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The Scope of the Bona Fide Occupational Qualification Exemption under the Age Discrimination in Employment Act

Charles J. Ryan Jr.

THE SCOPE OF THE BONA FIDE OCCUPATIONAL QUALIFICATION EXEMPTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

EEOC v. City of Janesville
630 F.2d 1254 (7th Cir. 1980)

The Age Discrimination in Employment Act[1] makes it unlawful for employers, employment agencies and labor organizations to discriminate on the basis of age against persons between the ages of 40 and 70 when making hiring decisions or when setting policies with respect to retirement or terms of employment.[2] The Act is intended to promote the employment of older workers by prohibiting decisions made on the basis of arbitrary age limits, without regard to the particular worker's ability to perform the job in question.[3] However, exceptions are provided for in the ADEA, allowing the use of age as a

1. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979) [hereinafter referred to as the ADEA or the Act].

2. *Id.* § 623(a)-(d) (1976). The Act also prohibits advertising for employment in a manner which indicates a preference based solely on age. *Id.* § 623(e) (1976).

As originally passed, the ADEA's protections extended only to workers between the ages of 40 and 65. *Id.* § 631 (1976). However, the 1978 amendments raised the upper age limit to 70 years of age. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (codified at 29 U.S.C. § 631 (Supp. III 1979)).

For the definition of employers, employment agencies and labor organizations covered by the Act, *see* 29 U.S.C. § 630 (1976).

The ADEA in general parallels the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979), which prohibit discrimination because of race, sex, religion or national origin. For a general survey of the ADEA's provisions, *see* C. EDELMAN & I. SIEGLER, FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW: SLOWING DOWN THE GOLDEN WATCH (1979) [hereinafter cited as EDELMAN]; 4 A. LARSON & K. LARSON, EMPLOYMENT DISCRIMINATION §§ 98.00-103.80 (1979) [hereinafter cited as LARSON]; 17 AM. BUS. L.J. 363 (1979); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. (1976) [hereinafter cited as Harvard Note]; Note, *Age Discrimination in Employment Suits: A Practical Guide*, 81 W. VA. L. REV. 503 (1979); Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979).

3. 29 U.S.C. § 621 (1976) states the Act's purpose:

(a) The Congress hereby finds and declares that—

. . . .

(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;

. . . .

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

For further declarations of the intent of Congress in passing the ADEA, *see* H.R. REP. NO. 805, 90th Cong., 1st Sess. [1967], *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213; S. REP.

criterion in employment decisions in certain circumstances.[4] One of these exceptions is the bona fide occupational qualification exemption, which allows an employer to "take any action otherwise prohibited" by the Act if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[5]

Courts construing the bfoq exemption have found its language less than clear. But there is little to guide them either in the Act's legislative history or the administrative interpretations of the ADEA.[6] Those courts which have addressed the question of how the bfoq exemption is to be applied in age discrimination cases have generally turned to case law interpreting the similar language of Title VII of the Civil Rights Act of 1964[7] for guidance. Most of these courts have applied an interpretation set forth by the United States Court of Appeals for the Fifth Circuit under Title VII[8] to ADEA cases. This interpretation imposes a

NO. 493, 95th Cong., 2d Sess. [1978], *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504 (report on the 1978 amendments).

A pertinent comment was made by Representative Burke during the congressional debates:

> Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.

113 CONG. REC. 34742 (1967). *See also* The President's Message on Older Americans, PUB. PAPERS 32 (Jan. 23, 1967) (recommending the ADEA to Congress).

4. 29 U.S.C. § 623(f) (1976 & Supp. III 1979).

5. *Id.* § 623(f)(1) (1976). [The bona fide occupational qualification exception is hereinafter referred to as the bfoq.] Title VII contains similar language, permitting otherwise prohibited practices where religion, sex or national origin is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." 42 U.S.C. § 2000e-2(e)(1) (1976).

6. For a discussion of the scarcity of comment on the bfoq in the ADEA's legislative history, *see* James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEV. ST. L. REV. 1, 9 (1977) [hereinafter cited as James & Alaimo].

For the interpretations of the bfoq given by the Department of Labor, the original enforcing agency, *see* 29 C.F.R. § 860.102 (1980). The EEOC, now the agency charged with enforcement of the Act, has issued proposed guidelines which have not yet been formally adopted. *See* Proposed Interpretations; Age Discrimination in Employment, 44 Fed. Reg. 68,858 (1979) [hereinafter cited as Proposed Interpretations]. *But see* the EEOC bulletin regarding the bfoq under Title VII, 29 C.F.R. § 1604.2 (1980).

7. 42 U.S.C. § 2000e-2(e) (1976). *See* note 5 *supra*. In Lorillard v. Pons, 434 U.S. 575, 584 (1978), the Supreme Court noted that "the [substantive] prohibitions of the ADEA were derived *in haec verba* from Title VII." Many courts, noting the similarities in language and purpose between Title VII and the ADEA, have declared that the two statutes are to be construed consistently with each other. *See, e.g.*, Gabriele v. Chrysler Corp., 416 F. Supp. 666 (E.D. Mich. 1976), *rev'd on other grounds*, 573 F.2d 949 (6th Cir. 1978), *cert. granted*, 442 U.S. 908 (1980). This assumption has been made, implicitly if not explicitly, in the cases discussed below, adopting in ADEA cases a standard applied to the bfoq provisions of Title VII.

For a discussion of the relationship between the two statutes, *see* Harvard Note, *supra* note 2, at 411, which suggests that, because of significant differences between age discrimination and the discrimination prohibited by Title VII, the ADEA and Title VII should not be applied in the same manner in all circumstances.

8. The leading cases are Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.),

heavy burden on an employer seeking to justify an asserted bfoq.[9] The United States Court of Appeals for the Seventh Circuit, however, has declined to adopt this interpretation in ADEA cases, preferring a less stringent standard.[10]

The Seventh Circuit first enunciated its standard in *Hodgson v. Greyhound Lines, Inc.*,[11] where the court held that a mere good faith belief by an employer was sufficient to justify the use of age as the determining factor in employment decisions.[12] The Seventh Circuit recently confronted a second ADEA case in which the employer asserted a bfoq to justify an employment policy based solely on age. In *EEOC v. City of Janesville*,[13] the Wisconsin city argued that its mandatory retirement policy for employees of the police department came under the bfoq exception to the Act. The essence of the city's argument was that since the employees carrying out the primary function of the police department could lawfully be forced to retire at a certain age because of the physical demands of their work, all employees of the department could be forced to retire at that age, regardless of their particular jobs.[14]

cert. denied, 404 U.S. 950 (1971) (sex discrimination; airline's policy of hiring only females for job of flight attendant held unlawful), and Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (sex discrimination; defendant's refusal to hire women for job of switchman held unlawful). The adaptation of these cases to the provisions of the ADEA is discussed in the text accompanying notes 27-91 *infra*. For a discussion of these cases and the bfoq under Title VII generally, *see* 1 LARSON, *supra* note 2, ch. 4; Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977).

9. *Weeks* and *Diaz* are to be read together, according to the court which decided the cases. *See* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), discussed in the text accompanying notes 45-58 *infra*. Taken together, these cases require the defendant to satisfy a two-part test to justify an asserted bfoq. Under *Diaz*, the defendant must show that the bfoq is a matter of business necessity; that is, that the essence of its business will be undermined if the bfoq is disallowed. 442 F.2d at 388. Thus, in *Diaz*, the airline did not prevail on its bfoq defense when it could only demonstrate that the practice of hiring exclusively women for the position of flight attendant was a matter of business convenience. *Id.* Under *Weeks*, the second part of the test requires the defendant to demonstrate that either there is reasonable cause—a factual basis—for believing that substantially all members of the plaintiff's sex would be unable to perform the duties of the job involved, or that because there is no practical manner to determine the fitness of each individual of that sex, the general proscription must be used. 408 F.2d at 235. In *Weeks*, the defendant failed to show that its policy was based on anything but stereotypes, and its bfoq defense failed. *Id.*

10. Courts have generally applied to the ADEA the maxim that a remedial statute is to be interpreted liberally to effectuate its purposes. *See, e.g.*, Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975); Sartin v. City of Columbus Utils. Comm'n, 421 F. Supp. 393 (N.D. Miss. 1976). A corollary of this proposition is that the exceptions provided for in such a statute are to be construed narrowly. *See* Beck v. Borough of Manheim, 505 F. Supp. 923, 925 (E.D. Pa. 1981); 29 C.F.R. § 860.102(b) (1980); Proposed Interpretations, *supra* note 6, at 68,861. *Cf.* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (Title VII case; bfoq exception to Title VII was meant to be an "extremely narrow exception").

11. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

12. The case is discussed in the text accompanying notes 28-46 and notes 98-103 *infra*.

13. 630 F.2d 1254 (7th Cir. 1980).

14. The defendant's argument is set forth in the district court opinion in this case; *see* EEOC

In accepting this argument, the *Janesville* court is in direct conflict with other courts deciding bfoq cases on essentially similar facts. Further, the Seventh Circuit in *Janesville* gives the ADEA bfoq exemption an interpretation so broad as to undermine the purposes of the Act.

The reasoning of the *Janesville* court is largely an outgrowth of the decision in *Greyhound*, in which the Seventh Circuit first indicated its willingness to give a broad interpretation to the ADEA bfoq. Before discussing the *Janesville* opinion, therefore, it is important to place the *Greyhound* decision in the context of the case law on the bfoq. A review of the cases will underline the contrast between the Seventh Circuit's interpretation and the narrower approach generally taken by other courts. It will also reveal how other courts have dealt with issues which arose in *Janesville*. The *Janesville* opinion can then be analyzed against this background.

THE BFOQ EXEMPTION

A major aim of the ADEA is to prevent age-based stereotyping.[15] It generally prohibits employers from relying solely on age as an indicator of ability in making hiring, retirement or discharge decisions involving workers within the protected class.[16]

However, the bona fide occupational qualification exception[17] recognizes that age, at times, may be the most significant criterion by which to judge an individual's fitness for a particular job. Since this exception, unlike the others provided for in the Act,[18] permits the em-

v. City of Janesville, 480 F. Supp. 1375, 1378-79 (W.D. Wis. 1979), *rev'd*, 630 F.2d 1254 (7th Cir. 1980).

15. *See* note 3 *supra* for text of 29 U.S.C. § 623(a) (1976). *See also* the legislative materials cited in note 3 *supra*.

16. 29 U.S.C. § 623(a) (1976) sets out the prohibited "employer practices." The Act also applies to employment agencies and labor organizations. *Id.* § 623(b)-(e).

The protected class includes all persons between the ages of 40 and 70 working for or applying for a job with an employer, in an industry affecting commerce, which has 20 or more employees for twenty or more weeks of the year. *Id.* §§ 630, 631 (1976 & Supp. III 1979).

17. *Id.* § 623(f)(1) (1976) provides, in pertinent part:

It shall not be unlawful for an employer . . .—

(1) to take any action otherwise prohibited under . . . this [Act] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

18. The other exceptions in the Act are as follows:

It shall not be unlawful for an employer . . .—

(1) to take any action otherwise prohibited under . . . this [Act] . . . where the differentiation is based on reasonable factors other than age;

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

ployer to rely solely on age, and therefore allows the very age-based employment policies the ADEA was designed to prevent,[19] it presents an important question of interpretation. If construed too broadly, this exception could swallow the rule.

