *Zinger* court's broad construction of the retirement-plan exemption—an adherence by the court to what it thought to be the letter of the law—is inimical to these basic rules of statutory construction. It narrows the remedial portion of the law and broadens the exemption.

The spirit of the ADEA emanates clearly from the declaration of Congressional findings and purpose in the opening section of the Act. It seeks "to promote the employment of older workers based on their ability

plans. 549 F.2d at 909. There is no further legislative-history connecting this provision with the section 623(f)(2) exemption. The committee reports, for example, make no additional comment about the study; in contrast, they specifically commented on the purpose of the exemption. Furthermore, the use of education and research programs by the Secretary of Labor to implement the Act's purpose is an integral part of the ADEA and is enunciated in section 622. 29 U.S.C. § 622 (1970). Thus, whether Congress intended a precise relationship between the study on involuntary retirement and the retirement-plan exemption is unclear.

89. Peyton v. Rowe, 391 U.S. 54, 65 (1967).

90. Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974).

91. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). *See also* note 66 *supra*.

92. Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (Marshall, J., concurring).

rather than age; [and] to prohibit arbitrary age discrimination in employment.''[93] The spirit of the ADEA is also reflected in such Congressional findings as that older workers are disadvantaged in retaining employment and are subject to discrimination in ''the setting of arbitrary age limits regardless of potential for job performance.''[94] It is the policy of the ADEA to eradicate such practices. The *Zinger* decision simply does not give effect to these aims.

Neither does the *Zinger* court's construction comport with the purpose of the exemption, which was enunciated in the House and Senate Reports[95] and in the Senate and House floor debates on the bill,[96] and was also evident in much of the testimony during the subcommittee hearings. This purpose was primarily to facilitate the hiring of older workers and, secondarily, to prevent the discontinuance of existing pension plans by protecting employers from suffering additional costs in order for their plans to be lawful under the Act. The exemption was not meant to serve as a broad vehicle for discriminatory termination on the basis of age.

The narrow reading of the exemption by the *McMann* court does, on the other hand, give liberal effect to the underlying policies of the ADEA. It does promote employment of older workers; it does discourage arbitrary age discrimination; and it does deter arbitrary age limitations.

Of course, *McMann* protects the employer if it can show cost justification for the early retirement policy.[97] However, ordinarily none will exist.[98] This is because the employer can observe the terms of a bona fide plan, by ceasing to credit further pension benefits to those who have reached the specified retirement age, even though it cannot mandatorily retire older employees under age sixty-five. Thus, there is no further cost incurred.

Involuntary Retirement Versus Discharge—An Invalid Distinction

Aside from its reliance on legislative history, the basis of the *Zinger* court's construal was its emphasis on the clear distinctions between retirement with a pension and discharge and between involuntary retirement with

93. 29 U.S.C. § 621(b) (1970).

94. *Id.* § 621(a)(2).

95. *See* text accompanying notes 68-69 *supra*. It is an established rule of statutory interpretation that committee reports have great import for such construction. 1 A. SUTHERLAND, STATUTES, AND STATUTORY CONSTRUCTION § 14, at 298 (4th ed. C. Sands 1972).

96. *See* text accompanying notes 70-74 *supra*.

97. *See* text accompanying note 25 *supra*.

98. *See* text accompanying notes 38-39 *supra* and notes 122-23 *infra*.

99. This construction not only gives effect to the purposes of the ADEA and of the exemption but interprets the last clause of section 623(f)(2)—that a plan shall not excuse the failure to hire any individual—in such a way that its effect is neither absurd nor anomalous. *See* text accompanying notes 32-33 *supra*.

and without a pension.[100] Several factors militate against the validity of these distinctions.

The difference between discharge and retirement is not generally recognized as being viable in the industrial relations field. For example, labor arbitrators, who constantly deal with such problems, generally hold that forced retirement is not distinguishable from discharge and is thus generally found to be an infringement of the security and seniority provisions of the collective bargaining agreement.[101] Arbitrators have also constantly disagreed with the argument that compulsory retirement with a pension is a just-cause discharge.[102] As one arbitrator noted, while compulsory retirement is not exactly the same as discharge, it has the same legal and practical effect.[103]

It is generally recognized in our society that forced retirement frequently has both injurious psychological as well as financial consequences.[104] The ADEA was intended to assuage not only economic suffering but also the psychological suffering endured by older workers because of employment discrimination.[105] For example, during the ADEA floor debates Representative Eilberg pointed to the human suffering flowing from discriminatory employment practices and noted that self-esteem and self-satisfaction are significant appurtenances of employment in the United States.[106] A recent ADEA case concerning forced retirement spoke of the "cruel blow to the dignity and self-respect" of a person who devoted a lifetime to productive work.[107] Thus, even if retirement with a pension could cushion the financial consequences of retirement, it cannot assuage the mental anguish of a person being denied the opportunity to continue fruitful employment simply because he or she has reached a certain age.

