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Protecting the Older Worker

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LEGISLATIVE NOTES

PROTECTING THE OLDER WORKER

Laws both at the federal level¹ and in thirty-one states² make discrimination against certain individuals because of their age illegal. These laws are designed to protect a specified class of people, normally those from forty to sixty-five years old, both from an employer's refusal to hire or promote them and from his decision to dismiss them solely because of their age. Yet few people know that this type of discrimination even occurs, much less is forbidden. The term "discriminate" when used in an employment setting brings to mind biases as to race, sex, or religion, but rarely bias as to age. The irony is that various age groups are minorities to which every person must belong.

Unlike racial discrimination, age discrimination statutes do not prohibit all forms of discrimination but only those forms that are arbitrary.³ In this respect age is most analogous to sex as a basis of discrimination: in neither case has a *conclusive* statutory presumption been made that these factors are irrelevant in an em-

¹ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970).

² Alaska, ALAS. STAT. §§ 18.80.200 to 18.80.280 (1971); California, CAL. UNEMP. INS. CODE ANN. §§ 2070-2078 (West Supp. 1972); Colorado, COLO. REV. STAT. ANN. §§ 80-11-16 and 80-11-17 (1963); Connecticut, CONN. GEN. STAT. ANN. §§ 31-126 to 31-128 (1958), *as amended*, (Supp. 1972); Delaware, DEL. CODE ANN. tit. 19, §§ 710-713 (Supp. 1970); Georgia, GA. CODE ANN. § 54-1102 (Supp. 1971); Hawaii, HAWAII REV. STAT. § 378-2 (1968); Idaho, IDAHO CODE §§ 44-1601 to 44-1606 (Supp. 1971); Illinois, ILL. ANN. STAT. ch. 48, §§ 881-887 (Supp. 1972); Indiana, IND. ANN. STAT. §§ 40-2318 to 40-2828 (1965); Iowa, IOWA CODE ANN. § 194.18 (Supp. 1972); Kentucky, KY. REV. STAT. §§ 344.010 *et. seq.* (1971), *as amended*, [1972] Acts of Ky. 686; Louisiana, LA. REV. STAT. ANN. §§ 23.892 and 23.893 (1964); Maine, ME. REV. STAT. ANN. tit. 26, §§ 861-864 (Supp. 1972); Maryland, MD. ANN. CODE art. 49B, §§ 1-20 (1972); Massachusetts, MASS. ANN. LAWS ch. 151B, § 4 (1965), *as amended*, (Supp. 1971); Michigan, MICH. COMP. LAWS ANN. § 423.303a (1967); Montana, House Joint Resolution No. 12, [1961] Laws of Mont. 840; Nebraska, NEB. REV. STAT. §§ 48-1101 to 48-1106 (1968); New Hampshire, N.H. REV. STAT. ANN. § 354-A:8 (Supp. 1971); New Jersey, N.J. REV. STAT. ANN. §§ 10:5-1 to 10:5-28 (Supp. 1971); New Mexico, N.M. STAT. ANN. §§ 4-33-1 to 4-33-13 (Supp. 1971); New York, N.Y. EXEC. LAW § 296 (McKinney 1972); North Dakota, N.D. CODE ANN. §§ 34-01-17 and 34-01-18 (Supp. 1971); Ohio, OHIO REV. CODE ANN. § 4101.17 (1965); Oregon, ORE. REV. STAT. §§ 659.010 to 669.115 (1971); Pennsylvania, PA. STAT. ANN. tit. 43, §§ 951-963 (1964), *as amended*, (Supp. 1972); Rhode Island, R.I. GEN. LAWS ANN. §§ 28-6-1 to 28-6-21 (1969); Washington, WASH. REV. CODE ANN. §§ 49.44.090, 49.60.180 to 49.60.210 (1962), *as amended*, (Supp. 1971); West Virginia, W. VA. CODE ANN. §§ 5-11-1 to 5-11-19 (1971); and Wisconsin, WIS. STAT. ANN. §§ 111.3 to 111.37 (Supp. 1972).

