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# Mandatory Retirement - A Vehicle for Age Discrimination

Elaine S. Fox

## NOTES AND COMMENTS

# MANDATORY RETIREMENT—A VEHICLE FOR AGE DISCRIMINATION

> "A man's ageing and his decline always takes place inside some given society: it is intimately related to the character of that society and to the place that the individual in question occupies within it."[1]
>
> SIMONE DE BEAUVOIR

## I. INTRODUCTION

In a society obsessed with youth and productivity, there is no place for the older worker, as a result the condition of the elderly is a deplorable one.[2] Though the poor and minorities are the most heavily burdened, no class, race, ethnic group, or sex are untouched by the pernicious effect of age discrimination. The White House, cognizant of the elderly's plight, in a recent position paper stated that:

> [the] administration is deeply committed to involving older citizens as actively as possible in the life of the nation, by enacting their opportunities for both voluntary service and regular employment.
>
> The President promised to send a directive to the heads of all federal departments and agencies emphasizing the administration policy that age should be no bar to a federal job when an individual is otherwise qualified to fill it.[3]

In 1967, Congress also intended to relieve the elderly's desperate situation by enacting the Age Discrimination in Employment Act.[4] Despite these official pronouncements and the passage of this legislation, pitifully little has been done to resolve the predicament of the aged.[5]

Most people philosophically agree that discrimination based on race, re-

1. S. de BEAUVOIR, THE COMING OF AGE, 56 (1973).
2. *The Aging in America*, 10 TRIAL 11 (Mar./Apr. 1974).
3. Beckman, *Nixon Plan for Elderly Is Outlined*, Chicago Tribune, March 24, 1972, sec. 2, at 12, col. 1.
4. 29 U.S.C. § 621 (1967). It should be noted that "on a percentage basis minorities are actually less affected" than other groups. Letter from Martin Hochbaum, urbanologist, American Jewish Congress, to author, May 10, 1974; *See also, Some Demographic Aspects of Aging in the United States*, U.S. DEPT. OF COMMERCE CURRENT POPULATION REPORTS, series P-23, No. 43, (Feb. 1973).
5. *See infra* discussion.

ligion, or sex is invidious. Unfortunately, discrimination against the elderly enjoys widespread social approval.[6]

There is a problem that is faced by the elderly that is not faced by any other minority segment in society. That problem is mandatory retirement. This article will attempt to analyze the negative effects of mandatory retirement, the role of organized labor in aiding the older worker, the Age Discrimination in Employment Act[7] and the individual's recourse in protecting himself through litigation. Perhaps through this analysis more viable remedies can be developed for providing work opportunitites for the capable elderly. These work opportunities should not be the result of arbitrary determinations based on age alone, but they should be founded on recent scientific and sociological data. Judges, legislatures, attorneys and unions must recognize and implement this research in order to effectively protect mature persons from arbitrary discrimination in employment. The following section analyzes the scientific and sociological data.

## II. MANDATORY RETIREMENT

There are three differing philosophies regarding retirement. The first philosophy views retirement as a time for increased leisure, a welcome escape from the work filled years of the past.[8] Voluntary retirement on an adequate income can be a highly satisfying experience. It affords freedom from pressure and opportunities for creativity. Conversely, the second philosophy adheres to a theory that employment is the most important role an individual undertakes; therefore, one should work as long as he can.[9] According to this school of thought, a person's value is dependent upon his skill and productivity.[10] A third philosophy is the middle position which advocates that the older worker be "slowly phased out of the work role" through part-time employment.[11] In addition, he should be offered paid employment in the retirement period.[12] This philosophy recognizes the fact that some older persons *must* continue working because Social Security and welfare benefits are inadequate.

The focus of this article will be on the estimated 34 per cent[13] of the

6. Porter, *The Toughest Form of Job Discrimination . . .*, Chicago Sun-Times, Nov. 18, 1973, at 103, col. 1; *see also* 28 U.N. GAOR 37 (Aug. 28, 1973).

7. 29 U.S.C. § 621 (1967) [hereinafter cited as ADEA].

8. WHITE HOUSE CONFERENCE ON AGING, RETIREMENT ROLES AND ACTIVITIES, (1971) [hereinafter cited as WHITE HOUSE CONFERENCE].

9. *Id.*

10. *Id.*

11. *Id.* at 11.

12. *Id.*

13. Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150, 162 (1971). Brief For Appellant at 25 n.18, Weisbrod v. Lynn, No. 73-1146 (D.C. Cir. 1974). It should be noted that it is difficult to estimate the number with accuracy. *See also* Abbott, *Covered Employment and the Age Men Claim Retirement Benefits*, 37 SOCIAL SECURITY BULLETIN at 3 (Apr. 1974).

elderly who have both the ability and the desire to continue working. These capable elderly are arbitrarily discriminated against, "contrary to the principle of equal employment opportunities."[14] This article does not address itself to those who voluntarily choose to retire, to those who can continue in the work force because of self employment, or to those whose particular occupations do not require their retirement.[15]

### A. *Myths That Support Mandatory Retirement*

Research has indicated that the nine most frequently cited reasons justifying mandatory retirement fall into two categories: the disabilities of the aged and administrative problems created by their continued employment.[16] Objections based on disability state that the elderly: 1. are less efficient; therefore, unable to maintain production standards; 2. experience an intellectual decline in old age;[17] 3. show a decrease in stamina and strength which causes an inability to comply with employer safety requirements; 4. cannot adjust to new work situations, new company policies and practices due to inflexibility; and 5. contract frequent illnesses resulting in absences from work.[18]

The administrative objections most often cited by employers include: 1. increased corporate insurance costs; 2. difficulty and costliness of administering "a selective retirement system on an individual basis";[19] 3. discouragement of new blood in the company; 4. fear that promotion openings would be hampered without mandatory retirement.[20] These premises are untenable in light of the facts.

Numerous studies have revealed that one's birth year is an irrelevant factor in determining capability.[21] "(P)erformance of middled-aged and older persons is at least equal to and often-times noticeably better than

14. *The National Council on the Aging*, INDUSTRIAL GERONTOLOGY 17 at 81 (Spring 1973).

15. *See* Brief For Appellant, Weiss v. Walsh, 324 F. Supp. 75 (S.D. N.Y. 1971); *aff'd* without opinion, Nos. 71-1398, 71-1852 (2d Cir. 1972), addendum and Brief For Appellant, Weisbrod v. Romney, No. 73-1146 (D.C. Cir. 1974) addendum. These addenda list famous individual's accomplishments past age 69. Some of the persons included are Mies van der Rohe, Frank Lloyd Wright, Michelangelo, Picasso, Bernard Baruch, James Bryant Conant, Robert Frost, David Ben Gurion, Golda Meir, Benjamin Franklin, Supreme Court Justice William O. Douglas, Pablo Casals, Toscanini, Immanuel Kant and many more.

16. S. CAL. L. REV. *supra* note 13.

17. Baltes and Schaie, *The Myth of the Twilight Years*, PSYCHOLOGY TODAY, 35 (Mar. 1974).

18. *See* note 16 *supra*.

19. *Id.* at 158.

20. *Id.* at 159.

21. *Id.*; WHITE HOUSE CONFERENCE ON AGING, EMPLOYMENT AND RETIREMENT, (1971) [hereinafter cited as WHITE HOUSE CONFERENCE ON RETIREMENT]: U.S. DEPT. OF LABOR, THE LAW AGAINST AGE DISCRIMINATION IN EMPLOYMENT 1303 (Sept. 1970); *see* also note 14 *supra*.

younger workers."[22] Because of the elderly's increased cautiousness and consciousness of safety regulations, they are less likely to cause accidents.[23] This is true despite the fact that older workers' reflexes are not as quick as their youthful counterparts.[24] Adjustments to new situations can be made by the elderly,[25] particularly where their economic condition necessitates it.

Recent research suggests that intellectual capacity of the elderly has not been properly measured by intelligence tests.[26] The score variations among age groups is due to the educational differences of each generation. Older people have had less formal education than younger people and their education relied more on memorization than problem solving.[27] Different generations also vary in their sophistication in taking tests. They also "differ in the extent to which they have been encouraged"[28] in intellectual achievement. Another reason for score variation is that the intelligence concepts and the measurement instruments used "are defined in terms of abilities most important during youth and early adulthood."[29] Prediction of school performance was the original purpose of intelligence tests thus "tests developed to measure the abilities of one generation may be invalid for another."[30]

The administrative objections advanced by employers in favor of mandatory retirement also lack substance. Higher insurance costs alone is not an adequate justification for discrimination against the elderly.[31] Instead

22. *Developments in Aging: 1972 and January-March 1973, A Report of the Special Committee on Aging, United States Senate*, 93rd Cong., 1st sess., at 72 (1973) [hereinafter cited as *Report On Aging*].

23. *See* note 16 *supra* at 161.

24. *Id.*

25. *Id.*

26. PSYCHOLOGY TODAY, note 17 *supra* at 36.

27. *Id.*

28. *Id.*

29. *Id.* at 37.

30. *Id.* at 36.

31. Because actuarial statistics favor the young, insurance rates also favor the young, but this is not the entire picture. Insurance costs should be a very incidental reason in an employer's removal of an employee. The cost factor is dependent upon the number of years the worker is employed, thus a new 25 year old worker can cost the company the same amount as the present 65 year old if the latter came to work for the company at age 25 also.