100. *See* text accompanying note 43 *supra*.

101. Armour Agricultural Chem. Co. v. United Steelworkers Local 4386, 47 Lab. Arb. 513, 516 (1966) (Larkin, Arb.); *accord*, Herman Nelson v. Machinists & Aerospace Workers Local 2045, 50 Lab. Arb. 1177 (1968) (Sembower, Arb.). As to judicial construction of discharge-retirement distinctions, *see* United Protective Workers v. Ford Motor Co., 194 F.2d 997, 1003 (7th Cir. 1952); United States Steel Corp. v. Nichols, 229 F.2d 396, 402 (6th Cir.), *cert. denied*, 351 U.S. 950 (1956).

102. *See, e.g.*, the arbitration cases cited in note 101 *supra*. *See also* Beatrice Foods v. Machinists & Aerospace Workers Local 1127, 55 Lab. Arb. 933, 942 (1970) (Young, Arb.).

103. Honeggers' & Co., Inc. v. International Bhd. of Teamsters Local 90, 56 Lab. Arb. 251, 253 (1971) (Anrod, Arb.). This arbitrator also found that "a normal retirement age" specified in an agreement (the situation in *McMann*) is not the same as a compulsory retirement age; *accord*, Vulcan Radiator Co. v. International Ass'n of Machinists Local 354, Dist. 26, 50 Lab. Arb. 90, 94 (1967) (Shipman, Arb.).

104. *See* note 2 *supra*.

105. Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 328 (D. N.J. 1975), *vacated and remanded* in light of *Zinger*, 550 F.2d 834 (3d Cir. 1977); Brennan v. Paragon Employment Agency, Inc., 356 F. Supp. 286, 288 (S.D.N.Y. 1973), *aff'd mem.*, 489 F.2d 752 (2d Cir. 1974).

106. 113 CONG. REC. 34745 (remarks of Rep. Eilberg); *see also id.* at 31256 (remarks of Sen. Young); *id.* at 34751-52 (remarks of Rep. Dwyer).

107. Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D. N.J. 1975), *vacated and remanded*, 550 F.2d 834 (3d Cir. 1977).

Additionally, the *Zinger* court's holding does not harmonize with the last clause of the exemption, that a plan cannot excuse the failure to hire.[108] A refusal to hire, the forced retirement of a plan member under the age of sixty-five, and discharge all involve the same basic element: a refusal to employ.[109] If a plan cannot lawfully excuse the failure to hire, logically it should not lawfully excuse the failure to retain or rehire.[110]

Policy Considerations

The policy behind the ADEA is, in a nutshell, to discourage employment discrimination against older persons. *McMann* fosters such a policy. *Zinger* does not.

The usual consequence of retirement is a sharp decline in income,[111] solely because of age, precisely what the ADEA is designed to deter. Even a combination of pension benefits and social security is often insufficient to permit older workers "to maintain the standard of living they desire."[112] This problem is obviously exacerbated when no social security benefits are available.[113]

Exact financial data on the average or median pension benefit paid to retirees is not readily accessible. However, those figures that are available

108. Congress expressed much concern over the fact that once an older worker was terminated, he or she faced much greater difficulty in obtaining new employment than did a younger worker. *See, e.g.*, 113 CONG. REC. 31746 (1967) (remarks of Rep. Dent). During the ADEA hearings, Secretary Wirtz testified that about half of the job openings in the United States were closed to applicants over the age of 55. *1967 House Hearings, supra* note 3, at 9. It does not seem unduly speculative to infer that Congress, by adding the proviso to section 623(f)(2), also intended to bar the non-retention of qualified employees who were plan members unless some essential cost justification was at stake. *See* McMann Amicus Curiae Brief I, *supra* note 35, at 16. That older workers cost more than younger workers to employ would not by itself be a valid excuse for differentiation under the ADEA. *See* 29 C.F.R. § 860.103(h) (1976); Note, *Age Discrimination in Employment: Available Federal Relief*, 11 COLUM. J.L. & SOC. PROB. 281, 325 (1975).

109. *See* text accompanying note 33 *supra*; McMann Amicus Curiae Brief I, *supra* note 35, at 16.

110. *See* Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 246 (1974).