This potential has been recognized both by the Department of Labor, originally charged with enforcement of the Act,[20] and the Equal Employment Opportunity Commission,[21] which is now the enforcing agency.[22] The interpretative bulletins issued by both indicate in general language that the bfoq exemption is to be construed narrowly,[23] with the burden on the party asserting it to justify the use of age as an indicator of ability.[24] But beyond these very general guidelines, there is little in the interpretative bulletins[25] or in the Act's legislative history[26]

plan shall require or permit the involuntary retirement of any individual [protected by the Act] because of the age of such individual; or

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

Id. § 623(f)(1)-(3) (1976 & Supp. III 1979).

19. *See, e.g.*, Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591 (5th Cir. 1978): "Establishment of a BFOQ may, in some cases, permit an employer to discriminate along otherwise illegal lines without reference to an individual's actual physical condition." *See also* the comment to the same effect in EEOC v. City of Janesville, 480 F. Supp. 1375, 1378 (W.D. Wis. 1979), *rev'd*, 630 F.2d 1254 (7th Cir. 1980): "Because the 'bona fide occupational qualification' exemption frees an employer from the ADEA's general requirement that he make an individual judgment about an older worker's ability, it embodies the risk of permitting on a broad scale the very age stereotyping which the ADEA was passed to prevent."

20. As originally enacted, the ADEA provided for enforcement according to the terms of the Fair Labor Standards Act, 29 U.S.C. §§ 211(b), 216, 217 (1976). *See* 29 U.S.C. § 630(b) (1976). Section 211(b) vests the power to enforce the Act in the Secretary of Labor and the Administrator of the Wage & Hour Division of the Department of Labor.

21. Hereinafter referred to as the EEOC.

22. Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978), transferred the enforcement functions under the ADEA from the Department of Labor to the EEOC, effective July 1, 1979. *See also* Exec. Order No. 12,144, 44 Fed. Reg. 37,193 (1979).

23. 29 C.F.R. § 860.102 (1980), the Department of Labor bulletin, provides:

Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application.

Id. § 860.102(b). The EEOC bulletin uses the same language. *See* Proposed Interpretations, *supra* note 6, at 68,861.

24. 29 C.F.R. § 860.102(b) (1980) declares:

[A]s this is an exception, it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer . . . which relies upon it.

The EEOC bulletin uses identical language. *See* Proposed Interpretations, *supra* note 6, at 68,861.

25. Beyond the language quoted in notes 23 & 24 *supra*, the Department of Labor bulletin gives few examples of what constitutes a bfoq: age limitations, without reference to the physical condition of the individual, when such limitations are "clearly imposed for the safety and convenience of the public," such as Federal Aviation Agency age limits for carrier pilots; actors required for youthful or elderly characterizations; and persons used to advertise products directed at a particular age group. 29 C.F.R. §§ 860.102(d)-(e) (1980). These examples have been deleted from the EEOC bulletin.

26. One of the few comments made on the point during the congressional consideration of

to aid the courts in determining when age is a bona fide occupational qualification or when a bfoq is "reasonably necessary to the normal operation of the particular business."[27] It is not surprising, then, that judicial interpretation of the bfoq exemption has resulted in different standards among the circuits regarding both the scope of the exception and the burden of proof borne by the party asserting it.

The Seventh Circuit was the first federal court of appeals to face the question. In *Hodgson v. Greyhound Lines, Inc.*,[28] the Department of Labor brought suit under the ADEA to challenge the bus company's hiring policy, which set an upper age limit of 35 for new drivers.[29] Greyhound claimed that youth was a bfoq and argued that to eliminate the upper age limit would increase the risk of harm to its passengers because of the manner in which the company assigned hours and routes to drivers.[30] The district court ruled against Greyhound, holding that the defendant had failed to meet its burden of proof on the bfoq issue.[31] To define this burden, the lower court had used the standard enunciated by the Fifth Circuit in a Title VII bfoq case, *Weeks v. Southern Bell Telephone & Telegraph Co*.[32] As applied in *Greyhound*, the *Weeks* standard required the defendant to demonstrate that there was "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all" persons over 35 would prove to be unsafe drivers.[33] The Seventh Circuit held this to be an inappropriate test on

the Act is contained in H.R. REP. NO. 805, 90th Cong., 1st Sess. 7 (1967), *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2220, where the House Committee on Education and Labor stated: "It is, of course, not the purpose of this legislation to require the employment, regardless of age, of one not otherwise qualified." For a further discussion of the ADEA's legislative history, *see* James & Alaimo, *supra* note 6; Harvard Note, *supra* note 2.

27. 29 U.S.C. § 623(f)(1) (Supp. III 1979).

28. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

29. The complaint alleged violations of § 623(a)(1), for refusing to hire because of age; of § 623(a)(2), for classifying employees in a manner which deprives them of employment opportunities because of age; and of § 623(e), for advertising in a manner which indicates a preference based on age. 499 F.2d at 860. Note that since the ADEA protects persons older than 40, the policy challenged in *Greyhound* would only be illegal under the Act with respect to applicants aged 40 or older. 29 U.S.C. § 631 (Supp. III 1979).

30. 499 F.2d at 861. New drivers were assigned "extra-board work" which involved 24-hour call, seven days a week, with as little as two hours' notice before a trip. Along with odd and irregular hours, this duty involved trips which frequently lasted up to 30 days. The less strenuous, more regular routes were assigned on the basis of seniority, and a driver could spend more than ten years on the "extra-board" before being assigned to a regular run. *Id.* at 864.

31. Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230, 239 (N.D. Ill. 1973).

32. 408 F.2d 228 (5th Cir. 1969) (sex discrimination case; held, being male not a bfoq for job of switchman).

33. 354 F. Supp. at 236. After citing *Weeks*, the district court stated: "The question thus arises as to whether Greyhound has established a 'factual basis' for its belief that applicants between the ages of 40 and 65 would be unable to perform safely the duties of an extra-board driver." *Id.*

the facts before it, since the issue in *Greyhound* centered around the safety of the bus passengers and other highway motorists, rather than, as in *Weeks*, the welfare of the individual job applicant.[34] In other words, the court considered the *Weeks* test too stringent where public safety was a concern. A better approach, the court declared, was that taken by the Fifth Circuit in another Title VII case, *Diaz v. Pan American World Airways, Inc.*,[35] where the question was framed in terms of a business necessity test: Would the essence of the defendant's business be undermined if the bfoq were disallowed?[36] Greyhound's business is the safe transportation of passengers by bus. The court said that since one goal is safety, the company must strive to employ the most highly qualified drivers.[37] Citing *Spurlock v. United Air Lines, Inc.*,[38] a Tenth Circuit Title VII case, the court then stated that where public safety is concerned, the burden on the defendant to justify a bfoq eases somewhat,[39] though the defendant must still demonstrate a rational basis for the challenged policy.[40]

The court was satisfied that Greyhound's policy had a rational basis. Evidence submitted at trial[41] showed that the upper age limit was based on a good faith belief that the safety of passengers could only be assured by this means.[42] This, the court held, was sufficient to justify a

34. 499 F.2d at 861.

35. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (sex discrimination case; held, being female not a bfoq for job of flight attendant).

36. *Id.* at 388 (cited in *Greyhound*, 499 F.2d at 862). In applying *Diaz* to the facts before it, the *Greyhound* court stated: "[T]he essence of Greyhound's business is the safe transportation of its passengers. Thus, we deem it necessary that Greyhound establish that the essence of its operations would be endangered by hiring drivers over forty years of age." *Id.*

37. *Id.* at 863.

38. 475 F.2d 216 (10th Cir. 1972). *Spurlock* was a race discrimination case brought under Title VII against the airline, alleging that the airline's employment standards were discriminatory, since few blacks were employed as pilots. The *Spurlock* court stated that in cases such as the one before it, "courts . . . should proceed with great caution before requiring an employer to lower his preemployment standards" where the job requires a high degree of skill and the risks to persons and property involved are great. *Id.* at 219.

39. 499 F.2d at 863.

40. In the court's words:

> Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person. . . .

Id. *But see* the standard applied by the district court in this case. *See also* note 33 *supra*.

41. 499 F.2d at 863-65. Greyhound presented testimony of industry officials on the use of an age limitation such as Greyhound's, but the court found this alone to be insufficient to support the asserted bfoq. *Id.* at 863. More convincing was the evidence regarding the rigors of extra-board work, the physical changes brought about by aging, and statistics showing that Greyhound's safest drivers were between 50 and 55 years of age with between 16 and 20 years of experience. *Id.*

42. *Id.* at 865. *But see* the conclusion of the district court:

> "Good basic common sense" does not suffice as "objective data" to satisfy the "factual

bfoq, and Greyhound's hiring policy was allowed to stand.[43]

Thus, it was enough for the *Greyhound* court that the employer could demonstrate that its hiring policy was not the result of an arbitrary belief which totally lacked an objective reason or rationale.[44] The Seventh Circuit interpreted the test applied by the district court in *Greyhound* to mean that a defendant must demonstrate to a certainty that the reasons or assumptions underlying the policy were in fact true for every applicant.[45] Where public safety was an issue, the court declared, this test was too strict. It was enough that the employer's policy was based on a good faith belief as to its necessity.[46]

Two years after *Greyhound*, the Fifth Circuit was faced with a case involving essentially the same facts. In *Usery v. Tamiami Trail Tours, Inc.*,[47] the Labor Department brought suit under the ADEA to challenge a bus company's 40-year upper age limit for new drivers.[48] The defendant in this case also asserted that its policy came within the bfoq exemption to the Act.[49] Like the trial court in *Greyhound*, the lower court in *Tamiami* used the standard set forth in *Weeks* in determining whether the defendant had met its burden of proof on the issue, but in this case held that the exception had been justified.[50] In affirming the

> basis" of the *Weeks* decision. Nor has defendant had any experience with applicants above age 40 so that it could factually state that such drivers would have the highest number of accidents. . . .
>
> . . . .
>
> [T]he data prepared by the defendant and the evidence it has presented [have not demonstrated] that its policy of age limitation is reasonably necessary to the normal and safe operation of its business nor that age is a bona fide occupational qualification within the meaning of the Act.

354 F. Supp. at 238-39.

43. 499 F.2d at 865.

44. *Id.*

45. The appellate court disagreed, explaining that "Greyhound need not establish its belief to the certainty demanded by . . . the district court for to do so would effectively require Greyhound to go so far as to experiment with the lives of its passengers in order to produce statistical evidence." *Id.*

46. The Seventh Circuit felt that "Greyhound has amply demonstrated that its . . . policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale." *Id.*

47. 531 F.2d 224 (5th Cir. 1976).

48. The Labor Department alleged violations of 29 U.S.C. §§ 623(a)(1) and 623(e) (1976), based upon the bus company's refusal to hire individuals over the age of 40 and its practices of specifying that age limit in its advertisements. 531 F.2d at 227 n.2.

There were eight complaining witnesses involved, ranging in age from 41 to 57. The defendant claimed that six were refused employment because of factors other than age, but it admitted that the other two were turned away simply because they were over 40. *Id.* at 227 & nn.3 & 4.