The cost of life insurance only becomes prohibitive to the employer when there is a lack of a pension program, a majority of the workers are over 65, the program does not have a cut back feature or reduction formula and the employer is locked into the situation because of a union negotiated contract. But in practice this is very rare and only 1% of group plan operations fall within this costly dilemma.

There are three types of coverage provided by employers: group life insurance, health insurance and disability insurance and it can be demonstrated that in the majority of cases, the insurance costs for retaining the over 65 year old are not so great. Most group life insurance is reduced by 50% at age 65 thereby resulting in a cost savings device to the employer and the employee. The reason for this reduction is that the need for life insurance is considerably reduced at 65. Even a 50 year old man does not gen-

the cost of administering a selective retirement system would be offset by the savings gained by retaining skilled, experienced employees and eliminating the costs of retraining new workers.[32] Generally, the percentage of older workers wishing to be retained in any one company would not be so great as to hamper promotions or discourage "new blood."[33] The older workers provide a stabilizing influence in a plant because they are not likely to seek new employment and are usually more loyal to their employers than younger employees.[34]

Medical and behavioral science studies have demonstrated the soundness of the concept of functional age rather than chronological age as the test for employability. However industry, commerce, unions and government agencies have not relied on these studies.[35] Instead they have relied upon a myth of the stereotyped inability of the elderly rather than "a rational assessment of individual capabilities or needs."[36] It is important to examine the pervasive effects of stereotyping the elderly on their economic, psychological and physical wellbeing.

### B. *Economic, Psychological, and Physical Consequences of Mandatory Retirement*[37]

Proponents of compulsory retirement tend to make unreasonable economic assumptions since retirement does not bring the pleasure of leisure when one is forced to live on a poverty level. "For most Americans, departure from the labor force brings a substantial decrease in income."[38] Even workers with retirement pension funds find these funds to be inadequate.

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erally need as much insurance because his children are older, thus reducing the need to provide for them and their education in case of death. Hence by reducing life insurance the older worker can be retained without financial harm to the employer.

Health and disability insurance are no major problems to the employer. The government has insured the older worker through medicare coverage; therefore, health insurance coverage costs reduce automatically at age 65. Many employers do not have disability insurance but for those that do, retaining 65 year old employees should not be an added cost to the employer because the benefits usually cease at age 65. Interview with Edward P. Phelan, Regional Manager of Guardian Life Insurance Company, in Chicago, Illinois, Mar. 6, 1974. General insurance information obtained from interview with Donald R. Dann, noted author and lecturer in the insurance field, Dann Brothers Inc. in Chicago, Illinois, Mar. 7, 1974.

32. S. CAL. L. REV., *supra* note 16.

33. *Id.* at 163.

34. *Id.*

35. WHITE HOUSE CONFERENCE, *supra* note 21.

36. S. CAL. L. REV., *supra* note 32, at 152.

37. *See generally* L.J. BESCHOF, ADULT PSYCHOLOGY (1969); V.M. BRANTL, READINGS IN GERONTOLOGY (1973); and C. TIBBITTS, HANDBOOK OF SOCIAL GERONTOLOGY, (1970).

38. *Developments in Aging, 1969, A Report of the Special Committee on Aging, United States Senate,* 91st Cong., 2d sess. (1970), at 146 [hereinafter cited as *1969 Report on Aging*]; *see also* Reno, *Compulsory Retirement Among Newly Entitled Workers,* SOCIAL SECURITY BULLETIN, No. 7, Mar. 1972, at 11.

The income from the pension fund does not coincide with increased costs of living and purchasing power declines.[39] Due to age discrimination and various restrictions of employment while on a pension, many needy elderly are unable to obtain another job in order to supplement their income.[40] These problems, coupled with increased longevity, contribute to the economic difficulties of the elderly. Life savings, earmarked for retirement, may no longer be sufficient to supplement the individual's income.

The elderly comprise a substantial percentage of our nation's poor.[41] Taking cognizance of the economic realities of the elderly, the legislature has increased the Social Security benefits.[42] However Social Security still provides insufficient funds and it has many inequities. The limit on the earned income for the purpose of the retirement test penalizes the elderly with no other income source. They *must* earn money in order to exist. Another inequity results for those who are forced to retire early because they receive decreased Social Security benefits and usually, these people are the ones who can least afford it.[43] Conversely those individuals that are able to continue to work past age sixty-five are not discriminated against by the Social Security Act. A "late retirement credit and a substitution of recent high earnings for lower past earnings in benefit calculations tend to increase benefits for people who are willing, able and permitted to work beyond typical retirement age."[44]

Not only is work economically important, it is psychologically a source of recognition in our society. The work ethic is tied in with being a respected member of the community. "[S]tudies have shown that morale and life satisfaction of employed persons are greater than in retired persons of similar health and socioeconomic status."[45] Mandatory retirement is another way for society to say that the older person is useless because society no longer needs his productivity.[46]

The American Medical Association Council on Aging disclosed that the denial of opportunity to work can threaten an individual's health.[47]

39. S. CAL. L. REV., *supra* note 36.

40. Davis, *Pension Provisions Affecting the Employment of Older Workers*, MONTHLY LAB. REV. (Apr. 1973).

41. *Legal Problems Affecting Older Americans, A Working Paper Prepared for the Special Committee on Aging, United States Senate*, 91st Cong., 2d sess., at 1 (1970). Poverty has been cited as a breeder of mental illness in the aged. "It can cause malnutrition and anemia that directly result in brain syndrome which, often unrecognized, becomes fixed." R.N. BUTLER, M.I. LEWIS, AGING AND MENTAL HEALTH, at 272 (1973).

42. Bloom, Public Policy Report, 2 PERSPECTIVE ON AGING, No. 4, (Aug., 1973).

43. The Aging Worker and the Union, AFL-CIO, at 21.

44. Letter from Virginia Reno, Social Security Administration, Office of Research and Statistics, to author, Sept. 13, 1973.

45. INDUSTRIAL GERONTOLOGY, *supra* note 14 at 81.

46. S. CAL. L. REV. *supra* note 39.

47. *Id.*

"[T]here is a growing body of knowledge which suggests that a major reason for the health problems exhibited by unemployed older individuals is related to damaging employment experiences in previous years."[48] Dr. Sidney Cobb[49] examined the impact of a plant closing on the physical and mental health of the workers. The study concluded that a loss of "a job can exacerbate diseases and even produce new illnesses",[50] thus indicating that idleness, rather than the aging process alone, may actually cause physical deterioration.

Despite these findings, generalizations must be avoided because economic conditions of employment, nature of the work, personality and general health factors may affect an individual's ability to continue in employment. A retirement study by G. F. Streib and C. J. Schneider[51] found that people " 'of higher income levels, higher educational attainments and higher occupational structure tend to work longer than their counterparts with lower socioeconomic status.' "[52] In juxtaposition, those groups employed in tedious assembly line or heavy labor type jobs cannot retire fast enough.[53] As a result of their retirement, their health improved rather than declined. These findings illustrate "how difficult it is to generalize from either the clinical or the social science perspective."[54]

The relegation of the elderly to a single role should not be permitted. They are individuals with different values, capacities, personalities and life styles.[55] A person's worth should be measured by his individual capacity, unique to each human being, rather than the number of years he happens to be on earth.[56] "Compulsory retirement is unfair to the capable older worker, psychologically and socially damaging and economically wasteful"[57] to the individual and the country.[58]

48. *1969 Report on Aging, supra* note 38, at 115.
49. He is with the institute for Social Research of the University of Michigan.
50. *1969 Report on Aging, supra* note 48, at 115.
51. G.F. STREIB, C.J. SCHNEIDER, RETIREMENT IN AMERICAN SOCIETY, (1971).
52. AGING AND MENTAL HEALTH, *supra* note 41, at 264.
53. Smedley, *Patterns of Early Retirement*, THE AMERICAN FEDERATIONIST (Jan. 1974) has a comprehensive discussion on the problems of early retirement. Interview with Carl Shier, International Representative with the United Auto Workers, in Chicago, Illinois, Mar. 20, 1974.
54. AGING AND MENTAL HEALTH, *supra* note 41 at 264; *see also*, letter from Morton A. Lieberman, Professor of Psychiatry at University of Wisconsin Medical School, to author, Mar. 21, 1974.
55. WHITE HOUSE CONFERENCE, *supra* note 8.
56. *Improving the Age Discrimination Law, A Working Paper*, prepared for use by the Special Committee on Aging, United States Senate, 93rd Cong., 1st sess., at 35, (Sept., 1973) [hereinafter cited as *Improving ADEA*].
57. INDUSTRIAL GEREONTOLOGY *supra* note 14, at 82.
58. *1969 Report on Aging, supra*, note 50. The cost of retirement to the government is enormous. In 1968 25 billion dollars was paid out through Social Security and 2.1 billion dollars to federal civil service retirees. AGING AND MENTAL HEALTH, *supra* note 41 at 270.