111. SOCIAL SECURITY: PERSPECTIVES, *supra* note 1, at 25.

112. BULL. NO. 1721, *supra* note 2, at 2.

113. Such is the case with plaintiff McMann, forced into retirement at age 60. The fact that Congress selected an upper-age limit of 65 for ADEA coverage is notable. Congress was certainly aware that only at this age may retirees receive full Social Security benefits. *See, e.g.*, 113 CONG. REC. 31253 (1967) (remarks of Sen. Yarborough). In fact, the overwhelming majority of retirement plans in the United States do provide for retirement at age 65. FINANCIAL EXECUTIVES RESEARCH FOUNDATION, FINANCIAL ASPECTS OF PRIVATE PENSION PLANS 74 (1975) [hereinafter cited as FINANCIAL ASPECTS OF PRIVATE PENSION PLANS]. In establishing this retirement age and in computing their own plan benefits, employers rely on the fact that their employees will receive a significant portion of their retirement income from Social Security. For example, according to one study of selected private plans, a worker who earned $9,000 in 1974 and retired in 1975, after 30 years, received a median plan benefit equal to 29% of his last year's pay and an additional 39% from Social Security. BANKERS TRUST CO., N.Y., STUDY OF CORPORATE PENSION PLANS 29 (1975).

do not paint an attractive picture. A 1968 study showed that most retirees in 1967 received less than $1,000 a year from private plans and that half of the couples received benefits of less than $970 a year.[114] A 1971 Senate study of 764 private plans divulged a median monthly benefit of $99 for those retiring at a normal age.[115] The federal government more recently estimated annual benefit outlays by private industry of $2,074 for each beneficiary,[116] cautioning, however, that this average is imprecise because it overrepresents the average amount by including lump-sum payments.[117] Also, of course, an average pension benefit inaccurately reflects what most people receive because of variables involved such as past earnings.[118]

These benefit levels do not support a policy favoring retirement with pensions. Other considerations bear on this. First, private pension programs often stipulate that retirees will forfeit benefits if they work for firms that compete with their previous employer,[119] the only areas where their skills are marketable. Second, even if such workers are sixty-two years of age and can claim early social security benefits, they must then take an actuarial reduction of twenty percent[120] and are ineligible for other old-age benefits, such as medicare.[121]

Furthermore, the *McMann* court's conclusion that postponing retirement to age sixty-five ordinarily results in cost savings—not cost—for the employer rests on firm footing. A 1975 research report on private pension plans states that lowering the retirement age of sixty-five increases plan costs.[122] The report continues: "Although the employee will accrue lesser benefits as of the earlier retirement age he will be receiving benefits earlier and for a longer period."[123] Not only do pension costs increase with early retirement but plans typically have a built-in actuarial reduction in employee benefits for each year that the employee's retirement precedes the normal retirement age.[124] The application of the *McMann* holding will thus have a salutory effect both on employer pension costs and on the benefits for those employees who consequently will be able to avoid the hazard of premature retirement.

114. R. NADER & K. BLACKWELL, YOU AND YOUR PENSION 79 (1973) [hereinafter cited as NADER & BLACKWELL].
115. *Id.* at 79-80.
116. Skolnick, *Private Pension Plans* 1950-74, SOC. SEC. BULL. 3, 5 (June 1976) [hereinafter cited as Skolnick]. The average Social Security benefit as of October 1976 was $223.97 per month. *Social Security in Review: Program Operations*, SOC. SEC. BULL. 1 (Feb. 1977).
117. Skolnick, *supra* note 116, at 5 n.2.
118. NADER & BLACKWELL, *supra* note 114, at 80.
119. SOCIAL SECURITY: PERSPECTIVES, *supra* note 1, at 119.
120. 42 U.S.C. § 402(q)(1)(A)-(B)(ii) (1970).
121. *Id.* §§ 426, 1395(c) (1970 & Supp. IV 1974).
122. FINANCIAL ASPECTS OF PRIVATE PENSION PLANS, *supra* note 113, at 74.
123. *Id.*
124. *Id.* at 74-75.

Clearly, no countervailing considerations of plan costs or injury to plans may serve to justify the *Zinger* decision. Additionally, even if one accepted the implication of this decision that mandatory retirement on an adequate pension is lawful, such a construction offers little in the way of guidelines for future adjudication of ADEA cases. Certainly courts should not adjudicate on a case-by-case basis whether a pension is adequate enough to escape classification as a subterfuge.