49. The defense was essentially the same as that in *Greyhound*, the defendant asserting that the demands of extra-board work made the age limitation necessary because of safety concerns. *Id.* at 227-28.

50. *Id.*

decision, the Fifth Circuit addressed the question whether the *Weeks* standard was appropriate where public safety was a concern.[51] Noting that it felt the Seventh Circuit had misapprehended the standard set forth in *Weeks* and *Diaz*,[52] the *Tamiami* court elaborated on the rationale of *Weeks* and *Diaz* and explained their application in ADEA cases. The *Diaz* business-necessity test was not exclusive of the *Weeks* substantial-factual-basis approach, as the *Greyhound* court had suggested. Rather, the court said, *Diaz* and *Weeks* set forth two elements of one standard.[53] The defendant must show that the asserted bfoq is essential to its business.[54] Having done so, the defendant must also demonstrate that there is a substantial factual basis for believing that substantially all applicants over 40 would prove to be unsafe drivers, or that there is no practical basis other than age by which to ascertain an applicant's passenger-endangering characteristics.[55]

In *Tamiami*, the court held that the defendant had met the first part of its burden—showing a business necessity—since the purpose of the policy in question was to assure the safety of its passengers, undoubtedly essential to its business.[56] Further, the second part of the test had been satisfied, although the defendant could not demonstrate a factual basis for its judgment that all applicants over age 40 would be unsafe drivers.[57] Tamiami did show to the court's satisfaction that

51. *Id.* at 234-37.

52. *Id.* at 235 n.27. The court also questioned *Greyhound*'s reliance on Spurlock v. United Air Lines, Inc., 475 F.2d 216 (10th Cir. 1972), which, it pointed out, dealt not with a bfoq defense but an unrelated question, the requirement under Title VII that employment criteria be job-related, a standard defined in Griggs v. Duke Power Co., 401 U.S. 424 (1971). The *Tamiami* court said that this distinction is crucial

> [b]ecause, although the indefinite nature of the common law job-relatedness test may necessitate the imposition of a lighter burden when the safety of third parties is implicated, the *Weeks-Diaz* standard is more precise, applies to a narrow statutory defense, and does not compel the hiring of unqualified job applicants.

531 F.2d at 236 n.28.

53. *Id.* at 235.

54. *Id.* The court noted here that it is this element of the two-part test which takes into account the safety factor: "The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving," since the essence of the business in this case was the safe transportation of bus passengers. *Id.* at 236.

55. *Id.* at 235-36. While the *Greyhound* court apparently felt that *Weeks* would require the hiring of unqualified applicants, the *Tamiami* court stated that this was not the case: "On the contrary, if all or substantially all members of a class do not qualify, or if there is no practical way reliably to differentiate the qualified from the unqualified . . . , it is precisely then that *Weeks* permits otherwise proscribed class discrimination as a BFOQ." *Id.* at 236. In other words, *Weeks* does not require an employer to hire an unqualified applicant, but it does require the employer to prove that it cannot tell the qualified from the unqualified and so must rely on age as the indicator.

56. *Id.*

57. *Id.*

there was no practical basis other than age on which to make such a judgment for each applicant.[58] Thus, the use of the upper age limit was justifed under the bfoq exemption to the ADEA and Tamiami's hiring policy was allowed to stand.[59]

Greyhound and *Tamiami* reach the same result, the employer's age-based hiring policy being held lawful in both cases. But the more rigorous analysis of the *Tamiami* court results in a heavier burden being imposed on the employer seeking to justify the use of age in its employment policy. This approach is more in accord with the interpretative bulletins declaring that the exemptions to the ADEA are to be construed narrowly.[60] Both cases require the defendant to satisfy the *Diaz* business-necessity standard.[61] Beyond that, however, *Greyhound*'s "good faith belief" requirement is a broader standard than the narrow, clearly defined factual-basis test adopted by the *Tamiami* court. This has been the view, at least implicitly, of all courts subsequently faced with bfoq cases under the ADEA, none of which has adopted the *Greyhound* rationale.

In *Aaron v. Davis*,[62] a private suit was brought under the ADEA to challenge the plaintiffs' forced retirement at age 62, an age limit set by a city ordinance. The plaintiffs had been assistant chief and district chief of a city fire department, and their duties had been largely super-

58. *Id.* at 238: "Whatever might have been our finding were we deciding the issue *de novo*, the District Court found that examinations cannot detect the relevant physiological and psychological changes 'with sufficient reliability to meet the special safety obligations of motor carriers of passengers.' "

59. *Id.* The court held that since the finding of fact by the district court was not clearly erroneous, it could not be set aside.

In accord with *Tamiami* is Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978). Although this case was primarily concerned with the defendant's burden of proof under the "reasonable factors other than age" exception, the Fifth Circuit did reiterate the reasoning of *Tamiami* in commenting on the bfoq exception. *Id.* at 591.

60. *See* note 10 *supra*.

61. *See* text accompanying notes 35 & 54 *supra*.

62. 414 F. Supp. 453 (E.D. Ark. 1976). In *Aaron*, it was the employees themselves who brought suit, not the Labor Department as in *Greyhound* and *Tamiami*. Under 29 U.S.C. § 626(c) & (d) (Supp. III 1979) (the provisions were substantially the same at the time of this suit), the aggrieved party may bring a civil suit, subject to certain procedural requirements, including notice to the enforcing agency. Should the enforcing agency institute a suit on the plaintiff's behalf after he has brought suit in his own name, this terminates the private suit. 29 U.S.C. § 626(c)(1) (Supp. III 1979). For a survey of the procedural aspects of the ADEA, *see* EDELMAN, *supra* note 2, at 137; 4 LARSON, *supra* note 2, § 102.00; Sheeder, *Procedural Complexity of the Age Discrimination in Employment Act: An Age-Old Problem*, 18 DUQ. L. REV. 241 (1980) [hereinafter cited as Sheeder].

The plaintiffs in *Aaron* alleged violations of 29 U.S.C. § 623(a) (1976), averring that under the ordinance they were discharged solely because of age. The complaint also contained a count based on 42 U.S.C. § 1983 (1976) and counts based on the due process and equal protection clauses of the fourteenth amendment. 414 F. Supp. at 456. The court declined to examine these claims, finding the ADEA dispositive. *Id.* at 460.

visory.[63] The ordinance, however, mandated the retirement of all members of the department, including department heads, at age 62.[64] The defendants asserted a bfoq on the grounds of public safety, citing *Greyhound* in support of their contention that they must only demonstrate "a rational basis in fact to believe that the elimination of the mandatory retirement provision would increase the . . . risk of harm to the public" and other firefighters.[65] The court, however, characterized as stereotyping the defendants' assumption that many or most department employees would be physically unable to perform their duties beyond a certain age.[66] The court also distinguished *Greyhound*, stating that it differed "both in kind and degree" from the case before it.[67] While agreeing that "the quantum of the showing" necessary to justify a bfoq decreases when the job involved carries an inherent risk to the public or fellow employees, the court further stated that there must still be some empirical justification for the policy in question.[68] The defendants' assumptions, based on stereotypes rather than any empirical evidence, did not meet this burden, and the court struck down the ordinance, calling it "arbitrary and capricious and wholly lacking in any justifiable business necessity."[69]

While the *Aaron* court did not expressly rely on *Tamiami*,[70] it did cite *Weeks* in support of its holding that there must be some empirical justification for the policy asserted as a bfoq.[71] It is clear that the court was not satisfied with the standard set forth in *Greyhound*, which, it said, called for a demonstration of a rational basis in fact underlying the policy in question.[72] The court apparently considered this a lesser

63. *Id.* at 456-57. It appears that even the department heads, however, were required at times to take an active part in fighting fires. *Id.*

64. The ordinance provided: "Retirement from active employment for all members, including department heads, of the fire department, shall be mandatory upon attaining the age of sixty-two years. . . ." 414 F. Supp. at 455 (citation omitted).

65. *Id.* at 461.

66. *Id.* at 462.

67. *Id.*

68. *Id.* at 461:

> [T]he quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. . . . But at no point will the law permit . . . the fixing of a mandatory retirement age based entirely on hunch, intuition, or stereotyping, i.e., without *any* empirical justification.

69. *Id.* at 463.

70. *Tamiami* was decided only a few weeks before *Aaron*.

71. 414 F. Supp. at 461.

72. Faced with a choice between *Weeks* and *Greyhound*, the *Aaron* court opted for the former, although stating that it was "of the opinion that it makes little difference in the result here whether one . . . applies the *Greyhound* or the *Weeks* rule," because of the defendants' total lack of empirical support for the policy. *Id.* at 462.

burden than that set forth in *Weeks*.

The year following *Aaron*, the Eighth Circuit turned to *Weeks* and *Tamiami* in deciding a bfoq case. In *Houghton v. McDonnell Douglas Corp.*,[73] a 52-year-old test pilot sued under the ADEA after he had been removed from flight duty and subsequently discharged.[74] McDonnell Douglas conceded that the plaintiff had been removed from flight duty solely because of age, a per se violaton of the Act.[75] The company had no set age policy on the transfer of test pilots to non-flying positions, but made each decision individually.[76] The defendant asserted, however, that age was an appropriate criterion on which to make the decision, due to the physiological and psychological changes that accompany aging.[77] In an opinion by Justice Clark, however, the court held that the defendant had failed to meet its burden of proof on

73. 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

The complete history of the *Houghton* case is one of the longer chapters of ADEA case law. Shortly after Houghton filed his private suit in January, 1973, the Secretary of Labor filed suit against McDonnell Douglas seeking prospective relief against the same discrimination alleged in the private suit. The Secretary sought to have this suit consolidated with the private action, but the district court dismissed the Secretary's suit as duplicative of the private action. A motion by the Secretary to intervene in the private action was denied by the district court as untimely. On appeal, the district court was reversed, and leave to intervene was allowed. Brennan v. McDonnell Douglas Corp., 519 F.2d 718 (8th Cir. 1975).

On remand, the district court entered judgment for the defendant after trial, holding that McDonnell Douglas had established age as a bfoq for the job of test pilot. Houghton v. McDonnell Douglas Corp., 413 F. Supp. 1230 (E.D. Mo. 1976). This decision was reversed by the Eighth Circuit in the opinion discussed in the text. Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977). The defendant sought review of this holding by the United States Supreme Court, but the Court declined to review the decision. 434 U.S. 966 (1977) (denying certiorari).

The case returned to the district court, which again entered judgment for the defendant, holding that additional evidence presented on remand demonstrated that Houghton had become physically unable to perform the duties of test pilot safely before he had been removed from flight status, so that his removal and later discharge were not violations of the ADEA. 474 F. Supp. 193 (E.D. Mo. 1979). Houghton appealed, and the Eighth Circuit again reversed the district court, holding that its decision in the previous appeal on the merits precluded the defendant from introducing additional evidence, that the plaintiff had established his right to back pay for the period from 1972 to 1975, and that the previous opinion had ruled that plaintiff was entitled to this relief. Judgment was ordered awarding back pay. The court also held that the plaintiff and the intervenor, now the EEOC, were entitled to attorneys' fees in all courts, but left the amount to be determined by the district court. 627 F.2d 858 (8th Cir. 1980).