## III. COLLECTIVE BARGAINING—A MEANS TO IMPROVE THE ECONOMIC SECURITY OF THE ELDERLY[59]

### A. *Nature of Collective Bargaining*

Organized labor is one means of improving the elderlys' economic position because collective bargaining is the principal method for determining wages, hours and other conditions of employment for those who work for others.[60] Numerous decisions and awards have frequently sustained compulsory retirement as a proper subject for collective bargaining.[61] It has been held to be in the same category "as the right to bargain and contract for wages, seniority, and discharge of employees . . . ."[62] Retirement age is bargainable because it affects a condition of employment, the right to work.[63] However, the increase of benefits for persons retired has been held not to be a mandatory subject of collective bargaining. The Supreme Court, in *N.L.R.B. v. Pittsburg Plate Glass*,[64] reasoned that as the individuals were no longer employees there is no duty to bargain for them. Therefore, the worker must be presently employed and under contract in order to receive any benefits relating to retirement. However, the recent contract negotiations between Basic Steel and United Steelworkers of America has resulted in an escalator provision in their new pension plan.[65] This additional payment added to retirees monthly pension amount will reflect the rising living costs and will enable older retired workers to cope with the rapid escalation in prices. This advantageous provision is an outstanding example of the manner in which collective bargaining can insure the economic security of older workers.

In order to participate in collective bargaining, employees choose, through a majority vote, a bargaining representative.[66] The employees are then bound by the agreement their representative and the company negotiate.[67] Collective bargaining agreements only include agreed upon employ-

59. *See generally* Serwer, *Mandatory Retirement At Age 65—A Survey of the Law*, INDUSTRIAL GERONTOLOGY 11 (Winter 1974).

60. Honeggers, 71-1 CCH ARB ¶ 8214 (Feb. 4, 1971). *See generally* DANEY, CONTEMPORARY COLLECTIVE BARGAINING (1959).

61. McMullans v. Kan., Okla., and Gulf Ry. Co., 229 F.2d 50 (10th Cir. 1956); Ricks v. Norfolk and Western Ry. Co., 184 F. Supp. 119 (E.D. Va., 1960), Lamon v. G. So. and Fla. Ry. 212 Ga. 63, 90 S.E. 2d 658 (1955); Pacific Coast Container Corp. 72-1 CCH ARB. ¶ 8016 (1972); Ingersoll-Rand Co., 42 LA 483 (1964) (Scheiber, Arbitrator); T.W.A. Inc. 31 LA 45 (1958) (Platt, Arbitrator).

62. McMullans v. Kan., Okla., and Gulf Ry. Co., 229 F.2d 50 (10th Cir. 1956) at 55.

63. Ingersoll-Rand Co., 42 LA 483 (1964) (Scheiber, Arbitrator).

64. N.L.R.B. v. Pa. Plate Glass, 404 U.S. 157 (1971).

65. Interview with Sam Evett, Director of District 31 of the United Steelworkers of America, in Chicago, Illinois, Apr. 16, 1974.

66. McMullans and Lamon, *supra* note 61.

67. *Id.*; Flowers v. Bhd. of Locomotive Firemen and Eng'rs, 212 Ga. 142, 91 S.E. 2d 41 (1956) at 43 holds that "no employee, a member of the class represented by the

ment rights.[68] But these agreements can provide for revisions and abrogations by future valid amendments;[69] therefore, they do not give permanent status to seniority rights.[70] Seniority rights are threatened by mandatory retirement. Consequently, in situations where individuals are forced to retire, disputes as to the distinctions between discharge and retirement often arise.[71]

## B. *Arbitration*

### 1. *Discharge versus Retirement Disputes*

Despite numerous rulings that have held age alone is not just cause for discharge, *United States Steel Corporation v. Nichols* clarified the distinction between discharge and retirement:

> In the absence of an established, bona fide, uniform retirement plan, the company could not 'discharge' an employee without cause 'by the simple expedient of saying that the employee had been retired, and in that manner avoid the consequences of breaking a contract which prohibits discharges except for cause.'[72]

This distinction has been further explicated through arbitration.

Arbitration results when there are disputes as to the meaning of the collective bargaining agreement.[73] There is no *stare decisis* in arbitration awards; therefore, they are decided on the facts and circumstances in each case.[74] A review of arbitration cases can, nonetheless, give a general idea as to the manner in which grievances involving mandatory retirement are being handled.[75]

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bargaining agent, would have a right to negotiate independently a contract of employment with the railroad."

68. U.S. Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir. 1956) held that although the union justifiably disagreed with the forced retirement policy of the company, the company had a common law right to exercise that policy until the union and company would agree.

69. Lamon, *supra* note 61.

70. *Id.*; the union is under no duty to inform their members of any changes in the contract, Ricks v. Norfolk and W. Ry. Co., *supra* note 61.

71. Brickles, Inc., 65-2 CCH ARB ¶ 8700 (1965) (Bell, Arbitrator).

72. *See supra* note 68 at 403.

73. The courts have jurisdiction of these disputes only when there is a dispute as to the agreement's validity, Lamon, *supra* note 69; or when there is a question as to their arbitrability, Timken Roller Bearing Co. v. N.L.R.B., 325 F.2d 746 (6th Cir. 1963) and American Stores Co. v. Johnston, 171 F. Supp. 275 (S.D. N.Y. 1959); or when the company is unwilling to comply with the grievance procedure, United Protective Workers of America v. Ford Motor Co., 194 F.2d 997 (7th Cir., 1952). Gunther v. San Diego and Ariz., E. Ry. Co., 382 U.S. 257 (1965) stated unequivocally that the power to interpret railroad union collective bargaining agreements and to arbitrate forced retirement grievances rests in the Railway Adjustment Board rather than the courts.

74. Armour Agricultural Chem. Co., 47 LA 513 (1966) (Larkin, Arbitrator).

75. Arbitrators interpret the contract. Even where the contract has expired, the arbitrator has ascertained that the old contract is in effect. Hale Bros., 32 LA 713 (1959) (Ross, Arbitrator).

In arbitrations involving forced retirement issues, the union usually argues that the employee was discharged without just cause where the contract does not specifically delineate a mandatory retirement policy.[76] The company contends that the employee has not been discharged but has been terminated for cause because there is an age limitation.[77] Arbitrators have tried to define the difference between discharge and retirement. Discharge has been distinguished as being unilateral, while retiremnt connotes some bilateral action. Though retirement needs the tacit consent of the employee, the end result of retirement is the same as discharge—termination of employment.[78] Thus, a person is "deprived of an opportunity to exchange his skills and energies with his employer for monetary payments[.]"[79]

In order for the unions to avoid unjustified termination of employment for their members, they must appreciate what is required to circumvent a valid mandatory retirement policy. A review of forced retirement disputes can be helpful for an understanding of one method used by organized labor in protecting their workers' seniority rights.

2. *Mandatory Retirement Plans Require Union and Company Agreement*

Arbitrators have invalidated compulsory retirement where there has been no printed mandatory retirement plan in evidence.[80] A company cannot claim that they have consistently maintained a mandatory retirement policy unless they reveal documents to establish such a plan. Only the parties involved in the collective bargaining, not the arbitrator, can change an agreement through future negotiations.[81]

Arbitrators have not allowed companies to unilaterally draft forced retirement provisions which would terminate physically able and competent employees. For the company to do so would be a violation of the workers' security and seniority rights as set forth in the collective bargaining agreement.[82] Arbitrators have found that unilateral decisions by management to discharge capable workers due to age is discriminatory when it is not consistent with any pension plan, when there is no specified retirement age in the contract and when there is no established past practice of forced retirement.[83]

76. Brickles *supra*, note 71.
77. Beatrice Foods, Ind. Moulding and Frame Co., 71-1 CCH ARB. ¶ 8073 (1970). (Young, Arbitrator).
78. Brickles *supra* note 76.
79. Beatrice *supra* note 77 at 3264.
80. Beatrice *supra*, note 77; and Grancolombiana, Inc., 42 LA 559 (1964) (Altieri, Arbitrator). The courts also have invalidated mandatory retirement where the contract has no provision for mandatory retirement because age alone is an insufficent cause for discharge. United Protective Workers of America v. Ford Motor Co., 194 F.2d 997 (7th Cir., 1952).
81. Beatrice *supra* note 80.
82. Armour *supra* note 74; Grancolombiana *supra* note 80.
83. Grancolombiana *supra* note 82.