³ See notes 64-86 and accompanying text *infra*.

ployment situation; in both situations the employer must make his decision to hire or not to hire on the abilities of the individual and not on assumptions, proven or unproven, about the class as a whole.⁴ This note considers the extent of arbitrary age discrimination and what measures have been taken and should be taken to combat it.

I. THE EXTENT OF AGE DISCRIMINATION

An increasing number of older workers, aged forty to sixty-five, are unable to find jobs and are forced to withdraw from the labor market altogether.⁵ From 1960 to 1970 the number of men between forty and sixty-four who annually left the work force grew from 1.4 million to 2.1 million—an increase of 40 percent.⁶ In June of 1971, 1,025,000 people aged forty-five and older were unemployed,⁷ while the unemployment figure for the same group in January of 1969 was only 596,000, seasonally adjusted.⁸ Thus, in a period of eighteen months the unemployment of older workers increased by 72 percent.

A comparison with unemployment rates for younger workers,⁹ in terms of length of unemployment, is appropriate here. In June of 1971, long-term joblessness, *i.e.*, joblessness for fifteen weeks or longer, involved one out of every three unemployed older workers as compared with one out of four younger ones.¹⁰ Moreover, 205,000 of the 353,000 older workers who qualified as long-term unemployed had been unemployed for twenty-seven weeks or more, representing a 327 percent increase from the January, 1969, figure of 48,000.¹¹ Thus at the end of the first half of 1971 the average length of unemployment for people forty-five and over was seventeen weeks, while for all other unemployed persons it was somewhat more than ten weeks.¹²

To view the employment problem in its entirety, the income

⁴ U.S. DEPARTMENT OF LABOR, THE OLDER AMERICAN WORKER: REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 2 (1965) [hereinafter cited as SECRETARY'S 1965 REPORT].

⁵ *Hearings on S. 830 and S. 788 Before the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 62 (1967) [hereinafter cited as 1967 Hearings].

⁶ *Hearings on Unemployment Among Older Workers Before the Senate Special Comm. on Aging*, 92d Cong., 1st Sess. 279 (1971) [hereinafter cited as 1971 Hearings].

⁷ *Id.*

⁸ *Id.*

⁹ For purposes of this article, "younger worker" means a worker under age forty.

¹⁰ 1971 Hearings, *supra* note 6, at 279.

¹¹ *Id.*

¹² *Id.*

levels of older workers must be examined. Studies have shown that the older a person is the greater are his chances of being below the federal poverty level. According to 1965 census data, 32.3 percent of the individuals between the ages of fifty-five and sixty-four were below the poverty level, compared to 25.2 percent of the forty-five to fifty-four age group and 13.4 percent of those twenty-five to thirty-four.¹³ Eight and a half million people aged forty-five and older were below the poverty level in 1971.¹⁴

These statistics set out the parameters of a very human problem. It would be naive to say that all the employment problems of the older worker are caused by age discrimination. It would be even more naive, however, to believe that age discrimination does not have a measurable and probably substantial bearing on these statistics. As the Secretary of Labor indicated to Congress:

Almost three out of every five employers covered by the survey have in effect age limitations (most frequently between 45 and 55) on new hires which they apply *without consideration of an applicant's other qualifications*. Twenty-seven percent of the employers reported formal upper age specifications for some or all occupations. It was determined on investigation that an additional 30 percent follow such policy in practice.¹⁵

The survey he mentions was conducted by the Bureau of Employment Security.¹⁶ The results of this survey would not be so disturbing if they reflected a preference of employers for younger people based on proven superior working ability. Unfortunately, the survey shows that about two-thirds of the employers set age limits "without consideration of an applicant's other qualifications";¹⁷ that is to say, these employers arbitrarily discriminate because of age.