74. After Houghton was removed from flight duty in July, 1971, the company offered him two other positions, which he refused because he considered them a step downward. He sought employment with another company but was unsuccessful. Returning to his former position at McDonnell Douglas, but without flight duty, he grew dissatisfied. He rejected an offer to join the space shuttle simulator program and was finally discharged in December, 1972, for "nonproductivity." *Id.* at 563. In addition to his initial charge that his removal from flight duty violated the ADEA, he added a claim that it was a constructive discharge. *Id.* at 564.

75. The company found it necessary to reduce its test pilot staff, and decided to do so by age. Houghton, at 52 the oldest test pilot in the company's history, was removed from flight duty along with two others, aged 48 and 46. *Id.* at 563.

76. *Id.*

77. *Id.*

the bfoq issue, since its data on the effects of aging dealt with the general population, rather than with test pilots in particular.[78] In setting forth the standard for the defendant's burden, the court relied on the language of *Weeks* and *Tamiami*, making no mention of *Greyhound*.[79]

The question whether *Greyhound* or *Tamiami* presents the better approach was also faced by the Fourth Circuit in *Arritt v. Grisell*.[80] The 40-year-old plaintiff in that case charged that a West Virginia statute setting an upper age limit of 35 for new applicants for certain police forces in the state violated the ADEA.[81] The district court entered summary judgment for defendants, holding that the demands of public safety and the safety of fellow officers justified the policy as a bfoq under the standard set forth in *Greyhound*.[82] On appeal, the Fourth Circuit rejected the *Greyhound* standard in favor of the "two-pronged test" formulated in *Tamiami*.[83] The court viewed the *Greyhound* test as requiring the employer to demonstrate only "a minimal increase in risk of harm, for it is enough to show that the elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice."[84] This "minimal" burden, the court held, was inappropriate.[85] The proper standard was that applied in *Tamiami*, requiring the employer to show first, that the bfoq was "reasonably necessary to the essence of its business," and second,

78. The company's expert witnesses testified that age was a bfoq for test pilots, based on their studies "reflecting the physiological and psychological changes that accompany the aging process in the general population." Houghton himself, however, had been found to be in excellent condition, "even when compared to pilots and test pilots." In addition, there was evidence presented by Hougton tending to show that aging occurs more slowly and to a lesser degree among test pilots. *Id.* at 563-64.

79. *Id.* at 564. *See* note 73 *supra* for the progress of the *Houghton* case after this decision. In accord with *Houghton* and *Aaron* is a recent decision from a district court in the Eighth Circuit, EEOC v. City of St. Paul, 500 F. Supp. 1135 (D. Minn. 1980). The case involved a fire department district chief who had been forced to retire at age 65, pursuant to a St. Paul ordinance and Minnesota law. His primary duties had been supervision, discipline, communication and training. *Id.* at 1137, 1139. While noting that the age limit might be lawful when applied to firefighters, the court held that it was a violation of the ADEA when applied to those in positions such as district chief who "retain sufficient strength and endurance to adequately perform their duties" beyond age 65. *Id.* at 1145. In defining the defendant's burden of proof on the bfoq issue, the court relied on *Houghton*. *Id.* at 1144.

80. 567 F.2d 1267 (4th Cir. 1977).

81. The statute in question, W. VA. CODE § 8-14-12 (1976), established an 18 to 35 year age limit for applicants for original appointment to the police force of any town with a population over 10,000. Plaintiff had applied for appointment to the police force in Moundsville, West Virginia, which was covered by the statute. He was rejected because he was over the age limit. 567 F.2d at 1269.

82. 421 F. Supp. 800 (N.D. W. Va. 1976).

83. 567 F.2d at 1271.

84. *Id.* (citing Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975)).

85. 567 F.2d at 1271.

that there was a factual basis supporting the hiring policy, or that it was impractical or impossible to deal with persons over the age limit on an individual basis.[86] Since the district court had applied an improper standard, summary judgment was reversed and the case was remanded to be considered under the *Tamiami* standard.[87]

Three recent district court decisions, each finding in favor of the defendant on the bfoq issue, also align with *Tamiami* rather than *Greyhound*, although not expressly and not without some criticism of the *Tamiami* rationale. In *Murnane v. American Airlines, Inc.*,[88] the court upheld the airline's upper age limit for hiring new pilots. In doing so, the court quoted language from both *Greyhound* and *Tamiami*,[89] but the decision seems to rest ultimately on the court's conclusions that American had a factual basis for believing that all or substantially all pilots above age 40 when hired would be unable to perform safely and efficiently[90] and that the age limit, as a means to assure the safety of passengers, was essential to the defendant's business.[91] It thus appears that the court applied the two-part *Tamiami* standard. In *Tuohy v. Ford Motor Co.*,[92] the court held that the defendant's mandatory retirement age of 60 for its private pilots was justified under the ADEA.[93] The *Tuohy* court acknowledged that *Greyhound* "lumped all the parts of the bfoq issue together," and that *Tamiami* separated the issues in an effort "to define a neat test with which to solve every potential bfoq prob-

86. *Id.* On the issue of public safety, the *Arritt* court noted that, while *Tamiami* had made this point relevant to the business-necessity question, it may be equally relevant to "the strictness by which the efficacy of the age requirement and the practicality of individualized screening are to be judged." *Id.* n.14.

87. *Id.* at 1271.

88. 482 F. Supp. 135 (D.D.C. 1979). The 43-year-old plaintiff, a retired Navy and Coast Guard pilot, applied for the position of flight officer. The airline had an unwritten policy of hiring only applicants 30-years-old or younger, and plaintiff's application was rejected.

89. *Id.* at 147.

90. *Id.*

91. *Id.*

92. 490 F. Supp. 258 (E.D. Mich. 1980). Plaintiff, a pilot for defendant's Air Transportation Office, was forced to retire at age 60, pursuant to company policy. Ford based its retirement policy on the Federal Aviation Administration regulation mandating retirement of commercial pilots at age 60. *See* 14 C.F.R. § 121.383(c) (1980).

93. The court viewed the issue as whether the FAA regulation relied upon by defendant as support for the retirement policy "in and of itself establishes a bfoq which permits defendant to terminate pilots in its private air transportation system simply because they have reached the age of 60." 490 F. Supp. at 260. The court held that the regulation did establish a bfoq and stated that such a holding was necessary "in order to give proper deference to an administrative agency which is much better equipped than is the court to handle issues concerning the safety of those involved in domestic air traffic." *Id.*

It should be noted that the FAA regulation in question in *Tuohy* is used as an example of a bfoq in the Department of Labor bulletin interpreting the ADEA. *See* 29 C.F.R. § 860.102(d) (1980).

lem."[94] But the *Tuohy* court felt that the *Tamiami* standard needed some refinement before it could be applied to the case before it, where safety was a primary consideration.[95] However, the court essentially took the approach of *Tamiami*, putting the bfoq defense to a two-part test. Finally, in *Beck v. Borough of Manheim*,[96] the court applied the *Tamiami* rationale in upholding a mandatory retirement age for all members of a small-town police force.[97]

Thus, no court outside the Seventh Circuit has expressly adopted the *Greyhound* rationale. Although *Greyhound* and *Tamiami* appear at first to differ only slightly, it seems clear on closer reading that the "two-pronged test" of *Tamiami* imposes a heavier burden on the defendant asserting a bfoq and so is more in keeping with the spirit of the ADEA.[98] In both cases, the court required the defendant to show that the asserted exemption was a matter of business necessity, as that standard was set forth in *Diaz v. Pan American World Airways, Inc.*[99] Further, both courts required some justification beyond mere assumption for the use of age as the determining factor in judging an individual's fitness for the job in question, and the language used by the two courts in this regard differs only slightly. Where the *Greyhound* court required "a rational basis in fact to believe" that eliminating the hiring policy would increase the risk of harm to passengers,[100] the *Tamiami* court called for "reasonable cause, that is, a factual basis for believing" that all applicants over age 40 would prove to be unsafe drivers.[101] The real difference between the two cases, however, is apparent in the way in which the two courts applied the standards set forth. The *Greyhound* court was ultimately satisfied with the defendant's "good faith belief" in the necessity of its hiring policy,[102] suggesting a more subjective approach than the step-by-step analysis of the court in *Tamiami*.[103] This in turn suggests that the court in *Greyhound* was more easily satisfied on the issue.

This suggestion was borne out in a recent Seventh Circuit case,

94. 490 F. Supp. at 261.

95. *Id.* at 262. For a discussion of the court's criticism of *Tamiami*, *see* note 194 *infra*.

96. 505 F. Supp. 923 (E.D. Pa. 1981). Plaintiff was forced, by the terms of a town ordinance, to retire from the town police force at age 60.

97. *Id.* at 925-27.

98. *See* note 10 *supra*.

99. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *See* text accompanying notes 35-40 and notes 54-59 *supra*.

100. 499 F.2d at 863.

101. 531 F.2d at 236.

102. 499 F.2d at 865.

103. 531 F.2d at 235-36.

EEOC v. City of Janesville,[104] in which the court again indicated its willingness to give a broader interpretation than that of other courts to the bfoq exemption under the ADEA.

EEOC v. City of Janesville

Facts of the Case

Kenneth Jones was appointed chief of police of Janesville, Wisconsin, in 1975. On June 30, 1979, nine days after his fifty-fifth birthday, he was forced to retire,[105] pursuant to a city policy that all "protective service" employees, a category which includes all members of the police force, must retire at the end of the calendar quarter during which they reach age 55.[106] The city's policy is patterned after the statutory provisions of the Wisconsin Retirement Fund,[107] which creates a retirement plan for all public employees in the state. The statute allows compulsory retirement of employees participating in the fund on their "normal retirement date,"[108] and defines normal retirement for "protective occupation employees" as "the day on which such [employee] attains the age of 55 years."[109] Among protective occupation employees are "policemen, including the chief and all other officers."[110]

The city described the job of chief as calling for "responsible administrative work directing all activities and employees of the City Police Department."[111] The retirement policy, however, did not take into account the demands of the particular position or the physical condi-

104. 630 F.2d 1254 (7th Cir. 1980).

105. EEOC v. City of Janesville, 480 F. Supp. 1375, 1377 (W.D. Wis. 1979), *rev'd*, 630 F.2d 1254 (7th Cir. 1980).

106. *Id.* It is possible under the city's policy for an employee who has reached the retirement age to get an extension for one year if retirement would cause hardship for the employee or administrative problems for the city. Jones had applied for such an extension, but it was denied. *Id.*

107. 6 WIS. STAT. ANN. ch. 41 (West 1979 & Supp. 1980). "As a participant in the [fund], the city pays the total cost of the retirement program for its police personnel and its contribution in this case amounts to approximately twenty-five percent of Jones's annual salary." 630 F.2d at 1256.

108. 6 WIS. STAT. ANN. § 41.11(1) (West Supp. 1980).

109. *Id.* § 41.02(23).

110. *Id.* § 41.02(11)(a).

111. The complete description of the job requirements, as given by the district court, is as follows:

> [C]omprehensive knowledge of modern police administration, the rules and regulations of the Police Department, police science, organization and operation, the use of police records, and the standards by which the quality of police work is evaluated; an ability to command the respect of officers, to supervise their work, to maintain effective relations with the public and other city employees, to express ideas clearly orally and in writing, and to prepare clear, accurate, comprehensive recommendations and reports; and good physical condition.