Companies have argued that they may exercise this unilateral right of mandatory retirement because: 1. it is their right to manage their business; 2. it is an accepted practice in industry;[84] 3. it is not unreasonable, arbitrary or capricious since all employees must retire at sixty-five;[85] 4. it is necessary to insure jobs for younger workers in economically depressed areas;[86] 5. it is a permissible policy so long as it is not a subterfuge to accomplish a discharge;[87] and 6. it is an enforcible policy regardless of previous practice.[88] The union rebuttal to these company assertions is that the bargaining table is the proper place to discuss mandatory retirement.[89]

Compulsory retirement requires the tacit consent of the union because it is a change in the employee's working conditions; therefore, the union must have notice of the plan and must have acquiesced to it. In *Trans World Airlines, Inc. and International Association of Machinists* the union had a history of vigorously protesting compulsory retirement every time they were confronted with the threat. The arbitrator held that the company cannot unilaterally

> introduce a compulsory retirement policy and hence a new condition for loss of seniority without giving prior notice to the Union of the intended change in the agreement and without bargaining collectively thereon. (Footnote omitted).[90]

The reason for this position by the arbitrators is that it is the union's obligation to protect their workers against any arbitrary actions of management, especially where these actions jeopardize the seniority rights and the job security of union members.[91]

A company that has never asserted its forced retirement perogative has not been allowed to do so without the union's approval.[92] The arbitrator in *Ingersoll-Rand Company* reasoned that the union was lulled into a false sense of security; consequently, the company was found to have waived its option to enforce mandatory retirement.[93] Notice to the union and the acquiescence to the forced retirement provision by the union appear to be mandatory.[94]

84. Brickles *supra* note 78.
85. Cook and Brown Lime Co., 68-2 CCH ARB. ¶ 8473 (1968) (Rice, Arbitrator); Beatrice *supra* note 81.
86. Brickles *supra* note 84.
87. Beatrice *supra* note 85.
88. Ingersoll *supra* note 61.
89. Beatrice *supra* note 85; Grancolombiana *supra* note 83; Hercules Powder Co., 37 LA 771 (1961) (Jones, Arbitrator).
90. 31 LA 45 at 51 (1958) (Platt, Arbitrator).
91. Hale Bros. *supra* note 75.
92. *Supra* note 61.
93. Ingersoll *supra* note 63.
94. Hale *supra* note 75; Hercules *supra* note 89.

3. *Interpretation of the Agreement*

The interpretation of the agreement is at the core of the arbitration proceedings and the contract provisions are interpreted as a whole.[95] Arbitrators will focus on contract provisions that expressly or impliedly prohibit age discrimination. For an employer to curtail seniority rights, the provision under which he acts must be clearly stated. If the agreement is silent on the issue of compulsory retirement, the company is unable to retire an employee mentally and physically capable.[96]

In the *T.W.A.* dispute the arbitrator focused on the contract clause that stated:

> Employees who have grown old in the service of the Company and become unable to follow their regular work to advantage shall be given preference of such light work as they are able to handle in their work classification.[97]

The arbitrator interpreted this provision to establish a policy of continuing workers in employment regardless of age, for as long as they can work competently.

A dispute involving *Armour Agricultural Chemical Company* further exemplified the manner in which arbitrators have construed a contract provision in favor of the elderly worker. The clause allowed for employee pensions for those "who shall have attained the age of sixty-five, and . . . shall cease active service" and it "permits, but does not require retirement . . . ."[98] The arbitrator interpreted this clause using the word "permit" as substantiating a flexible retirement policy. He further concluded that age discrimination is contrary to public policy and he cited an Executive Order of President Johnson:

> [D]iscrimination in employment because of age, except upon the basis of a *bona fide* occupational qualification . . . is inconsistent with that principle and with the social and economic objectives of our society . . . .[99]

Another contract provision that was interpreted to provide economic security for the elderly was found in the *Beatrice Foods* arbitration. The clause said:

> 'The Company will not discriminate in respect to hire, tenure of employment against any employee . . . . The provisions of this Agreement shall apply to all employees covered by this Agreement without discrimination on account of race, color, national origin, sex, AGE, or creed.' (Emphasis added).[100]

95. Ford *supra* note 80; T.W.A. *supra* note 61.
96. Armour *supra* note 74; Ingersoll *supra* note 73; Honnegers *supra* note 60.
97. T.W.A. *supra* note 61, at 51.
98. Armour *supra* note 82, at 513.
99. *Id.* at 518.
100. *Supra* note 77, at 3264.

Regardless of contract provisions, the arbitrator also analyzes the past practices of the employer. Where there is no past practice of enforcing retirement at a specified age, the findings are usually for the union.[101] In order for past practice to become part of a labor agreement, the practice must be well known, of long duration and mutually agreed upon by the company and the union.[102]

In contradistinction to the majority of arbitration awards two recent arbitrators found in favor of the elderly despite incapability and frequent absences. They required the company to reinstate the older workers after their forced retirement. In the *Pacific Coast Container Corporation* controversy, a man was retained by the company for three years despite his incapability. The arbitration award protected the older worker and held that the company could not unilaterally decide upon forced retirement.[103] In the other case the company forced early retirement because of the numerous absences of the worker. Although these absences were a result of a history of chronic illnesses, the union presented the medical diagnosis which found the employee capable and ready for continued work. The arbitrator found that the employer had a duty to warn the employee before termination.[104] Thus arbitration awards have protected older workers when they were forced to retire because of health and also where their jobs have been terminated due to plant closures.[105]

In juxtaposition to the above awards, some arbitrators have held that compulsory retirement at sixty-five is not unreasonable, arbitrary or capricious because many retirement plans and the Social Security Act coincides with this age. Since Social Security benefits are available to them, retirement is justified because jobs must be made available to the younger worker.[106]

Despite the questionable merit of the above opinion, mandatory retirement has been held to be valid only where there has been a long established policy, fairly and consistently enforced by the company. The union must have knowledge of the forced retirement policy and they must have acquiesced to it.[107]

101. American Stores and Ford *supra* note 73.
102. Honningers *supra* note 60.
103. Pacific *supra* note 61.
104. Gen. Tel. Co. of Calif., 72-2 CCH ARB. ¶ 8461 (1972). (Eaton, Arbitrator).
105. In the Matter of Arbitration Between UAW, Aerospace and Agricultural Implement Works and Ex-Cell-O Cor. Case no. 5430071172 (1973) (Sembower, Arbitrator); and Bower Roller Bearing Division of UAW, Grievance No. D1828 (1973) (Cole, Arbitrator), preferential transfers were ordered here.
106. Brickles *supra* note 71; Cook *supra* note 85.
107. U.S. Steel Corp. *supra* note 68; American Stores and Food *supra* note 73; Brickles *supra* 71; Cook *supra* note 85; Hercules *supra* note 89.

For a union to prevent age discrimination through forced retirement it should attempt to:

1. negotiate mandatory retirement out of any contract during collective bargaining if there is not an adequate pension plan; and
2. negotiate for flexible retirement during the bargaining procedure; and
3. protest any practice of involuntary retirement so that it cannot subsequently be construed as acquiescence to that policy.

The unions have been active in lobbying for better economic protection for the elderly through social legislation. They have accomplished much through collective bargaining.[108] Yet this response from organized labor has not been sufficient to combat discrimination against the elderly worker. The Age Discrimination in Employment Act[109] was specifically instituted to improve the sad condition of the elderly. An analysis of the Federal Act, state age discrimination acts and cases is essential to determine whether this legislation is accomplishing its noble purpose.

## IV. Legislation Regarding Age Discrimination

### A. *Age Discrimination in Employment Act*

Forced retirement is essentially a question of age discrimination.[110] Age discrimination bills were introduced in the Congress in the 1950's; however, no action was taken until the 1964 Executive Order 11141 made it public policy to ban age discrimination in employment under federal contracts. After investigation the Secretary of Labor concluded that age discrimination resulted in serious consequences to the economy and the individual.[111] In 1967 Congress finally acted to bar age bias by passing the Age Discrimination in Employment Act,[112] which "prohibits discrimination in employment because of age in hiring, job retention, compensation, promotions, and other conditions and privileges of employment."[113] The ADEA has been interpreted to deal with discharge practices, as well as hiring practices.[114]

The purpose of the Act is exemplary. It declares that:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain

108. *The Aging Worker and the Union, supra* note 43.
109. 29 U.S.C. § 634 (1967). [Hereinafter cited either as Act or EDEA].
110. Letter from Rudolph T. Danstedt, Assistant to the President of National Council of Senior Citizens, Inc. to author, Oct. 12, 1973.
111. *Improving ADEA, supra* note 56.
112. 29 U.S.C. § 621-634 (1967).
113. *Improving ADEA supra* note 56.
114. *See* Hodgson v. Am. Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn., 1971).

> employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially longterm unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (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.[115]

The ADEA must be studied as a whole in order to ascertain whether its purpose has been or can be effectuated.

### 1. *Substantive Problems in the ADEA*

The principle defect in the ADEA is that only those persons between forty and sixty-five are protected.[116] Consequently, persons under forty and over sixty-five can be discriminated against. The use of age sixty-five as the upward limit is arbitrary because it does not allow for individual differences.