The absurdity of arbitrary age limits becomes apparent when several of the employers' most common reasons for setting them are scrutinized. While there may be a grain of truth in each reason for age limits, there is not enough to justify the employer's actions. For example, although physical requirements of the job, the primary reason cited by employers for setting age limits,¹⁸ may at

¹³ 1967 Hearings, *supra* note 5, at 183 (statement of Mr. Sheppard).

¹⁴ 1971 Hearings, *supra* note 6, at 279.

¹⁵ SECRETARY'S 1965 REPORT, *supra* note 4, at 6-7 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Hiring Policies, Prejudices and the Older Worker*, 88 MONTHLY LAB. REV. 968, 969 (1965).

times be a valid basis for disqualifying an unfit individual from a job, they should not serve to disqualify an entire age group.¹⁹

Most studies agree there is a gradual decline in job performance after the worker passes the age of thirty.²⁰ Yet studies of the effects of age on job performance have also shown that any variations in performance between various age groups are slight.²¹ More importantly, however, these studies have concluded that the output of a particular individual is likely to differ sharply from the average of his age group.²² These findings make generalizations about age and job performance an unsupportable basis for wholesale exclusions of age groups. The studies dealing with job performance have also found that there is almost no difference between the attendance records of the older and younger worker.²³ Other studies have shown that older workers are more prone to long-term, but not necessarily work-debilitating, conditions and that there are fewer brief, but severe, illnesses among older workers.²⁴ Furthermore, the lower life expectancy of an older worker should concern the employer only if it affects the period for which the worker will stay with him. And, statistically, the older worker stays on a *particular* job longer than the younger worker.²⁵

¹⁹ In 70 percent of the cases where employers claimed that age limits were based on physical requirements, no investigations had in fact been made to demonstrate a valid relationship between the physical requirements and the age limits. SECRETARY'S 1965 REPORT, *supra* note 4, at 8. Moreover, there was a vast difference among employers' views as to what age limits to set even where a bona fide physical requirement did exist. In jobs with comparable physical exertions and demands for strength, the exclusionary age limits ranged from twenty-five to sixty years. *Id.*

²⁰ See Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U.L. REV. 383, 395 (1966); U.S. Department of Labor, Bureau of Labor Standards Bulletin No. 1223, at 1 (1968) [hereinafter cited as Labor Bulletin No. 1223].

²¹ See Mark, *The Older Worker: Measurement of Job Performance and Age*, 79 MONTHLY LAB. REV. 1410, 1412-13 (1956). This study of piecework operation in the footwear and clothing industries found that beginning with age fifty-five, job performance figures did show a decline which, although statistically significant, was not of serious proportions. *Id.* at 1413. In an extension of this study covering twenty-six companies in footwear and furniture manufacturing the conclusions were the same with differences between age groups being particularly small. See also Labor Bulletin No. 1223, *supra* note 20, at 1.

²² Labor Bulletin No. 1223, *supra* note 20, at 1; Mark, *supra* note 21, at 1413. For example, the output of male machine operators between the ages of fifty-five and sixty-four may vary 13.7 percent from the median, and for women in the same age and occupation groups the variations is 11 percent. *Id.* at 1412.

²³ Labor Bulletin No. 1223, *supra* note 20, at 2. In the eleven footwear plants used in one of the studies the attendance indexes between the six age groups (under 25, 25-34, 35-44, 45-54, 55-64, and 65 and over) varied less than 1 percent for men and 1 percent for women. In the furniture industries the variation between age groups was less than 4 percent for both sexes. *Id.* Here not even the relative differences between the age groups can be used to legitimize arbitrary preference for younger workers.

²⁴ SECRETARY'S 1965 REPORT, *supra* note 4, at 11.

²⁵ For example, for the twenty to twenty-four age group the expected number of years on a job is six, for the forty-five to fifty-four age group it is nine, and for those between

Another major source of age discrimination in employment is a group of personnel programs and practices collectively known as institutional arrangements. These include such practices as promotion-from-within policies, age balances, seniority systems, and pension plans. These institutional arrangements may have as great an effect on the older worker's exclusion from employment as employer attitudes do.²⁶ Yet, unlike employer attitudes, these programs and policies have a valid primary purpose. It is only as a side effect that they promote age discrimination.