480 F. Supp. at 1377.

tion of the employee. Jones was forced to retire only because he had reached age 55, without regard to the quality or demands of his work.[112]

District Court Opinion

The EEOC brought suit in Jones' name to enforce his rights under the ADEA,[113] and in advance of trial sought a preliminary injunction to reinstate Jones pending the outcome of the trial on the merits. To prevail on its motion, the EEOC of course had to demonstrate the likelihood of its success on the merits.[114]

Since the plaintiff had made out a prima facie case of age discrimination,[115] the district court dealt with the motion by examining the

112. *Id.*

113. Jones originally filed suit in his own name, basing his claim on the ADEA, on 42 U.S.C. §§ 1983 and 1985, on U.S. CONST. art. IV, and on the equal protection provisions of the fifth and fourteenth amendments. Pursuant to § 626(c)(1) of the ADEA, the EEOC elected to bring an action to enforce Jones' rights under that act, thereby terminating his individual action based on the ADEA. *See* 29 U.S.C. § 626(c)(1) (Supp. III 1979). However, the EEOC suit does not affect Jones' actions based on §§ 1983 and 1985, article IV, and the fifth and fourteenth amendments. 480 F. Supp. at 1376 & n.1. For a review of the procedural aspects of the ADEA, *see* Sheeder, *supra* note 62.

114. 480 F. Supp. at 1378. The court also noted that the EEOC was required to demonstrate irreparable harm to Jones in the interim should interlocutory relief be denied. *Id.* at 1380. For the district court's determination of this issue, *see* note 113 *infra*.

The granting or denial of a preliminary injunction under FED. R. CIV. P. 65 is a matter for the court's discretion, and it is ordinarily determined by balancing four factors: 1) the likelihood of irreparable harm to the plaintiff if the injunction is not granted; 2) the balance between this harm and the injury to the defendant if the injunction is granted; 3) the likelihood of plaintiff's success on the merits; and 4) the public interest. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2948 (1973) [hereinafter cited as WRIGHT & MILLER]. Since the court will weigh each factor, no single one will determine the issue, although the most important appears to be the likelihood of irreparable harm to the plaintiff. *Id.* Thus, even if plaintiff seems unlikely to win on the merits, preliminary relief may still be granted where the balance of hardship tips heavily in his favor. *See, e.g.*, Costandi v. AAMCO Automatic Transmissions, Inc., 456 F.2d 941 (9th Cir. 1972). *See generally* Nussbaum, *Temporary Restraining Orders and Preliminary Injunctions—The Federal Practice*, 26 SW. L.J. 265 (1972).

The order to reinstate Jones was the second preliminary order sought in *Janesville*, the district court having previously granted a temporary restraining order preventing the city from installing Jones' successor. 480 F. Supp. at 1376.

115. The court simply stated its conclusion that the EEOC had set forth its prima facie case. *Id.* at 1377.

One of the most controversial questions under the ADEA is what constitutes the plaintiff's prima facie case. Where the employer plainly states that the basis of the employment decision was the plaintiff's age, the question is an easy one. *See* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972). But in most cases, the discrimination is less obvious. In these cases, the plaintiff is generally required to demonstrate that he is a member of the protected group, that he was qualified for the job in question, that he was discharged or refused employment, and that the employer continued to seek or in fact hired someone with similar qualifications. *See* Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978); Cova v. Coca-Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978). *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (prima facie case of discrimination under Title VII). In addition, some courts have held that the person hired in place of the plaintiff must be from outside the protected age group before a violation of the ADEA

likelihood that the defendant would prevail on its affirmative defense. The city asserted that its retirement policy came within the bfoq exemption to the Act. In support of its assertion, the city argued that since the primary function of the police department is the protection of life and property, and since age is a valid criterion for employment in light of the physical demands of this type of work, all employees of the department could be subjected to the age requirement, regardless of their particular duties. Thus, the chief, although not actively involved every day in the duties of a patrolman, could be subjected to the same age limit as a patrolman. The city further offered reports of the State of Wisconsin Retirement Research Committee demonstrating that the statutory plan on which the city's policy was based was an expression of the good-faith judgment of the state legislature that public safety demanded the retirement of all "protective service" employees at 55 years of age, regardless of their individual duties.[116]

The district court considered, however, that to allow a bfoq exemption on the grounds asserted by the city would go beyond the language and intent of the ADEA.[117] Such a broad classification of employees for the purpose of setting a mandatory retirement age, without regard to the particular job of each member of the class, would "deprive whole classes of older workers of the protection of the ADEA if they worked in 'businesses' whose primary function could be said to involve qualities associated with youth."[118] The focus, the court held, must be on the particular job in question, not on the primary function of the police department: "At the threshold, defendant City must show a relationship between being younger than fifty-five and the demands of the chief's job."[119]

occurs. *See* Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981); Houser v. Sears, Roebuck & Co., 627 F.2d 756 (5th Cir. 1980). Other courts and the Department of Labor, however, have taken the view that it is enough if the plaintiff is replaced by someone younger, though still within the protected class. *See* Wilson v. Sealtest Foods Div., 501 F.2d 84 (5th Cir. 1974); Moore v. Sears, Roebuck & Co., 464 F. Supp. 357 (N.D. Ga. 1979); 29 C.F.R. § 860.91 (1980). It has been held that intent to discriminate on the part of the defendant is not an element of the plaintiff's case. *See* Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980). *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (not required that plaintiff show defendant's discriminatory intent to establish violation of Title VII). Nor is it necessary that age be the only factor in the employer's decision, as long as it is the determining factor. *See* Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

116. 480 F. Supp. at 1379-80.

117. *Id.* at 1379.

118. *Id.*

119. *Id.* In this respect, the court noted elsewhere:

> [I]t is quite obvious that the effect of the ages of the department members upon the normalcy or absence of normalcy in the operation of the department can be gauged only by addressing precisely the particular activities of a particular employee or category of employees (dispatchers, for example). The effect of the ages of all of the members of the

The reports submitted by the city in support of its bfoq defense failed to show any empirical basis for analyzing the relationship between age and a particular "protective service" job.[120] At best, the court said, they demonstrated that the legislature was not deliberately discriminating against older workers, but had made its judgment on mandatory retirement in good faith.[121] This, the court held, was insufficient. Since the city had submitted no evidence showing the relationship between being younger than 55 and the demands of the chief's job, it had failed to demonstrate the likelihood of its success on the issue at trial.[122] Therefore, the court held, the plaintiff was likely to prevail and the injunction reinstating Jones was granted.[123]

Seventh Circuit Opinion

The city appealed the order, and the Seventh Circuit reversed, dissolving the injunction.[124] While agreeing with the lower court that the bfoq exemption is to be construed narrowly, the Seventh Circuit declared that the lower court had given an excessively narrow reading to the provision, especially in the context of a preliminary injunction proceeding.[125] The court also took exception to the district court's focus on the demands of the chief's job. Dismissing the legislative history relied upon in the opinion below,[126] the court declared that the plain

> department . . . cannot be gauged by addressing only the particular activities of the patrol officers.

Id. at 1378. In support of its view, the court cited the cases discussed above and the legislative history of the ADEA. *Id.* at 1379.

120. *Id.* In fact, the court pointed out, one report suggested the arbitrary nature of the policy, declaring that early retirement is less important in the case of administrative employees than for other, more physically demanding positions. *Id.* at 1380.

121. *Id.*

122. *Id.*

123. *Id.* The court also found for the EEOC on the issue of irreparable harm to Jones. The harm which the plaintiff (or Jones, in this case) claims he will suffer in the absence of the requested preliminary relief is balanced against the harm the defendant might suffer should the injunction be granted. *See* WRIGHT & MILLER, *supra* note 114, § 2948. In this case, the court held that the deterioration in Jones' morale and administrative skills pending the outcome of trial outweighed the managerial difficulties his reinstatement would create for the city. The court characterized the city's injury as self-inflicted. 480 F. Supp. at 1380-81.

124. 630 F.2d 1254 (7th Cir. 1980). Along with the bfoq issue, the Seventh Circuit was faced with the question of irreparable harm and a challenge to the ADEA on constitutional grounds. *Id.* at 1256. (As to the irreparable harm issue, *see* note 135 *infra*.) The constitutional challenge, asserting that the ADEA as applied to the states violated the reserved powers clause of the tenth amendment, had been raised in the district court on a motion for reconsideration of the order appealed from here. The motion had been denied. This constitutional issue was passed over by the Seventh Circuit, since the issue had not been fully adjudicated below. 630 F.2d at 1259.

125. *Id.* at 1258.

126. *Id.* In the court's words, "our examination of the legislative history of the ADEA yields no support for such a construction."

meaning of the Act's language supported the city's argument.[127] The bfoq exemption could be applied in light of the employer's business as a whole, and need not be viewed in terms of a particular occupation.[128] In the Seventh Circuit's view, the issue was not the relationship between age and the duties and demands of a particular "protective service" job, but whether the city could establish "a BFOQ for the generic *class* of employees subject to its retirement program."[129]

Having shifted the focus from the position of chief to the "business" of the police department as a whole, the court then addressed the legislative reports offered by the city in support of its defense. Conceding that the reports contained no empirical analysis of the relationship between age and any particular position, the court declared, however, that such a showing was unnecessary.[130] The reports did show that the legislature, in setting the retirement age, had acted in good faith out of concern for public safety, not simply to discriminate against older workers.[131] Such a showing, the court held, was sufficient.

Further, the court placed some emphasis on the fact that the policy in question was a legislative enactment, and it showed great deference to the judgment of the legislature: "That the wisdom of a legislative act is not subject to judicial scrutiny requires no citation."[132] The state, in creating the Wisconsin Retirement Fund, had created "a statutory presumption that age is a BFOQ for the class of protective service occupations covered."[133]

Thus, in the Seventh Circuit's view, the lower court had erred in requiring the city to direct its bfoq defense to the position of chief, and in requiring more evidence in support of the defense than had been submitted. Therefore, the court held, since the exemption could be applied in this case and the city had ample evidence to support it, the city did have a reasonable likelihood of prevailing on its asserted bfoq de-

127. *Id.* The court stated: "[The district] court ascribed to the term 'particular business' a meaning synonymous with the term 'particular occupation'. . . . [T]he plain meaning of the term 'particular business' is not susceptible to interpretation. That a particular occupation may by definition be encompassed within the meaning of the term 'particular business' is irrelevant." *Id.*

128. *Id.*

129. *Id.* The court distinguished Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975), by stating: "Nor do we find reliance on our decision in [*Greyhound*] to be dispositive because in that case a BFOQ was asserted to justify the mandatory age-based retirement of a generic class of employees." *Id.* The issue in *Greyhound*, however, was the validity of an employer's hiring policy. *See* notes 28-46 and accompanying text *supra*.

130. 630 F.2d at 1258.

131. *Id.* at 1258-59.

132. *Id.* at 1259.

133. *Id.*

fense at trial.[134] This in turn meant that the EEOC was not entitled to preliminary relief.[135] The lower court opinion was reversed and the injunction dissolved.