In addition to the restricted age coverage, the definition of employer had been a limitation in the Act. Employer was defined as "a person engaged in an industry affecting commerce who has twenty-five or more employees."[117] With federal and state government employees being exempted as well, a vast number of persons were not covered by the ADEA. However the 1974 amendments to the ADEA include within the scope of the Act those industries with twenty employees or more and government employees.[118] The ADEA prohibits employers, employment agencies and labor organizations from advertising or indicating a preference as to age.[119] A recent case interpreted this clause broadly. A suit was brought against

115. 29 U.S.C. § 621 (1967).
116. *Id.* at § 631.
117. *Id.* at § 630 (b).
118. Conference Report on and Text of Minimum Wage Bill (S. 2747) G-6 (No. 60) 3-27-74; Chicago Daily News, Apr. 8, 1974 at 12, col. 1. Nixon signed the bill amending the ADEA. The amendments also increased the monetary authorization from 3 million to 5 million.
119. 20 U.S.C. 623 (e) (1967).

an employment agency that advertised for "college students" and "recent college graduates." The court did not find this a violation of the Act as its intent was to alleviate the economic and psychological suffering of those between forty and sixty-five, not to prevent younger people from getting started in employment.[120]

Certain situations are excepted from the protection of the ADEA. "[W]here age is a *bona fide* occupational qualification that is reasonably necessary in normal operations of the particular business, or where the differentiation is based on reasonable factors other than age,"[121] there is no age discrimination. There are two categories under this section. The first category deals with federal statutory requirements that provide for compulsory retirement before a specified age "in order to secure the safety and convenience of the public."[122] The retirement of airline pilots at age sixty has fallen within this exception.[123] The mandatory retirement of policemen at age sixty was also upheld in *McIlvaine v. Pennsylvania State Police.* The Pennsylvania court found that even if the ADEA was applicable, it would be within the *bona fide* occupational qualification because physical vigor and alertness needed for this job could only be provided by younger men. The court also felt older men are more cautious to danger, while younger men are likely to disregard danger thus they are better qualified to be policemen.[124]

In juxtaposition to these interpretations of the *bona fide* occupational qualifications provision of the ADEA is the 1973 case of *Hodgson v. Greyhound Lines, Inc.* An Illinois Federal District Court found that the company's refusal to consider employment applicants between forty and sixty-five was not a *bona fide* occupational qualification reasonably necessary to the normal operation of its business. Judge Parsons declared:

> [s]afety is the foremost concern involved herein not only for defendant but for plaintiff and this Court as well, but I cannot accept the contention that persons over 40 cannot become safe bus drivers. I believe strongly that functional capacity and not chronological age ought to be the most important factor as to whether or not an individual can do a job safely. This determination must be made repeatedly throughout the employee's employment experience. The human variances involved are myriad; there is no way to generalize as to the physical capability and phy-

120. Brennan v. Paragon Employment Agency, 356 F. Supp. 286 (S.D.N.Y. 1973), *aff'd* without opinion, No. 73-1811, (Jan. 10, 1974). New York Times, Jan. 20, 1974, sec. 1, at 2, Col. 1.

121. 29 U.S.C. § 623 (f) (1) (1967).

122. *Age Discrimination in Employment under Federal Law*, 9 GA. BAR. J. 114, 124 (1972); *see also* note, *The Age Discrimination in Employment Act of* 1967: *A Practical Application*, 24 BAY L. REV. 601 (1972).

123. Airlines Pilots Asso. v. Quesada, 276 F.2d 892 (2d Cir. 1960).

124. 6 Pa. Cmwlth 505, 296 A.2d 630 (1972), *aff'd* 454 Pa. 129, 309 A.2d 801 (1973), *cert. denied* 42 U.S.L.W. 3540-41.

> siological makeup of an individual. Nor is there a way to project how an individual will be affected by the aging process.[125]

However, this decision has been recently reversed by a three judge court on the theory that Greyhound's concern with the well-being and safety of their passengers is sufficient to justify its hiring age policy.

The second category of *bona fide* occupational qualifications encompasses special occupational circumstances. Actors and persons hired to advertise and promote the sale of products to a particular group are exempted.[126]

Another exception to the ADEA is that the age determination must be part of *bona fide* seniority system or benefit plan;[127] it must not be a subterfuge to evade the purposes of the Act.[128] In the 1973 case of *De Loraine v. MEBA Pension Trust*, an engineer alleged violations of ADEA. The court found that a trust is not a labor unit, thus this action was not within the ADEA. More importantly, the court holds that it is not unlawful under the Act to observe a *bona fide* pension plan if it is not used as a subterfuge to evade the Act.[129] To determine whether a particular plan is a subterfuge, the court must consider whether it is uniformly applied. This provision has also been interpreted to mean that employees not covered by any retirement benefit plan cannot be forced to retire.[130] Because it is very difficult to ascertain what is a *bona fide* seniority system, it appears incongruous for the Act to protect only those employees not covered by any retirement plan.

Still another exception provides that it is not unlawful to discharge or discipline an individual for just cause.[131] The Secretary of Labor has interpreted this section to require certain criteria that must be uniformly applied.[132] The criteria are: 1. physical fitness, 2. evaluation factors, 3. "an employer's condition as to the number or schedule of hours," and 4. a "policy against hiring relatives of present employees."[133] *Strongfellow v. Monsanto Company*, a case dealing with this exception, involves employees who were involuntarily retired when the plant was closed for economic reasons. Most of the workers eliminated were in the over forty category but no discrimination was found here because the company conducted a complete uniform evaluation of the employees' performances. From this evaluation they retained only the most capable and competent workers. The court decided

125. 354 F. Supp. 230 at 239 (N.D. Ill. 1973), *rev'd.*, No. 73-1214 (7th Cir. 1974).
126. GA. BAR. J. *supra* note 122.
127. 29 U.S.C. § 623 (f) (2) (1967).
128. GA. BAR. J., *supra* note 122.
129. 355 F. Supp. 89 (S.D.N.Y. 1973).
130. GA. BAR. J., *supra* note 122.
131. 29 U.S.C. § 623 (f) (3) (1967).
132. BAY. L. REV., *supra* note 122.
133. GA. BAR. J., *supra* note 122 at 122.

that retirement here was based on reasonable factors other than age, thus there was no violation of the ADEA.[134]

In opposition to *Strongfellow* is the Fifth Circuit opinion *Hodgson v. First Federal Savings and Loan Association of Broward Co., Florida.*[135] The court did not find that the facts of this case brought it under the just cause exception. First Federal's personnel manager did not hire anyone past thirty to be a teller, he was unable to present to the court a clear cut evaluation plan and it was apparent that there was no reasonable basis for his refusal to hire older employees. The criteria he used for the evaluation was unevenly applied. He rejected a woman applicant over forty because she was too fat, yet he hired a young woman who weighed twenty pounds more. The court found that one standard for the young and a different standard for the old would not bring it within the just cause exception to the Act.

The ADEA not only delineates persons protected, but it provides for educational and research programs concerning the needs and abilities of the elderly.[136] It should be especially noted that there is a specific provision for the Secretary of Labor to recommend to Congress whether the forty to sixty-five classification in the Act should be changed.[137] The ADEA provides that this be done within six months after the Act becomes effective. Six years later this has not been accomplished. Additionally, a study regarding involuntary retirement was to be submitted to the President and Congress.[138] This also has not been completed, thus those persons the Act was designed to protect have not been benefited by available research.

2. *Procedural Difficulties in ADEA*

The enforcement of the ADEA is under the fair labor standards division of the Department of Labor.[139] Provisions for damages come within this section.[140] An evaluation of these provisions will help clarify the effectiveness of the ADEA.

There are many practical problems in litigating cases under the ADEA. Before any litigation can take place, the informal methods provided for in

134. 320 F. Supp. 1175 (W.D. Ark. 1970).
135. 455 F.2d 818 (5th Cir. 1972).
136. 29 U.S.C. § 622 (1967).
137. *Id.* at § 622 (b).
138. *Id.* at § 624.
139. *Id.* at § 626 (b).
140. *Id.* The case of Monroe v. Penn-Dixie Cement Co., 335 F. Supp. 321, 234 (N.D. Ga. 1971) has a good discussion of damages under the Act: "The damages should properly equal the difference between the value of the compensation by way of salary together with other specific monetary benefits, such as increased pension benefits which would have vested prior to trial, to which plaintiff would be entitled had he remained employed by defendant until the trial date and the value of his total benefits and earnings at other jobs from his discharge until the trial date." (Footnote omitted).

the ADEA must be exhausted.[141] *Brennan v. Ace Hardware*, a 1973 decision, held for the employer despite violations of the ADEA because the conciliation officer did not follow the prescribed regulation of informal administrative procedure prior to the legal procedure. The court found it was necessary to make "efforts to obtain voluntary compliance through conciliation, conference, and persuasion."[142] To hold for the employer who violated the ADEA because of a procedural defect, seems to blatantly contradict the main thrust of the ADEA.

Once the informal procedure has been dispensed with, either the Secretary of Labor or a private individual may bring an action. The plaintiff has a very heavy burden since there must be sufficient evidence to establish a *prima facie* case.[143] Seldom will the plaintiff have the amount of evidence at his disposal as was found in *Hodgson v. First Federal*,[144] previously mentioned. The personnel officer's memorandums presented in court stated simply that the older woman was "too old." Additionally, there was a high turnover rate for the job of bank teller, although there were thirty-five positions available in one year, none of the thirty-five were filled by people over forty. The interviewer told the woman that he did not think she could perform the job because of the long hours it was necessary to stand on her feet. He also placed a request limiting applicants to those within the twenty to twenty-four year age range with the employment agency.

The court found that the plaintiff established a *prima facie* case under the ADEA. This is an unusual case because those incriminating memos were discovered and placed in evidence. In the normal course of litigation it would be difficult to obtain such concrete evidence.

Once a plaintiff establishes a *prima facie* case the burden then shifts "to the defendant to justify the existence of any disparities" in treatment between the younger and older applicant.[145] The court found there was no justification for the personnel officer's refusal to hire older women. Unfortunately, most cases lack this evidence of blatant discrimination.