For example, pension plans pose considerable dilemmas for the older worker. When he is displaced by factors over which he has no control,²⁷ the older worker often finds that the pension plan to which he or his employer has been contributing for many years is of no value to him. Although many plans have vesting rights,²⁸ most of the plans require that the employee work for ten or fifteen years before the vesting rights come into effect.²⁹ Whether or not an employee has vested rights under his old plan, he faces opposition from prospective new employers because of other aspects of pension plans, primarily cost factors. Generally, pension plans provide for either fixed benefits for every employee with variable contributions based on expected work life,³⁰ or a fixed cost with variable benefits depending on expected work life.³¹ Under one plan the cost may become prohibitive for the employer and under the other the employee may end up with few or no benefits after retirement. Both programs have the same effect: an older worker seeking a new job will be discriminated against because of his age. Moreover, many pension plans contain age group exclusions which prohibit people over certain ages from participating in a plan at all.³²

fifty-five and sixty-four, it is seven and a half years. *1967 Hearings, supra* note 5, at 274. These figures are also borne out by an earlier study done by the Bureau of Labor Statistics. Labor Bulletin No. 1223, *supra* note 20, at 2.

²⁶ SECRETARY'S 1965 REPORT, *supra* note 4, at 15.

²⁷ For example, a worker may be laid off or his plant may be closed. From 1954 to 1967, the annual number of business failures ranged from 11,000 to 17,000. *Hearings Before the Senate Special Comm. on Aging*, 91st Cong., 2d Sess. 1478 (1970) (statement of Professor Bernstein) [hereinafter cited as *1970 Hearings*]. In 1967, almost one-fourth of these shutdowns occurred in businesses over ten years old. *Id.* at 1479. Thus, unless he works for a large and stable corporation, no employee can be assured that he will ever receive back the money he has contributed to his company's pension plan.

²⁸ In 1958, 60 percent of limited benefit plans surveyed had vesting provisions, that is, the worker has an equity in the pension plan and will receive that equity when he reaches retirement age no matter where he is. U.S. Department of Labor, Bureau of Labor Statistics Bulletin No. 1407, at 11 (1962).

²⁹ *1970 Hearings, supra* note 27, at 1478.

³⁰ See Note, *supra* note 20, at 402.

³¹ *Id.* at 403.

³² A 1964 study showed such exclusions vary widely from age fifty to age sixty-five with

Given the attitudinal and institutional barriers the older worker faces when he is looking for a new job, it is not surprising that significant actions have been required to aid him. Most forms of assistance have been legislative, for, as Secretary Wirtz said, "The possibility of a new non-statutory means of dealing with such arbitrary discrimination has been explored. That area is barren."³³ The unique problem such legislation faces is how to accommodate the needs of the older worker with those valid reasons for not hiring such individuals.

II. ATTACKING AGE DISCRIMINATION

A. State Statutes

At present, thirty-one states have a statute or resolution prohibiting employment discrimination based on age.³⁴ There is a wide variation as to what age groups are protected, who is exempt, what practices are prohibited, what the penalties are, and how the statutes are enforced.³⁵ Some of these statutes are nothing more than exercises in legislative drafting,³⁶ although some states do appear committed to ending age discrimination.³⁷ Yet, in most states the enforcement of age discrimination statutes has been minimal. While there have been no recent studies of state enforcement, a 1963 study showed that of the 1,560 "age" complaints received by state agencies that year, over half were filed in the four states with vigorous enforcement programs.³⁸

at least one-third of them set below age fifty-five. See SECRETARY'S 1965 REPORT, *supra* note 4, at 17.

³³ SECRETARY'S 1965 REPORT, *supra* note 4, at 2.

³⁴ See sources cited in note 2 *supra*.

³⁵ There is a summary of the state statutory provisions dealing with age discrimination in employment in U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1971, at 18-29, submitted to Congress in 1972 in accordance with Section 13 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970) [hereinafter cited as SECRETARY'S 1971 REPORT].