ANALYSIS

EEOC v. City of Janesville indicates that the Seventh Circuit is willing to depart even farther than it had in *Greyhound* from the narrow reading of the bfoq exemption adopted by other courts. It should be remembered that the bfoq defense in *Janesville* was examined in the context of a preliminary injunction proceeding, where the parties need not satisfy the court on the merits of a claim or defense to the same degree required at trial on the merits.[136] The parties must demonstrate the "reasonable likelihood" of prevailing. In this case, since the EEOC's prima facie case under the ADEA was easily made out, the issue turned on whether the defendant would be able to rely on the bfoq defense to defeat the claim.[137] It was necessary, therefore, for the city to demonstrate the reasonable likelihood of its success on the bfoq issue.[138] Thus, while the holding in *Janesville* does not mean that the defendant had actually established that a bfoq applies in this case, it does mean that in the court's view the defendant's evidence had demonstrated the essential elements of the defense.[139]

Three aspects of the opinion suggest that the court has construed the exemption in a manner which goes beyond the intent of Congress in providing for the bfoq exception: the court's refusal to focus on the duties of the particular job in question; the court's suggestion that empirical evidence is not needed to support an asserted bfoq; and the court's ready acceptance of a "statutory presumption" that age is a bfoq in this case.

134. *Id.*

135. *Id.* Since the granting of a preliminary injunction is determined by balancing the several factors involved, the court also addressed the question of irreparable harm to Jones. *See* note 114 *supra*. The court held that the EEOC had failed to demonstrate that Jones would be irreparably damaged in the absence of preliminary relief, finding nothing in the record to support the district court's conclusion regarding the deterioration of Jones' skill and morale. *Id.* at 1259.

136. "The standard for granting a preliminary injunction requires the plaintiff to show that he is likely to prevail on the merits and that in the absence of its issuance he will suffer irreparable injury." 630 F.2d at 1257. *See also* WRIGHT & MILLER, *supra* note 114, § 2948.

137. The district court framed the issue in these terms. 480 F. Supp. at 1378. The Seventh Circuit accepted this view of the issue. 630 F.2d at 1257.

138. 480 F. Supp. at 1378.

139. *See, e.g.*, 630 F.2d at 1258, where the court stated:

> The [district] court concluded that the plaintiff had a reasonable likelihood of sustaining its prima facie case in a trial on the merits because the City had failed to show by its evidence a BFOQ for the position of police chief. It is this conclusion with which we take exception.

Particular Job or Primary Function?

The defendant in *Janesville* used a novel argument in support of its bfoq defense. It urged the court to disregard the fact that the chief's duties are different from those of employees carrying out the primary function of the police department, the protection of life and property.[140] The city argued that since age is a bfoq for those engaged in the department's primary function, and since the chief's job is closely related to that primary function, age is a bfoq for the position of chief.[141] By the city's interpretation of the bfoq exemption, the focus is not on the duties of the particular job involved, but on the primary function of the employer's business.

Aside from noting that every previous case, including *Greyhound*, had analyzed the bfoq issue in light of the duties of the particular job,[142] the district court in *Janesville* pointed out the compelling reason to reject the city's argument. The purpose of the ADEA is to require that employment decisions affecting older workers be made not on the basis of age, but by examining the abilities of the worker: an applicant who can do the work cannot be rejected because of his age.[143] The bfoq exemption allows the employer to use age limits in circumstances where it is in fact necessary to be a certain age in order to qualify for the occupation. This exemption is to be construed narrowly,[144] however, and the more limited construction of the bfoq requires the employer to demonstrate that being a certain age is a necessary trait for the particular job involved. To accept the broader interpretation urged by the city in *Janesville* would "deprive whole classes of older workers of the protection of the ADEA if they worked in 'businesses' whose primary function could be said to involve qualities associated with youth."[145]

The Seventh Circuit accepted the broader reading of the bfoq, for which it found support in the "plain meaning" of the statutory lan-

140. 480 F. Supp. at 1378.

141. *Id.* at 1379. The city argued that the differences in the duties among particular jobs were "marginal or extraordinary aspects" of the business of the department and should not affect the court's analysis of the relationship between age and the primary function of the department. *Id.*

142. *Id.* The district court cited Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); and Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976).

143. *See* note 3 *supra* for text of 29 U.S.C. § 621 (1976); H.R. REP. NO. 805, 90th Cong., 1st Sess. (1967), *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213; President's Message on Older Americans, PUB. PAPERS 32 (Jan. 23, 1967).

144. *See* notes 10 & 23-24 *supra*.

145. 480 F. Supp. at 1379.

guage.[146] In the court's view, "Congress was certainly at liberty to limit the applicability of a BFOQ to a 'particular occupation' rather than to a 'business' if it so intended," but Congress chose not to do so, and thus the district court's reading of the exemption was "excessively narrow."[147] It appears, in fact, that this limitation is what Congress did intend.

Although the *Janesville* court dismissed the legislative history of the ADEA as yielding no support for the narrower construction,[148] there is some legislative comment which suggests that a narrow construction is the proper reading.[149] Further, and more importantly, the language of the statute itself suggests that the narrower construction is the proper one. There are two elements to the bfoq exemption. First, age must be a bona fide qualification, not for a particular business, but for an occupation, a particular job. Then, as a second element, the bfoq must be a matter of reasonable business necessity. This was the reading of the *Tamiami* court in formulating its two-part burden of proof which a defendant asserting a bfoq must satisfy.[150] This also appears to be the view taken in the interpretative bulletins, which phrase the question as whether "occupational qualifications will be deemed to be 'bona fide' *and* 'reasonably necessary to the normal operation of the particular business.' "[151] The first element, whether the "occupational qualification" is "bona fide," requires the employer seeking to rely on a bfoq to demonstrate that all persons above the age limit in question are unable to carry out the duties of the job involved.[152] In other words,

146. 630 F.2d at 1258. *See* note 127 *supra*.

147. 630 F.2d at 1258.

148. *Id*. *See* note 126 *supra*.

149. One remark, made during discussion of the bfoq exemption, suggests that the narrower interpretation was intended:

> The committee intends to make clear that . . . an employer would not be required to retain anyone who is not qualified to perform a particular job. For example . . . 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.

S. REP. NO. 493, 95th Cong., 1st Sess. 10-11 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 513-14 (report on the 1978 amendments to the ADEA).

150. *See* notes 47-59 and accompanying text *supra*.

151. 29 C.F.R. § 860.102(b) (1980); Proposed Interpretations, *supra* note 6, at 68,861.

152. Thus, in *Tamiami*, the defendant was required to offer proof that all persons over 40 would prove to be unsafe drivers, or to demonstrate that there was no other practical manner, apart from relying on age, to determine an applicant's unsafe propensities. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). Similarly, in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), the Title VII case from which a part of the *Tamiami* rationale was drawn, the defendant was required to offer proof that all women were unable to perform the duties of a switchman. In contrast, the *Janesville* court required no evidence that everyone over age 55 would be unable to do the work of the chief of police, or even that Jones himself was no longer able to do so.

the employer must show that in light of the duties of the job in question, the use of age as an indicator of fitness for the particular job is justified. If the employer fails to satisfy this element, the second element, the business-necessity question, is unimportant.[153]

An additional reason for rejecting the city's argument in *Janesville* is found in another section of the ADEA, section 623(a)(2), which makes it unlawful for an employer "to . . . classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's age."[154] The city's policy grouped all employees of the police department under the heading "protective service occupations," setting a mandatory retirement age without regard to the fact that a chief's duties are different from those of a patrolman or dispatcher.[155] The city argued that since it could demonstrate that some of its employees—the patrolmen who carry out the primary "protective service" function—could be lawfully forced to retire at a certain age,[156] all members of the police force could be lawfully retired at that age.[157] By accepting the argument, the *Janesville* court permits the mandatory retirement of a group of employees based solely on age, without regard to ability. The court ignores the fact that the operation of a police department involves "a bundle of coordinated activities,"[158] each activity with its own duties and demands, some

153. The *Tamiami* court called this business-necessity element the "threshold burden," indicating that the defendant must satisfy this part of the test first. 531 F.2d at 236. But since the defendant must meet both parts of the two-part burden of proof set forth in that case, showing business necessity alone will not suffice to justify an asserted bfoq.

154. 29 U.S.C. § 623(a)(2) (1976).

155. 630 F.2d at 1256.

156. It does seem clear that for patrol officers a mandatory retirement age could be justified under the ADEA. The legislative report referred to "particularly arduous types of law enforcement activity" as an example in which an age limitation may be properly used. *See* note 149 *supra*. Courts have agreed. *See, e.g.*, EEOC v. City of St. Paul, 500 F. Supp. 1135 (D. Minn. 1980) (retirement policy valid as to firefighters, though not when applied to district chiefs in administrative positions); Beck v. Borough of Manheim, 505 F. Supp. 923 (E.D. Pa. 1981) (mandatory retirement of police officers held lawful in circumstances where inability of any one officer to function effectively could have serious consequences).

157. 480 F. Supp. at 1379.

158. *Id.* at 1378. The district court characterized the operation of the police department as "an organic relationship among component jobs which mesh together to yield law enforcement," requiring for effective operation the cooperation of all persons involved:

> [P]olice officers on foot or in squad cars, patrolling the streets, sometimes chasing and apprehending persons, sometimes controlling crowds, sometimes quieting boisterous parties, sometimes resolving family quarrels, and so on; detectives engaged in interviewing or surveillance; telephone operators and dispatchers responding to and passing on information; record keepers; and an executive supervising the whole range of activity.

Id.

The Seventh Circuit, on the other hand, declared that it was irrelevant that "a particular occupation may by definition be encompassed within the . . . 'particular business.'" 630 F.2d at 1258.

more physically and psychologically taxing than others. The court suggests that by grouping all these activities under the heading of "protective service occupations" these differences can be disregarded and all employees can be made subject to the same retirement age. Yet this classification of employees deprives some members of the department of employment opportunities based solely upon age. The chief, though perhaps less able to do the work of a patrolman when he reaches age 55, is not necessarily less capable as an administrator at age 60 than at 55 or 50; but, because he is a "protective service employee," he must retire at age 55.[159] This appears to be the type of practice that section 623(a)(2),[160] with its ban on classifications that adversely affect older workers, was intended to prohibit.

Of course, a practice otherwise unlawful under section 623(a)(2), like any other practice the ADEA prohibits, can fall within the bfoq exemption in the proper circumstances.[161] However, it is difficult to see how *Janesville* presents a compelling case for the lawful use of such a broad categorization of employees, given the variety of occupations involved in the operation of a police department.[162] Unless the bfoq exemption is to be construed without regard to the prohibitions of section 623(a)(2), the better approach, that of the district court in this case,[163] is to sort out the "bundle of coordinated activities" and examine the age limitation in light of the duties of each particular "protective service occupation."

It clearly seems to stretch the bfoq defense too far to suggest that the bus company in *Greyhound* or *Tamiami*, having established the validity of its age limit for new drivers,[164] could now apply that same age

159. The district court pointed out in this case that the decision to retire Jones was based simply on the fact that he had reached age 55, and no consideration had been given to the quality of his work. 480 F. Supp. at 1377.

160. 29 U.S.C. § 623(a)(2) (1976).

161. *Id.* § 623(f)(1) provides that "any action otherwise prohibited" by the ADEA is not unlawful where age is a bfoq.