Despite the ADEA, the employment difficulties of older workers continue to be serious. The Department of Labor has found that the "highest incidence of ADEA violations occur [for workers] between the ages of 55 and 65."[125] Only if section 623(f)(2) is narrowly construed can the ADEA protect those workers whose discriminatory terminations are otherwise justified as being pursuant to bona fide retirement plans. A broad construction creates "a large loophole in the Act's protection."[126]

As the median age of the population rises, the harmful effects of age discrimination multiply. These effects pertain to more than the suffering endured by workers denied the opportunity to continue useful and productive employment; they pertain also to those dependent on those workers for sustenance.[127] They pertain further to economic waste. Premature retirement denies society useful goods and services, reduces our national product, and produces smaller revenues for the social security system.[128]

These policies may appropriately be considered when analyzing the *McMann* issue. "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit . . . . That principle has particular application in the construction of labor legislation."[129] The *McMann* resolution of the issue is within the spirit of the ADEA. The *Zinger* conclusion is not.

CONCLUSION

The *McMann* decision, on balance, remains more convincing and solid than *Zinger*. It is in harmony with the explicitly stated purpose of the ADEA, with the Congressional findings and legislative history, with the prohibition against discriminatory discharge, with the last clause of section

125. *Hearing on H.R. 2588 Before the Subcomm. on Equal Opportunities of the Comm. on Educ. and Labor*, 94th Cong., 2d Sess. 22 (1976) (statement of Ronald J. James, U.S. Department of Labor).

126. *Id.*

127. *See, e.g., 1967 Senate Hearings, supra* note 75, at 31 (statement of Sen. Randolph).

128. *See* Bixby, *Retirement Patterns in the United States: Research and Policy Interaction*, SOC. SEC. BULL. 3, 7 (Aug. 1976); *1967 Senate Hearings, supra* note 75, at 31 (statement of Sen. Randolph).

129. Woodwork Mfrs. v. NLRB, 386 U.S. 612, 619 (1967).

623(f)(2), with proper statutory construction, and with ADEA policy. No one reading the legislative history of the ADEA can fail to perceive the genuine concern of Congress with the injurious effects of age discrimination on many thousands of American workers and their families. "[T]he principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age . . . ."[130] Compulsory retirement of qualified workers before age sixty-five solely because of the terms of a retirement plan would seem to be such an arbitrary classification and victimization.

In construing the section 623(f)(2) exemption, it is at first difficult to separate the requirements that a plan be both bona fide and not a subterfuge to evade the purposes of the Act. However, as one district court stated, the "plain reading" of the subterfuge provision leads one to conclude that

> regardless of how 'genuine' or 'authentic'. . . a plan might be on its face or in its inception, if the employer retires an employee (in effect terminating the employee for age considerations) pursuant to a retirement plan, then, in effect, the plan is being used to accomplish an act of age discriminaton. Thus, the retirement . . . is a 'subterfuge' . . . .[131]

Such a construal in no way renders the exemption meaningless or illusory. Rather, it makes the exemption limited and narrow in scope, in accordance with legislative history, and as it should be in this remedial statute. If one looks at the plain language of the House and Senate Reports,[132] the purpose of the exemption is to permit the employment of older workers without necessarily including them in employee benefit plans and thus, to facilitate the hiring of older workers. This narrow scope and purpose is affirmed, too, by the explanations of Senators Javits and Yarborough during the Senate floor debates[133] and by the comment of Representative Daniels during the House debates.[134] Furthermore the finding of the *McMann* court is not inconsistent with the secondary purposes that Congress intended the exemption to have, *i.e.*, to prevent the disruption of fringe benefit schemes which often differentiate on the basis of age in covering older and younger workers and, consequently, to protect employers from the economic hardship of rectifying such actuarily-based differentiations.

The ADEA was enacted to rectify a serious social problem. It was directed at the consequences of unfair employment practices. Age discrimi-

130. Laugesen v. Anaconda Co., 510 F.2d 307, 312-13 n.4 (6th Cir. 1975).

131. Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330, 332 (D. Hawaii 1976) (citation omitted).

132. *See* text accompanying notes 68-69 *supra*.

133. *See* text accompanying notes 70-72 *supra*.

134. *See* text accompanying note 74 *supra*.

nation, except where bona fide occupational qualifications exist, is contrary to the humane, economic and social objectives of our society.[135] On balance, the ADEA's legislative history, accepted canons of construction concerning remedial statutes and exemptions to such statutes, and policy considerations all serve to render the *McMann* decision more persuasive than that of *Zinger*. Age discrimination in employment is a continuing problem. Only a narrow construction of the section 623(f)(2) exemption will provide older workers with the protection against age-based, unmerited, involuntary termination that Congress intended them to have.

135. *See, e.g.*, Armour Agricultural Chem. Co. v. United Steelworkers Local 4386, 47 Lab. Arb. 513, 518 (1966) (Larkin, Arb.).