³⁶ For example, the Indiana statute forbids age discrimination against any person between forty and sixty-five by the state, all labor organizations, and all private employers. IND. ANN. STAT. §§ 40-2318 to 40-2328 (1965). See IND. ANN. STAT. § 40-2319 (1965) which makes it an unfair employment practice to "dismiss from employment, or to refuse to employ or rehire, any person solely because of his age." Yet, under this liberal act, there are no penalties for violations, and the enforcement agency only has the power to conciliate. IND. ANN. STAT. § 40-2323 (1965).

³⁷ The New York Human Rights Commission has been the most vigorous enforcer of age discrimination prohibitions. Between July 1, 1958, and June 20, 1966, the Commission received 755 "age" complaints averaging about 15 percent of the total yearly employment complaints. In over one-third of these complaints the commission found unlawful practices or patterns and corrected them. 1967 Hearings, *supra* note 5, at 232 (statement of Judge Conway).

³⁸ Note, *supra* note 20, at 413.

B. Constitutional Protection

With the passage of state and federal legislation forbidding employment discrimination based on age, the use of constitutional arguments is limited to those people who are unprotected by the statutes. Indeed, there is only one case in which unconstitutional age discrimination is discussed. In *Weiss v. Walsh*,³⁹ a seventy-year-old professor sought a preliminary injunction to prevent a New York university from giving to another an endowed chair the university had first offered the plaintiff but had subsequently revoked. In refusing to grant the injunction, the court said the fact that age is not mentioned in the due process clause does not insulate age classifications from constitutional scrutiny, although they are less likely than racial or religious classifications to be invidious, since age "generally bears some relation to mental and physical capacity."⁴⁰ It is interesting to note that the court left open the possibility that an "age" argument might succeed when alleged by a person who is unprotected by statute and who is not at either end of the age spectrum. Moreover, the *Weiss* court noted that if a plaintiff could show an age limit had been discriminatorily applied, the equal protection clause's prohibition against selective enforcement of the law would apply.⁴¹

C. The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 (Act or ADEA)⁴² is an outgrowth of Title VII of the Civil Rights Act of 1964.⁴³ Section 715 of that title directed the Secretary of Labor to make a "full and complete study" of the problem of discrimination based on age and to submit a report to Congress.⁴⁴ The report, *The Older American Worker*, was the catalyst to enactment of the ADEA.

The ADEA has three purposes: to promote the employment of persons who are over forty years of age but under sixty-five; to prohibit arbitrary age discrimination in employment; and to help employers and workers solve the problems of the impact of age on employment.⁴⁵ The Act prohibits discrimination because of age in

³⁹ 324 F. Supp. 75 (S.D.N.Y. 1971).

⁴⁰ *Id.* at 77.

⁴¹ *Id.* at 78.

⁴² 29 U.S.C. §§ 621-634 (1970).

⁴³ 42 U.S.C. §§ 2000e *et seq.* (1970).

⁴⁴ *Id.* § 2000e-14.

⁴⁵ 29 U.S.C. § 621 (1970).

matters of hiring, job retention, compensation, and other terms, conditions, or privileges of employment.⁴⁶ It covers most employers of twenty-five or more persons⁴⁷ and the public and private employment agencies serving such employers,⁴⁸ as well as labor organizations having twenty-five or more members.⁴⁹ The Act also sets forth four defenses or exceptions for actions which would otherwise be prohibited.⁵⁰

The Secretary of Labor is given broad responsibilities. He must conduct education and research programs designed to show the needs, utilization, and potential of older workers,⁵¹ as well as make a study of institutional arrangements giving rise to involuntary retirement.⁵² He may also make any rules or regulations deemed necessary to fulfill the Act's purposes, including the establishment of reasonable exemptions.⁵³

Enforcement and recovery procedures⁵⁴ are similar to those of the Fair Labor Standards Act (FLSA).⁵⁵ The major difference is that the ADEA specifically requires that attempts must be made to eliminate the discriminatory practice through informal methods of conference, conciliation, and persuasion before any legal proceedings can be initiated.⁵⁶ Any aggrieved party may then sue,⁵⁷ provided that he gives at least sixty days notice of his intent to file.⁵⁸ Private right to sue is terminated when the Secretary starts an action to enforce the employee's rights.⁵⁹ If an alleged violation occurs in a state with age discrimination legislation, no action can be taken until the state has had an opportunity to act.⁶⁰

⁴⁶ *Id.* § 623(a)(1).