162. *See* the district court's description of the "normal operation" of the police department, 480 F. Supp. at 1378, in note 158 *supra*. As the district court pointed out, use of the broad classification "protective service employees" is inappropriate in this case, because "[t]he effect of the ages of all of the members of the department upon the normalcy of the department's operation cannot be gauged by addressing only the particular activities of the patrol officers." *Id.* It appears that the use of such a classification would only be justifiable in a case where for each job within the group there was some demonstrated relationship between age and the ability to perform.

163. *Id.* at 1379. As the court noted, this was also the approach of virtually all other courts construing the bfoq, including the *Greyhound* court. For the cases cited in this respect by the district court, *see* note 142 *supra*.

164. In both cases the defendant succeeded in establishing age as a bfoq for the occupation of bus driver, so that upper age limits on hiring were held lawful. *See* the discussion of the cases in the text accompanying notes 28-59 *supra*.

limit to applicants for office jobs or other positions that do not involve driving. To allow an exemption in that case would ignore the purpose of the ADEA. Yet, if the bus company classified the positions involved as "transportation occupations," since all the jobs involved are presumably essential to the company's primary function of transporting passengers by bus, the rationale of the *Janesville* court would support such an argument. Such a broad construction of the bfoq exemption, focusing on the primary function of the employer's business rather than the duties of the particular job in question, will allow the use of age as the determining factor in the employment decision when in fact the job applicant or employee may be fully able to meet the demands of the job. This is precisely what the ADEA was intended to prevent.[165] The narrower approach, more in keeping with the letter and spirit of the ADEA, is to require the defendant to demonstrate that age is a valid criterion for employment because of the nature of the particular job involved in each case.

Empirical Evidence or Good Faith Judgment?

Even if the broad interpretation of the bfoq exemption is accepted, it would still be possible for the asserted bfoq defense to fail. An employer invoking the exemption must demonstrate some basis beyond mere stereotyping for the use of age as the determining factor in the employment decision.[166] The only evidence offered by the city in this regard in *Janesville* was a series of legislative reports containing no empirical evidence of the relationship between age and the ability to perform the duties of any "protective service occupation."[167] In suggesting that this was sufficient to justify the asserted bfoq defense, the *Janesville* court underlined the basic difference between the Seventh Circuit's approach to the bfoq issue and that of other courts.[168]

The district court in *Janesville* had rejected the legislative reports as insufficient because they failed to analyze the specific demands of individual jobs within the "protective services" classification in relation to age.[169] The reports not only failed to relate being younger than age 55 to the demands of the chief's job, but they apparently contained no

165. *See* note 3 *supra* for text of 29 U.S.C. § 621 (1976).

166. *See, e.g.*, Aaron v. Davis, 414 F. Supp. 453, 461 (E. D. Ark. 1977) (emphasis in original): "[A]t no point will the law permit . . . the fixing of a mandatory retirement age based entirely on hunch, intuition, or stereotyping, i.e., without *any* empirical justification."

167. 630 F.2d at 1258.

168. *See* notes 98-103 and accompanying text *supra*.

169. 480 F. Supp. at 1379-80.

data connecting age and any "protective service" position.[170] Moreover, in the district court's view, one report showed "the irrationality of the current state classification . . . by noting that 'the necessity of early retirement in the administrative position . . . is obviously of less concern than in the case of the law enforcement officer.' "[171] The reports did demonstrate, however, that the legislature had acted in good faith, believing that the early retirement of all employees in the classification was necessary in the interests of public safety.[172] The Seventh Circuit declared this sufficient to sustain the city's defense.[173]

The *Janesville* court here echoed the opinion in *Greyhound*, where the court was ultimately satisfied that the defendant's age-based policy rested on a good faith belief in its necessity for the safety of the company's passengers.[174] As in *Greyhound*, the court indicated that only a minimal showing that the age-based policy is not arbitrary or intentionally discriminatory is sufficient to justify a bfoq.

This standard is in sharp contrast to the narrower construction of the exemption adopted by other courts. *Tamiami* and the courts following that decision imposed a much stiffer burden of proof on the defendant, requiring empirical evidence that "all or substantially all" members of the age group in question would be unable to perform the duties of the particular job involved.[175] The *Tamiami* rationale, with its two-part test,[176] makes the exemption more difficult to justify and therefore less readily available to the defendant. If the bfoq exemption is to be construed narrowly and have limited application,[177] the *Tamiami* rationale is the better one.

If a bfoq exemption is allowed to be based only on the defendant's good faith belief in its necessity, without requiring any empirical justification for the age-based policy, the exemption will provide a loophole

170. *Id.* at 1380.

171. *Id.*

172. *Id.*

173. 630 F.2d at 1258-59. The Seventh Circuit also noted here that "but for the failure of the City's evidence to address . . . the position of police chief, which we have determined was not required, the district court was apparently willing to accept the statutory presumption that age is a BFOQ" in this case. *Id.* at 1259. However, this is not so clear from the district court opinion, which pointed out the absence of empirical evidence relating to any protective service position and noted that the reports suggested the arbitrariness of the retirement policy. 480 F. Supp. at 1380.

174. Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 865 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). The case is discussed in the text accompanying notes 28-46 and notes 99-103 *supra*.

175. *See* the cases discussed in the text accompanying notes 47-87 *supra*.

176. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 234-36 (5th Cir. 1976). *See* notes 47-59 and accompanying text *supra*.

177. *See* 29 C.F.R. § 860.102(b) (1979); Proposed Interpretations, *supra* note 6, at 68,861. *See also* note 10 *supra*.

which will allow a continuation of the arbitrary policies the ADEA was intended to prevent. Although the *Janesville* court put some emphasis on the fact that the city's retirement policy was not an act of deliberate discrimination against older workers,[178] the prohibitions of the Act are not limited to intentional acts of discrimination.[179] Regardless of the employer's intentions, any age-based policy which does not fall within one of the ADEA's exceptions is unlawful.[180] A refusal to hire because of the age of the applicant, or a mandatory retirement policy, would appear to be unlawful under the ADEA even though the employer is acting in what he believes to be the best interests of the older worker, unless the employer can demonstrate that age is an "occupational qualification." It is possible that an employer might believe in all good faith that anyone over age 55 is unable to do the work involved in a particular job, or that public safety requires that all persons in a particular occupation be under a certain age, and yet be mistaken in this belief.[181] If it is the case that the employer is mistaken, and in fact there is no relationship between age and the ability to do a particular job, then the policy is the type of practice the ADEA was meant to prohibit, since it is based on unfounded assumptions regarding age rather than on an assessment of the older worker's ability.[182] But by the reasoning of *Janesville* and *Greyhound*,[183] this good faith belief is

178. 630 F.2d at 1258.

179. Thus, it is stated that the Act is directed not only at arbitrary age-based employment policies, but at "certain otherwise desirable practices which work to the disadvantage of older workers." 29 U.S.C. § 621(a)(2) (1976). Further, that discriminatory impact alone is enough to violate the ADEA is apparent in that the Act provides for additional damages where the violation is shown to be unlawful. *Id.* § 626(b).

180. Title VII, similar to the ADEA in its language and purpose in prohibiting discrimination based on race, sex, religion and national origin, has been construed in this manner. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court held that Title VII was directed at the consequences of discriminatory employment policies, and that practices which were racially discriminatory in impact, even though not intentionally so, were unlawful under the act.

This view, that it is the impact of the disputed policy and not the employer's intentions which should be considered, has been taken by the court in an ADEA case. Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980).

181. For example, in EEOC v. City of St. Paul, 500 F. Supp. 1135, 1145 (D. Minn. 1980), the court pointed out:

> [T]he evidence introduced at trial does not establish that the traits of susceptibility to heart attack and loss of strength and endurance preclude District Chiefs over the age of 64 from safely and efficiently performing their duties. To the contrary, the evidence indicates that older, more experienced District Chiefs generally are better able than younger, less experienced District Chiefs to determine the hazards at a fire scene and direct fire fighting activities so as to avoid fire fighter injuries and fatalities.

The defendant in that case had argued that because of the decline in physical condition after age 64, older district chiefs were more prone to injuries and heart attacks themselves and were unable to perform their jobs safely.

182. *See* note 3 *supra*.

183. The *Greyhound* court did find that the defendant's age limitation in that case was not

sufficient to qualify the policy as a bfoq exemption. The exception, applied in this manner, all but eliminates the rule.

This danger does not arise when the defendant is required to supply some empirical basis for the policy in question. The ADEA does not insist that the employer hire an individual who is not qualified,[184] but it should be interpreted to require that the defendant have some proof, other than the age of the individual, that the person is in fact not qualified. It may be the case that all persons over a certain age are unable to meet the demands of a particular job,[185] and for this reason the bfoq exemption is established. By demanding that there be some objective proof that older workers are unqualified, as the court did in *Tamiami*,[186] the defendant will be unable to rely on an assumption which, though firmly believed, is in fact unfounded.

There is one element of the city's argument which indicates that the burden of justification should be somewhat reduced in this case—the safety factor. The retirement policy challenged in *Janesville* was instituted in the interests of the safety of the individual employees and of the public.[187] Courts have generally agreed that where public safety is the basis for the challenged age-based policy, there is some effect on the defendant's burden of proof on the bfoq issue. In *Tamiami*, the court regarded the safety factor as bearing on the business-necessity element of the two-part test enunciated in that case.[188] Thus, where the defendant demonstrated that the purpose of the age limitation was to assure the safety of its passsengers and other motorists, there could be no doubt that the policy was necessary to the normal operation of the defendant's business, since the normal operation of the business involved the safe transportation of passengers by bus.[189] But the defendant still had to demonstrate that there were facts underlying the assumptions on which the policy was based to satisfy the second element of the test.[190] However, in *Arritt v. Grisell*,[191] the court suggested

totally "lacking in objective reason or rationale," suggesting the court felt that it was presented with something more than simply the defendant's belief in the necessity of the policy. 499 F.2d at 865.

184. *See, e.g.*, S. REP. No. 493, 95th Cong., 1st Sess. 10-11 (1978), which is quoted in part in note 149 *supra*. *See also* the comment of the *Tamiami* court that the construction given the bfoq in that case does not require an employer to hire an unqualified individual. 531 F.2d at 236.

185. *See, e.g.*, the examples of bfoq exemptions given in 29 C.F.R. § 860.102 (1980), which are described in note 25 *supra*.

186. *See* notes 47-59 and accompanying text *supra*.

187. 630 F.2d at 1258.

188. 531 F.2d at 235-36. *See* note 54 *supra*.

189. 531 F.2d at 236.

190. *Id.* Some language in the opinion suggests that even this burden eases somewhat when safety is an issue. The court stated, when discussing the business-necessity element of the stan-

that where public safety is involved, the overall burden on the defendant to justify the policy should be reduced.[192] The *Arritt* court did not elaborate, but it seems clear that, since the court in that case had rejected the "minimal increase in the risk of harm" standard of *Greyhound*,[193] it did not mean to suggest that this minimal burden is appropriate. But the court was apparently indicating that even the second, factual-basis element of the *Tamiami* standard should be applied less strictly where the defendant's policy is based on a concern for public safety.[194]

The safety factor should have some effect on the defendant's burden of proof, and the ADEA should not require the defendant to experiment with lives or property in order to gather the data in support of its age-based employment policy.[195] But the defendant's simple assertion

dard, that "[t]he greater the safety factor . . . the more stringent may be the job qualifications." *Id.* Later in the opinion, the court declared that where safety is an issue, "the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb." *Id.* at 238. *Accord*, Murnane v. American Airlines, Inc., 482 F. Supp. 135 (D.D.C. 1979).