> [T]he applicant can produce little, if any, evidence of why he was denied employment. For this reason, the ultimate burden of persuasion should be placed on the defendant-employer since he is the only person who can provide an explanation as to why the applicant was denied employment, for reasons other than his age.[146]

141. 29 U.S.C. § 626 (b) (1967).
142. 6 FEP 145, 148 (D. of Neb. 1973).
143. GA. BAR. J., *supra* note 122; Hodgson v. Earnest Mach. Prods., 479 F.2d 1133 (6th Cir. 1973).
144. Hodgson v. First Federal Sav. and L. Ass'n, *supra* note 135.
145. *Id.* at 822; *see also* N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); Shultz v. Hickok Mfg. Co., Inc., 5 EPD ¶ 8657 (N.D. Ga. 1973).
146. BAY L. REV., *supra* note 122 at 609.

The ADEA has been evaluated by the *White House Conference on Aging* in 1971[147] and the *United States Senate Reports of the Special Committee on Aging*.[148] They have found advancing age to be a formidable obstacle during prosperity as well as during recession. Older workers are the first fired in periods of widespread unemployment and the last to be hired during the recovery.[149] The *White House Conference* questioned whether the Act was being vigorously enforced and whether further efforts were needed to secure the protection of the elderly.

### 3. *Conclusion*

The following improvements are necessary in the ADEA:

1. To strengthen the ADEA, the age sixty-five limitation should be removed because it is arbitrary and can be attacked constitutionally since it is not based on an individual's ability.[150]

2. Although the ADEA calls for forced retirement research, six years have elapsed and nothing has been accomplished because other programs have been given priority;[151] therefore, this study should promptly commence.

3. The clause excepting companies with retirement benefit funds as long as they are not a subterfuge also requires close scrutiny for in many instances, the older worker loses his job and his pension benefits as well.[152]

4. There has been very little litigation under the ADEA and many times there has been superficial enforcement.[153] The Wage and Hour Division of Employment Standards Administration has the jurisdiction for enforcement but they have limited time to devote to age discrimination activities because they are charged with administering other labor related statutes.[154] A new enforcement agency may also be necessary to put more emphasis on age discrimination budgetary requests.

5. Government pronouncements and legislation indicate an official intent to aid the elderly. Its actions do not. The 1972 Special Committee Report on Aging said:

147. WHITE HOUSE CONFERENCE ON RETIREMENT, *supra* note 21.

148. *1969 Report on Aging, supra* note 38; *Report on Aging, supra* note 22; *Improving ADEA, supra* note 56.

149. *Report on Aging, supra* note 22.

150. *See* discussion *infra*.

151. *1969 Report on Aging, supra* note 38.

152. *Report on Aging, supra* note 22.

153. *Improving ADEA, supra* note 56. According to this 1973 report, the Dept. of Labor has filed 140 suits. Sixty of these have been settled by either a court decision or monetary settlement. The Labor Dept.'s biggest victory to date has been the negotiated settlement with Standard Oil of Calif. whereby the Co "agreed to pay 2 million dollars in back pay to 160 older workers it had fired and to rehire 120 of them." Newsweek, at 73, Col. 1, (May 27, 1974).

154. *Report on Aging, supra* note 22.

> [a]dequate funding has also been a major stumbling block for effective enforcement of the act. The 1967 law authorized $3 million for enforcement purposes, but no administration has ever spent one-half that amount. For fiscal 1974, the Administration's budget request is $1,451,000.[155]

Despite the fact that in many instances the state legislation has been in existence for a longer period than the Federal Act, similar problems confront the enforcement of state legislation providing protection for the elderly. The experiences of these states are important to legislative findings in further developing the ADEA.

### B. *State Anti-Age Discrimination Legislation*

Strong state laws, actively administered, curtail discrimination against the mature worker, thus allowing the elderly to be considered more frequently for vacant positions.[156] Unfortunately, states are handicapped by a lack of funds, a lack of personnel and loopholes within the law itself.

A classic example of an inadequate statute is one without a civil remedy. In a case interpreting the Massachusetts anti-age bias statute, the court said the employer's duty not to discharge an employee due to age is statutory.[157] Therefore, if there is no civil remedy in the statute, there is no redress for a violation. Despite public policy condemning age bias, this statute is ineffective.

The Wisconsin statute states that nothing in the Act can prevent retirement when the retirement policies in the pension agreement are not a subterfuge for evasion of the Act's purposes. A case where thirty-eight persons were forced to retire resulted in a decision for the employer.[158] The court reasoned that the employees were retired pursuant to a retirement policy that was within the statutory exception. The evidence necessary to sustain a court's finding that a pension agreement is a subterfuge are:

> either that the retirement benefits payable to the retired employee were unsubstantial or, if substantial, that continued payment thereof was likely to be jeopardized.[159]

This is a difficult burden to prove, thus limiting the statute's usefulness.

There has been no litigation under the Illinois Statute.[160] This statute

155. *Id.* at 67. The new amendments providing for funding of 5 million dollars instead of 3 million is meaningless if there is no enforcement.

156. *Improving ADEA*, *supra* note 56.

157. Johnson v. U.S. Steel, 348 Mass. 168, 202 N.E.2d 816 (1964).

158. Walker Mfg. Co. v. Indus. Comm'n, 27 Wisc. 2d 669, 135 N.W. 2d 307 (1965).

159. *Id.*, 27 Wisc. 2d at 685, 135 N.W. 2d at 316.

160. ILL. REV. STAT., ch. 48, § 881 - § 887 (1967). It should be noted that age discrimination is not included in the F.E.P.C., ILL. REV. STAT. ch. 48 § 851 et. seq. (1971).

has broader coverage than the federal statute as there is no age limitation. Discrimination against anyone forty-five and over is banned.[161] Nonetheless, the act is contradictory to its policy and intent as it allows the government to maintain compulsory retirement policies.[162]

A model statute and program, the Connecticut Statute and the Connecticut Commission on Human Rights and Opportunities, have shown how valuable this type of legislation can be to the elderly. *Baskin v. University of Connecticut*[163] held that the plaintiff, a doctor, was discriminated against when he was denied a job with the student health center. The court ordered the University to hire the plaintiff. Since age was the predominant motivating factor in the denial of the complainant's application for employment, the defendant's actions were a violation of the statute. In another decision the Commission also found a company policy to be discriminatory because they did not hire any truck drivers over forty,[164] but hired instead younger men with less experience. The order of the Commission required the company to:

1. offer each of the complainants the position desired;
2. pay the complainants the difference between what they have earned since the filing of the complaint and what they would have earned had they been given the desired position on that day;
3. cease and desist from discriminating because of age;
4. post in prominent places the employees' rights under the statute.

This state statute accomplishes effectively its intended purpose by eliminating arbitrary age discrimination.

As can be deduced from the above section, social legislation requires improvement and increased appropriations are mandatory.[165] If the statutory coverage is inadequate, it cannot effectuate a proper solution for the elderly's status. The only alternative remedy is an individual action.

## V. The Individual's Ability to Protect Himself

### A. *The Constitutional Right*

Tremendous reliance has always been placed on litigation for redress of wrongs, but this remedy alone has not been successful in rapidly achieving results. Anyone familiar with *Plessy v. Ferguson*[166] and *Brown v. Board*

161. Ill. Rev. Stat., ch 48, § 881 (b) (1967).
162. *Id.* at § 883.
163. 2 (CCH) EPG ¶ 5054 (1971).
164. Williams *et al.* v. Entenmann's Bakery of Conn., Inc., 3 (CCH) EPG ¶ 5114 (1972).
165. Chicago Sun Times, *The Fight Against 'Age-ism'*, Nov. 19, 1973, at 70, col. 3.
166. 163 U.S. 537 (1896).

*of Education*[167] must realize that it took fifty-eight years to reject the separate but equal doctrine in race discrimination. The protective attitude toward women, which results in sex discrimination embodied in the 1908 case of *Muller v. Oregon*,[168] has not yet been rejected by the courts. Thus legislation, litigation and mass re-education are the weapons necessary to fight for the rights of the elderly. Litigation is a valuable means for re-educating the public and for securing small victories against age discrimination. These small victories are the building blocks upon which further litigation and legislation are built.

To preserve the livelihood of competent employees, cases constitutionally attacking mandatory retirement statutes are currently being litigated.[169] The same arguments presented against the mandatory retirement statutes are also applicable against the ADEA.[170] The ADEA can be constitutionally attacked on two levels. The age classification of forty to sixty-five is an arbitrary classification not based on facts which irrebutably presumes that all people over sixty-five are incompetent and the Statute infringes upon the individual's right to work. The provision for a mandatory retirement study which was written into the Act itself reveals legislative concern for the reasonableness of mandatory retirement.[171] Thus whether an individual attacks compulsory retirement statutes or the ADEA itself, another viable remedy for procuring economic security is thereby afforded to the elderly. Understanding the arguments on both sides of this issue will elucidate its value to the elderly plaintiff.

In the 1974 case of *Weisbrod v. Lynn* a seventy year old attorney employed by the Department of Housing and Urban Development was retired from his position in compliance with a mandatory retirement statute. Attacking the constitutionality of this compulsory retirement provision is the remedy utilized by Mr. Weisbrod since his age places him beyond the limited protection of the ADEA. This plaintiff sought to have a three judge court convene to examine the issues but the District Court for the District of Columbia denied the motion and dismissed the complaint. The Appellate Court reversed stating that the constitutional issues presented are "of sufficient substance as to warrant consideration by a three judge court."[172] In

167. 374 U.S. 483 (1954).