⁴⁷ *Id.* § 630(b).

⁴⁸ *Id.* § 630(c).

⁴⁹ *Id.* § 630(e).

⁵⁰ *Id.* § 623(f). See text accompanying notes 64-86 *infra*.

⁵¹ *Id.* § 622.

⁵² *Id.* § 624.

⁵³ *Id.* § 628. Rules were promulgated and are set out in 29 C.F.R. pt. 850 (1972).

⁵⁴ 29 U.S.C. § 626(b) (1970).

⁵⁵ *Id.* §§ 211(b), 216, and 217.

⁵⁶ *Id.* § 626(d).

⁵⁷ *Id.* § 626(c).

⁵⁸ *Id.* § 626(d).

⁵⁹ *Id.* § 626(c).

⁶⁰ *Id.* § 633. As this overview of its provisions shows, the ADEA is a hybrid of Title VII and the FLSA. The basic prohibitions and exceptions of the ADEA are very similar to Title VII, whereas the enforcement provisions are generally those of the FLSA. The reason for commingling can be found in the ADEA's legislative history. Initially, there were two Senate bills proposed. The administration bill was remarkably similar to Title VII except that a new bureaucracy would have been established in the Department of Labor with cease and desist powers subject to enforcement at the court of appeals level. S. 830, 90th Cong., 1st Sess. (1967). The other bill, proposed by Senator Javits as an amendment to the FLSA, would have put responsibility for enforcement of the ADEA under the Department of Labor's Wage and Hour Division. S. 788, 90th Cong., 1st Sess. (1967). Although the ADEA as enacted does not specify that it should be administered by

For purposes of enforcement the most important parts of the ADEA are the four exceptions in Subsection 4(f).⁶¹ Depending on the manner in which these exceptions are construed, the Act can become either a strong antidiscrimination measure or a mere statement of public policy. Fortunately, the former seems to be the trend; the Secretary has interpreted the exceptions in Subsection 4(f) narrowly,⁶² and his opinion has been given great weight by those few courts that have dealt with the ADEA.⁶³

1. *Bona Fide Occupational Qualifications (BFOQ) Reasonably Necessary to the Normal Operations of the Particular Business*—The Secretary has interpreted this exception to be of limited scope and application.⁶⁴ Furthermore, he has said that the burden of proof in establishing that a BFOQ exists is on the one who relies upon the exception.⁶⁵ Recently one court ruled on the requirements necessary to establish a BFOQ. After finding a prima facie case of age discrimination, the court in *Hodgson v. Tamiami Trail Tours*⁶⁶ applied the same test to an age BFOQ as used in *Diaz v. Pan American World Airways*⁶⁷ to determine a sex BFOQ—that is, whether the employer has shown “that the essence of its business would be undermined”⁶⁸ by hiring employees older than its established age limit. Moreover, the court held that the defendant has the burden of proving that there is “reasonable cause to believe, that is, a factual basis for believing” that substantially all people over the age limit cannot perform the job safely and efficiently.⁶⁹ Although the *Tamiami* court found that the defendant had carried his burden of proof, it is significant that the one court that has ruled on the BFOQ exception has determined that BFOQs are applicable only in very special and limited cases of age discrimination.

2. *Differentiation Based Upon Reasonable Factors Other Than Age*—This exception, also found in Subsection 4(f)(1) of the

the Wage and Hour Division, the Secretary has delegated to that Division the powers to enforce, to make rules and regulations, and to interpret the Act. Secretary of Labor Order No. 11-68, 33 FED. REG. 9690 (1968). The most unfortunate result of this compromise was the deletion of the cease and desist power in favor of civil suits.