191. 567 F.2d 1267 (4th Cir. 1977).

192. *Id.* at 1271 n.14.

193. The question in *Arritt* was whether *Greyhound* or *Tamiami* presented the better standard. The court chose *Tamiami*. *See* the discussion of the case in the text accompanying notes 80-87 *supra*.

194. In Tuohy v. Ford Motor Co., 490 F. Supp. 258 (E.D. Mich. 1980), the court took the view that the *Tamiami* test became less workable as the importance of the safety factor increased. Defendant argued in *Tuohy* that its 60-year retirement age for its private pilots was a bfoq because of the high risks involved in the job. Under *Tamiami*, the safety factor is considered only as part of the business-necessity element. *See* text accompanying note 188 *supra*. The *Tuohy* court noted that since safety concerns play no part in the determination of the second, factual-basis element, "[t]he court would treat this question [the plaintiff's ability to perform the job safely and efficiently] as it would any other where experts testify on both sides, and it would permit the fact finder to make the ultimate decision." 490 F. Supp. at 262. But a decision in favor of the plaintiff which turned out to be incorrect could have "catastrophic results." *Id.* The court considered the *Tamiami* approach too inflexible, since it would be applied in the same manner in cases, like the one before it, where the safety factor was "enormous" and in cases where the risks involved were not nearly as great. *Id.* at 263. A better approach in the opinion of the *Tuohy* court would apply a test of reasonableness to the age-based policy, determining the "proper amount of leeway" to be given an employer on a case-by-case basis. *Id.* The court ultimately sustained the bfoq defense on the defendant's motion for summary judgment.

See Murnane v. American Airlines, Inc., 482 F. Supp. 135 (D.D.C. 1979), another pilot case, in which the airline argued that its upper age limit for new pilots was a bfoq. While apparently applying the *Tamiami* standard to test the validity of the defense, the court stated that "American should be able to apply a reasonable general rule in order to minimize the risks of the disastrous consequences of an airline accident." *Id.* at 147.

195. The *Greyhound* court used this reasoning in rejecting the *Weeks* standard as too strict. 499 F.2d at 865. Recent decisions have echoed this rationale. Tuohy v. Ford Motor Co., 490 F. Supp. 258, 262 (E.D. Mich. 1980) ("If the court were to prohibit the defendant from terminating the plaintiff, and if it then turned out that the defendant's experts had been right, many people might lose their lives."); Murnane v. American Airlines, Inc., 482 F. Supp. 135, 147 (D.D.C. 1979) ("In some cases, the individual's interest in being free of employment discrimination on account of age must give way to the societal interest in having the safest air transportation system possible.").

that a concern for public safety underlies the challenged policy should not alone be sufficient to create a presumption that the policy is justified.[196] The *Janesville* court seems to have taken this view, however, in showing such deference to the judgment of the Wisconsin legislature. As with its acceptance of a good faith judgment in place of some empirical proof,[197] the court opens the way by this interpretation for the use of the bfoq exemption as a means to evade the purposes of the ADEA. A better view would require the defendant, where public safety is a concern, to make some showing that the age limitation in question in fact serves to assure the safety of those to be protected and that the assumptions underlying the policy—that those over a certain age are unable to perform the job safely—have some basis in fact.

The Statutory Presumption of a BFOQ

The *Janesville* court showed added deference to the defendant's good faith judgment in this case because the judgment was embodied in a state statute:[198] "That the wisdom of a legislative act is not subject to judicial scrutiny requires no citation."[199] It may be that the court was reluctant, on the basis of the limited evidence presented at a preliminary injunction proceeding, to examine the validity of Wisconsin's retirement plan for public employees.[200] But the opinion suggests, especially in the language quoted above, that because the policy is found in a statute, it is less subject to scrutiny under the ADEA than a similar practice of a private employer.

Since the 1974 amendments, the ADEA has included within its definition of employer "a State or political subdivision of a State."[201]

196. *See* note 68 *supra* for language of the court in *Aaron*.

197. *See* text accompanying notes 166-86 *supra*.

198. The city's policy was drawn from Wisconsin's statutory retirement plan for public employees. 6 WIS. STAT. ANN. ch. 41 (West 1979 & Supp. 1980).

199. 630 F.2d at 1259.

200. The court criticized the lower court opinion:

> It is true, as the district court properly observed, that an exemption to a remedial statute must be narrowly construed, but in our judgment, especially in the context of a preliminary injunction proceeding, the district court's construction of the exemption provided in Section 623(f)(1) of the ADEA is excessively narrow.

Id. at 1258.

201. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. § 630(b) (1976)). Those portions of the Fair Labor Standards Amendments of 1974 which extended minimum wage and overtime requirements to the states were challenged on tenth amendment grounds in National League of Cities v. Usery, 426 U.S. 833 (1976), and were held unconstitutional under the reserved powers clause. However, the sections of the act amending the ADEA, and specifically the section making the ADEA applicable to the states, were not at issue in that case. Several defendants in ADEA cases have argued that *National League of Cities* also invalidates these provisions, but the courts have held as to the ADEA that the act is a valid exercise of congressional power under the fourteenth amendment. Arritt v. Grisell, 567 F.2d 1267,

There is no suggestion in the ADEA itself, or in its legislative history, that the Act was meant to be applied differently when the defendant is the state rather than a private employer.[202] Nor have other courts taken this view. A city ordinance[203] and a state statute[204] mandating the retirement of fire chiefs, and a state law setting an upper age limit for applicants to police forces in the state,[205] have all been asserted as bfoq exemptions, and each has been held subject to the same standard of justification as the age-based policies of private employers.

While the interpretative bulletins do not address this issue under the ADEA, the EEOC has issued guidelines with respect to state laws claimed as bfoq exemptions in sex discrimination suits under Title VII. Title VII recognizes that for some jobs sex may be a bona fide occupational qualification,[206] and in several cases it has been argued that because a state law bars women from certain occupations, ostensibly to protect them, this is enough to qualify the ban as a bfoq under the Act.[207] But the EEOC's guidelines take a contrary view: state laws which "do not take into account the capacities, preferences, and abilities of individual females, and, therefore, discriminate on the basis of sex, . . . will not be considered a defense to an otherwise established unlawful practice or as a basis for the application of the [bfoq] exemp-

1269-71 (4th Cir. 1977); Aaron v. Davis, 424 F. Supp. 1238, 1239 (E.D. Ark. 1976). The defendant in *Janesville* also raised this argument on appeal, but it was not addressed by the court. 630 F.2d at 1259. For a discussion of the ADEA issues raised by *National League of Cities*, *see* Note, *The Constitutionality of the ADEA after Usery*, 30 ARK. L. REV. 363 (1976) (commenting on *Aaron*); Note, *National League of Cities v. Usery: Its Implications for the Equal Pay Act and the Age Discrimination in Employment Act*, 10 U. MICH. J.L. REF. 239 (1977).

202. H.R. REP. NO. 913, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2850, commenting on the amendments, states: "The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs . . . as it has and continues to do in private employment."

203. Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976). *See* text accompanying notes 62-72 *supra*.

204. EEOC v. City of St. Paul, 500 F. Supp. 1135 (D. Minn. 1981). See note 79 *supra*.

205. Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977). *See* text accompanying notes 80-87 *supra*.

206. 42 U.S.C. § 2000e-2(e) (1976).

207. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (Alabama law barring women from those "correctional counselor" positions requiring close contact with male inmates); Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973) (state law setting maximum weekly hours for women); Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (state law barring women from upper ranks of correctional facility staff); Manley v. Mobile County, 441 F. Supp. 1351 (S.D. Ala. 1977) (sheriff's department regulation barring women from guard positions in all-male jail); Mitchell v. Board of Trustees, 415 F. Supp. 512 (D.S.C. 1976) (school board ban on pregnant women in teaching positions); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972) (state law setting maximum daily and weekly hours for women); Jones Metal Prods. v. Walker, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972) (statutory ban on women in certain occupations).

tion."[208] There is no presumption that a practice is lawful simply because it is embodied in a statute. Thus, in those cases where the statutory ban on women has been asserted as a bfoq, the defendant has been required to supply some justification for the practice beyond the fact that it has the legislature's stamp of approval. Where no other justification sufficient to sustain the practice has been offered, the statute has been struck down.[209]

The deference shown by the *Janesville* court to the legislative judgment that age is a bfoq for "protective service" employees, therefore, is inappropriate. The ADEA, by including the states within the definition of employers, intends that state laws and practices which have a discriminatory impact on older workers be subjected to the same scrutiny as similar practices of private employers.

CONCLUSION

The immediate effect of *EEOC v. City of Janesville*, it appears, will be that the city will prevail at trial on its bfoq defense and Jones will be denied relief under the ADEA.[210] A decision on a motion for preliminary relief is binding only with respect to the issues and facts presented at the hearing on the motion, and it is possible that the outcome may change after the issues are fully tried.[211] But the broad interpretation of the bfoq exemption given by the court in *Janesville* indicates that the city has demonstrated all the necessary elements of the defense as far as the court is concerned. It will be difficult for the EEOC to rebut the city's case.

More generally, the *Janesville* decision suggests that the Seventh Circuit is willing to go far to uphold an employer's assertion of a bfoq

208. 29 C.F.R. § 1604.2(b)(1) (1980).

209. *See, e.g.*, Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); Gunther v. Iowa State Men's Reformatory, 426 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); Manley v. Mobile County, 441 F. Supp. 1351 (S.D. Ala. 1977); Mitchell v. Board of Trustees, 415 F. Supp. 512 (D.S.C. 1976); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972); Jones Metal Prods. v. Walker, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972).

But see Tuohy v. Ford Motor Co., 490 F. Supp. 258 (E.D. Mich. 1980), an ADEA case in which the defendant supported its practice of retiring its private pilots at age 60 by citing the Federal Aviation Administration regulations setting age 60 as the upper limit for commercial airline pilots. 14 C.F.R. § 121.383(c) (1980). The court, viewing the issue as "whether or not 14 C.F.R. 121.383(c) in and of itself establishes a bfoq," answered in the affirmative, "in order to give proper deference to an administrative agency which is much better equipped than is the court to handle issues concerning the safety of those involved . . . and in order to avoid a needless duplication of effort." 490 F. Supp. at 260.

210. However, Jones' claims based on 42 U.S.C. §§ 1983 and 1985, U.S. CONST. art. IV, and the fifth and fourteenth amendments remain unaffected. *See* note 113 *supra*.

211. *See* 11 WRIGHT & MILLER, *supra* note 114, § 2950.

in an age discrimination case. This deference to an employer's judgment on the relationship between age and the ability to perform is questionable in light of the ADEA's express purposes of eliminating age-based stereotyping and of promoting the employment of older workers based on their abilities. The court's insistence on focusing on the primary function of the employer's business, rather than on the particular job in question, gives a further advantage to the employer. By the rationale of *Janesville*, the way is opened for the widespread use of the bfoq exemption where an employer's business is one which primarily must employ younger workers. Such a broad interpretation of the bfoq is not in accord with the spirit of the ADEA.

CHARLES J. RYAN, JR.