168. 208 U.S. 412 (1908).

169. Weisbrod v. Lynn, No. 73-1146 (D.C. Cir. Mar. 11, 1974); Chicago Daily News, Apr. 3, 1974, at 4, col. 6. The A.M.A. has joined the plaintiff in this suit in an attempt to overturn mandatory retirement of Civil Service employees. Chicago Daily News, May 18, 1974, at 16, col. 6.

170. 29 U.S.C. § 621 (1967).

171. *Id.* at § 625. The act also provides for a research and education program pertaining to the desirability of changing the lower or upper age limits set forth in the Act at § 622 (b). Although this was to be accomplished within 6 months after the passage of the Act, it still has not been accomplished.

172. Weisbrod, *supra* note 169 at 3.

light of this court's decision and increased litigation in this area, an analysis of the individual's arguments against mandatory retirement provisions is necessary.

1. *The Individual's Arguments*

The equal protection clause permits classifications that have a reasonable basis in fact. The test traditionally used is that the classification must have a rational purpose which is reasonably related to a legitimate objective.[173] The legislative conclusion that certain common characteristics bind the aged into a designated class cannot provide a rational basis for the classification because of available data which discredits age as a determination of capability. An even stronger case against mandatory retirement can be developed if the plaintiff brings himself within the more stringent test of interference with a fundamental right to work or an inherently suspect classification of invidious discrimination.[174]

Mandatory retirement legislation abridges an individual's fundamental right to work implicit within the due process clause of the fifth and fourteenth amendments.[175] Furthermore, the requisite compelling governmental interest required to justify interference with that fundamental right is lacking.[176]

The original discussion regarding a fundamental right to work began with the 1914 Supreme Court case of *Smith v. Texas* which found that

> [i]nsofar as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords to those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.[177]

The following year another Supreme Court case, *Truax v. Raich*, declared that

> [i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure.[178]

Years later in his concurring opinion in *United States v. Robel*, Mr. Justice Brennan similarly perceived that an individual has a fifth amendment right to employment that is protected against any unreasonable governmental in-

173. B. SCHWARTZ, CONSTITUTIONAL LAW, § 153 (1972).
174. *Id.* at 154.
175. U.S. CONST. amends. and XIV, § 1.
176. SCHWARTZ, *supra* note 174.
177. 233 U.S. 630, 636 (1914).
178. 239 U.S. 33, 41 (1915).

terference.[179] The fifth amendment in stating that "[n]o person shall be . . . deprived of life, liberty, or property"[180] must implicitly protect the ability to acquire property. Without employment, economic security cannot be achieved; consequently, the fifth amendment protection of life, liberty and property must include the ability to maintain employment and earn a livelihood to support one's fundamental needs.

Mandatory retirement provisions may be attacked because there is a denial of equal protection under the law since age classification is arbitrary and invidious discrimination.[181] These statutes foster an inherently unreasonable classification which is repugnant to the equal protection clause. Classifications based solely on age are invidious because they unreasonably curtail the older persons opportunity to find and keep employment. Recent statistical and legislative materials indicate that grouping all elderly into one classification is capricious because it is based on stereotyped notions of disability.[182] The arbitrary classification of the aged into one group does not recognize the vast individual differences existing among the elderly. This unjustifiably categorizes people without regard for their individual performance and ability to contribute to society.

Analogies between age discrimination in employment and sex discrimination in employment can also be drawn.[183] Exclusion of individuals based on physical characteristics over which there is no control has been held to be unconstitutional because sterotyped ideas of an individual's capability can not provide the proper basis for job classifications.[184] Maintaining a presumption as to a person's ability "works an injustice on those whose natural attributes do not conform to the employer's prejudice."[185]

The Supreme Court in *Stanley v. Illinois* declares that these irrebutable presumptions are constitutionally infirm. The Court holds that unmarried fathers may not be irrebutably presumed to be incapable of caring for their children, since

179. 389 U.S. 258, 270 (1967) (concurring opinion).

180. U.S. CONST. amend. V.

181. Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd* without opinion, Nos. 71-1398, 71-1852 (2d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3392 (Jan. 8, 1973); *see also* Brief for Appellant, Weisbrod *supra* note 13; Retail Clerks U., Local 770 v. Retail Clerks Int. Ass'n., 359 F. Supp. 1285 (C.D. Calif. 1973); Fabio v. City of St. Paul, 267 Minn. 273, 126 N.W.2d 259 (1964); Armstrong v. Howell, Civ. 72-0-510 (D. of Neb., 1974) (memorandum opinion); Gault v. Garrison, No. 74C 931 (N.D.E.D. Ill. Apr. 1974), (memo in support of preliminary injunction); Murgia v. Mass. No. 72-2083-T at 2 (D. Mass. May 31, 1974), (3 Judge District Court holds "[c]lassification based on age alone has no rational basis in furthering any substantial state interest.").

182. Discussion *infra*.

183. Brief for Appellant Weisbrod, *supra* note 13.

184. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Weaks v. So. Bell Tel. and Tel. Co., 408 F.2d 228 (5th Cir. 1969); and Ridinger v. Gen. Motors Cor., 325 F. Supp. 1089 (S.D. Ohio, W.D. 1971).

185. Note, *Sexual Mythology and Employment Discrimination*, 3 SET. HALL. L. REV. 108, 125 (1971).

> as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that by denying him a hearing . . . the State denied Stanley the equal protection of law guaranteed by the Fourteenth Amendment.[186]

Irrebuttable presumptions without allowing for individualized determinations have been further rejected in the 1974 Supreme Court case of *Cleveland Board of Education v. La Fleur.* Here the Court holds invalid a mandatory retirement provision aimed at pregnant school teachers because it is contrary to the due process clause of the fourteenth amendment. In explaining their position, the Court said:

> [t]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebutable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.[187]

Although differing on many points, medical experts agreed that "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter."[188] (Footnote omitted). An overwhelming amount of medical testimony concluded that most teachers are quite capable of fulfilling their responsibilities beyond the arbitrary time fixed by the regulation.[189] In *La Fleur* the Court recognizes that scientific data justifies individual determinations while arbitrary classifications without any factual basis do not.

*Reed v. Reed*, a 1971 Supreme Court decision, absolutely rejected preferential treatment based on a feature over which an individual has no control. Striking down a mandatory provision in the Idaho Probate Code that gave preference to men over women for appointment as administrators of a decedent's estate, the Court said that this arbitrary preference in favor of males contravened the equal protection clause of the fourteenth amendment. Although the Court recognizes that the equal protection clause does not deny the "[s]tates the power to treat different classes of persons in different ways"[190] the equal protection clause does

> deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that stat-

186. 405 U.S. 645, 649 (1972).
187. 94 S. Ct. 791, 798 (1974).
188. *Id.* at 799.
189. *Id.* at 803 (concurring opinion).
190. 404 U.S. 71, 75 (1971).

> ute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (Citation omitted).[191]

The Court here adopted a more rigorous standard for determining what constitutes a rational relationship.[192] This view does not allow for blanket assumptions that are unsupported by any scientific evidence. Mandatory retirement provisions create arbitrary classifications that are unreasonable and they do not achieve the legislative objective of retaining only competent employees. Instead incompetents under sixty-five retain their positions while competent employees over sixty-five are terminated.

The 1973 Supreme Court in *Frontiero v. Richardson* goes one step further than the *Reed* criteria of reasonableness when it states that regulations discriminating against servicewomen by not allowing a quarters allowance and medical and dental benefits for their spouses, as was allowed for the spouses of servicemen, cannot prevail. This practice was held to be a violation of the due process clause of the fifth amendment. Mr. Justice Brennan, joined by Justices Douglas, White and Marshall conclude

> that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.[193]

Although the stereotyped notions of women's capabilities were legally preserved for years, recent changes in society and the accompanying changes in the law indicate that these myths can no longer be preserved.

Embedded notions of agism are similar to sex discrimination because they totally ignore individual differences by categorically classifying *all* elderly as incompetent after a specified age. This presumption of senility is not based upon facts and is not the result of a fitness hearing.[194]

The American Civil liberties Union has recently established an elderly rights project in order to champion the older person's cause and to provide a viable remedy to combat mandatory retirement statutes. Their position regarding age discrimination in employment is "that age should be viewed as a suspect classification, similar to race, color, sex, religion or national origin. The test for employment should be the ability of the individual to perform the particular job function."[195] The official litigation position is that

191. *Id.*
192. Brenden v. Independent School Dist. 742, 477 F.2d 1202 (8th Cir. 1973).
193. 411 U.S. 677, 688 (1973).
194. Stanley, *supra* note 186.
195. Interviews with Howard Eglit, Legal Director of the ACLU in Chicago, Illinois, Feb. 18, 1974, Mar. 12, 1974, Apr. 2, 1974.

> [m]andatory retirement solely on the basis of age—without any consideration of the abilities of the individual—simply runs contrary to the Constitutional guarantees of due process and equal protection. If the point of mandatory retirement laws is to ensure that teachers are competent, we would do better to test each of them individually throughout their careers, rather than just arbitrarily tossing out all 65 and over competent educators, whether they are competent or not.[196]

2. *Arguments Justifying Mandatory Retirement*

Although the above arguments have been advanced on behalf of the elderly, the contrary arguments cannot be ignored. The government's rebuttal in *Weisbrod* exemplifies the oppositions' contentions in mandatory retirement suits. It is claimed by the government that

> [t]he right to work posited here by plaintiff, like the right to education involved in *Rodriguez*, is simply not among the rights afforded explicit or implicit protection by the Constitution, and no court has indicated to the contrary. Moreover, as we also demonstrate, age classifications are not 'suspect classifications' for purposes of constitutional ajudication.[197]

A right to work has not been conclusively adjudicated to be fundamental. Those few cases that have considered the issue have referred to the right to work as being fundamental in dicta only. For example, in *Truax* an invidious discrimination was found when a state law limited the number of aliens who could be hired by the state.[198] Hence an elderly plaintiffs' assertion that the right to work is fundamental is subject to criticism.

The requirement of close scrutiny of mandatory retirement statutes has been disputed by defendants who contend that an age classification is not suspect as invidious discrimination.[199] In *Weiss v. Walsh*, a New York Federal District Court case dealing with this problem, a seventy year old metaphysician was denied employment at Fordham University despite his outstanding qualifications due to his age. The court found that

> a classification that cuts fully across racial, religious, and economic lines, and one that generally bears some relation to mental and physical capacity, age is less likely to be an invidious distinction. . . . Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future. It cannot be said, therefore, that age ceilings upon eligibility for employment

196. Press release of Ruth Adams, Executive Director of the ACLU in Chicago, Illinois, Apr. 11, 1974.

197. Brief for the Appellees, Weisbrod v. Lynn, No. 73-1146 (D.C. Cir. 1974).

198. Truax, *supra* note 178.

199. *But see* McIlvanie 6 Pa. Cmwth., *supra* note 124 (concurring opinion).

> are inherently suspect, although their application will inevitably fall unjustly in the individual case.[200]

A California Federal District Court in 1973 relied on the *Weiss* decision to declare that mandatory retirement by-laws adopted by a union were permissible because they accomplished a rational objective and age classification is not constitutionally infirm.[201]

Thus without a fundamental right or an invidious discrimination, the higher standard of a compelling state interest is not required. If a legitimate governmental purpose is rationally furthered, the classification is constitutionally permissible. Congress is deemed to have a legitimate purpose in creating these mandatory retirement regulations. These rules are effectuated by Congress to protect the efficiency and the economy of the civil service system; therefore, the stringent standards suggested by the individual fighting mandatory retirement statutes do not apply. But arguments of administrative convenience and economy in reducing the federal payroll are constitutionally infirm. Although the government can legitimately limit its expenditures for any purpose, invidious distinctions between classes of citizens are prohibited.[202]

It must be noted that both of the above cases[203] involved respectively a private university and a union, thus the requisite state action necessary for constitutional protection was lacking. Therefore, these cases are easily distinguishable from cases involving government employees where state action is present.

Despite federal and local governments numerous declarations as to their anti-age bias policies, the government may be the leading offender in practicing discrimination based on age. In 1968 a group of air force officers tried to recover the difference between active duty pay and what they would have received if they had not been forced to retire early under a statutory provision. The statute's purpose was found to allow for the retention and promotion of the most qualified officers. Consequently, the officers' retirement was held not to be arbitrary since it was supported by substantial evidence affirming the reasonableness of the forced retirement requirement for these individuals. Moreover, the court found no deprivation of a vested property right without due process of law because there is no vested right in federal employment.[204]

This case can be distinguished from cases concerning civil service workers, lawyers, doctors and teachers because, arguably, a greater degree of physical fitness may be required for adequate performance in the armed

200. Weiss, *supra* note 181 at 77.
201. Retail Clerks, *supra* note 181.
202. SCHWARTZ, *supra* note 173.
203. Weiss and Retail Clerks, *supra* note 181.
204. Norman v. U.S., 392 F.2d 255 (Ct. Cl. 1968).

services. However, the *Greyhound* standard of functional capacity rather than chronological age has been suggested for determining whether a person can safely perform on the job. Physical capability determinations should be made throughout a career rather than at an arbitrary age. Despite the Seventh Circuit Appellate Court's reversal of this landmark decision, the Labor Department may appeal the case. Restitution of the elderly's rights can only be obtained by fighting for judicial cognizance of scientific data which substantiates that mature individuals' abilities are as diverse as may be found in any age group. This diversity must be recognized.

A 1974 memorandum opinion of the Nebraska District Court upholds a mandatory retirement provision in civil service employment.[205] The court found that an age classification has a reasonable relation to the law in question because age has a definite relationship with ability to perform on the job. This decision does not consider the functional capabilities of the individual, but rather finds the purpose of forced retirement is to induce older workers to retire when their skills diminish in order to maintain efficiency and economy in civil service positions. But they assume that all older workers skills automatically diminish at sixty-five. This case also refutes the plaintiff's contention that she was entitled to a fitness hearing before she was forced to retire. "It is only where a possible collision with a constitutionally protected right or privilege is involved that there should be extended the right of a termination hearing."[206] It is to be noted that the judiciary's acceptance of the mandatory retirement provisions do not take cognizance of current studies that show the vast differences and capabilities of the elderly individual.

### 3. *Conclusion*

To date, no plaintiff has won a suit based on age discrimination against the governement. Perhaps heightened interest in litigating these suits plus increased awareness of the inequities involved in age discrimination are operating to cause a change. The recent *Weisbrod* decision allowing for a three judge court because of substantial constitutional issues coupled with the Supreme Court's reasoning in *La Fleur* indicate that these mandatory retirement statutes are ripe for legal attack.

As a result of the majority's opinion in *La Fleur*, Justice Rehnquist in his dissent forecasts the possible striking down of mandatory retirement provisions affecting government employees. After discussing the right to work as established in the *Truax* case, he said:

> [s]ince this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having

205. Armstrong v. Howell, *supra* note 181.
206. *Id.* at 10.

today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees.[207]

Because compulsory retirement creates an irrebutable presumption not based on ability or recognition of individual differences, increased litigation is a means of refuting these presumptions and providing an opportunity to set precedent in favor of the mature worker. Recent Supreme Court decisisions that have rejected arbitrary classifications in sex discrimination cases may be setting a trend toward protecting the mature, capable workers' employment positions.

### B. *The Tort Right*

If the constitutional approach is unsuccessful, another avenue that might be investigated is a tort action. A tort arises whenever there is interference with an individual's rights. If there is a right to work,[208] there may be an action in tort for preventing employment through forced retirement.

Dean Prosser said that where there are interferences that "invade a right which is entitled to protection, . . . an action may lie for them . . . ."[209] Additionally, since "[c]ivil rights statutes have been held to afford a cause of action,"[210] a tort action may thus arise for the infringement of an individual's opportunity to maintain gainful employment. This possible remedy can only occur once a right to work has been firmly established.

An analysis of what the individual can do to protect their employment status has been presented. Social legislation and labor organizations ability to assist the elderly has been evaluated. What else can be done to help the elderly?

## VI. RECOMMENDATIONS

Widespread experimentaion should be encouraged to adjust career patterns to individual needs and desires. This should include:

1. sabbaticals before retirement;
2. the encouragement of part-time work;
3. trial retirement;
4. gradual retirement;[211] and
5. the development of a separate governmental department that would deal only with the problems of the elderly would better protect the mature individual.

207. LaFleur, *supra* note 187 at 806 (dissenting opinion).
208. Truax, *supra* note 178.
209. PROSSER, LAW OF TORTS (4th ed. 1971) at 42.
210. *Id.* at n.42.
211. *Developments in Aging, 1968, A Report of the Special Committee on Aging,* U.S. Senate, 91st Cong., 1st sess., at 113.

The *United States Special Committee on Aging* made additional valuable recommendations in March, 1973. They called for:

> [e]stablishment of "National Employ the Older Worker Week" on a permanent basis to educate the public about the true capabilities of persons in their 40's, 50's, and above.
> Full funding for the Older American Community Service Employment Act. Early enactment of the Middle-Aged and Older Workers Training Act.
> Encouragement of job redesign in government and industry to provide greater freedom of choice to older workers who want or need to work.
> Private pension reforms, including provisions for vesting, minimum funding requirements, reinsurance, fiduciary standards, and other essential improvements.[212]

This Committee's recommendations to extend ADEA coverage to government employees, to broaden the law to include employers with twenty rather than twenty-five employees and to increase the three million dollar authorization to five million have already been accomplished.[213]

## VII. Conclusion

This article has attempted to systematically assess the remedies available to the mature worker for the protection of his employment and income. Legislation has been ineffective. Union protection must be expanded. Individual recourse is just beginning. However, improvement in any of these areas will only be possible after a massive re-education program. Myths associating the aged with blanket senility must be disspelled and factual material relating to the capabilities of the mature worker must be recognized. Stereotypes which operate to relegate all elderly to an inferior status must be discredited as older persons possess as numerous individual differences as do younger persons. As is true in any class, the elderly do not all have the same characteristics. There is as much diversity in this age group as can be found in any age group. Many persons perform competently, consistently and conscienciously past their sixty-fifth or seventieth birthday. Useful today, useless tomorrow is a theme that should haunt us all.

Elaine S. Fox

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212. *Report on Aging, supra* note 22 at 71, 72.
213. Amendments to ADEA, *supra* note 118.