⁶¹ 29 U.S.C. § 623(f) (1970).

⁶² 29 C.F.R. pt. 860 (1972).

⁶³ See, e.g., *Grossfield v. Saunders Co.*, 1 F.E.P. Cases 624 (S.D.N.Y. 1968), and *Hodgson v. American Hardware Mutual Insurance Co.*, 329 F. Supp. 225 (D. Minn. 1971).

⁶⁴ 29 C.F.R. § 860.102 (1972).

⁶⁵ *Id.*

⁶⁶ 4 F.E.P. Cases 728 (S.D. Fla. 1972).

⁶⁷ 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

⁶⁸ 4 F.E.P. Cases at 731.

⁶⁹ *Id.* at 731-32. The *Tamiami* court was quoting and approving the test used by the same court in *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 288 (5th Cir. 1969).

Act,⁷⁰ is unique to age discrimination and has no counterpart in other employment discrimination legislation. Since it is such an open-ended exception, the Secretary has gone to great lengths to explain its scope.⁷¹ Since Congress did not intend to require the employment of anyone, regardless of age, who is disqualified on other grounds,⁷² this exception is necessary to allow a showing of the other factors which caused an employer not to hire or promote a person in the protected group. The exception must be construed narrowly, however, and the burden of proof to establish a valid differentiation is on the one who seeks to rely on the exception.⁷³

Although no case has dealt with this exception in the setting of a refusal to hire, there has been one decision dealing with termination based on reasonable factors other than age. In *Stringfellow v. Monsanto Co.*,⁷⁴ the defendant reduced the number of employees in each of its plant's three departments. The determination of which employees were to be laid off was based on the application of a number of criteria to each employee's job performance. In each instance of alleged age discrimination, the court concluded that "the differentiation resulting from the application of such factors and criteria in the plan of evaluation which Monsanto used was based on reasonable factors other than age . . ." ⁷⁵ The court, however, failed to determine whether the criteria themselves were age-biased, which is essential to finding a valid differentiation. Given the Secretary's general interpretation of this exception and the ease with which it can be misapplied, greater efforts should be made to establish a more definite standard.

3. Bona Fide Seniority Systems or Any Other Employee Benefit Plans—This exception in Section 4(f)(2)⁷⁶ was enacted to cover those institutional arrangements discussed earlier⁷⁷ which have a valid primary purpose but also a discriminatory side effect. In order for a seniority system to be bona fide, it must be primarily based on length of service as the criterion for allocating employment opportunities, regardless of the employee's age.⁷⁸ It

⁷⁰ 29 U.S.C. § 623(f)(1) (1970).

⁷¹ 29 C.F.R. §§ 860.103, 860.104 (1972).

⁷² *Id.* § 860.103(c). Jobs which may require special degrees of physical fitness or levels of education may qualify for this exception. *Id.* §§ 860.103(f)(1)(i), (ii). However, since there can be no grouping or stereotyping (*id.* § 860.103(f)(1)(iii)) a proven relationship between the job and its qualifications must be shown. *Id.* § 860.103(f)(2). Cost alone will never be a valid determination. *Id.* § 860.103(h).

⁷³ *Id.* § 860.103(e).

⁷⁴ 320 F. Supp. 1175 (W.D. Ark. 1970).

⁷⁵ *Id.* at 1180.

⁷⁶ 29 U.S.C. § 623(1)(2) (1970).

⁷⁷ See text accompanying notes 26 - 32 *supra*.

⁷⁸ 29 C.F.R. § 860.105(a) (1972).

must also be applied uniformly.⁷⁹ For example, adoption of a seniority plan which gives those with longer service lesser rights in case of discharge or perpetuates prior discriminatory age practices will be considered a "subterfuge to evade" the Act.⁸⁰ An employer does not, however, have to offer an employee protected by the Act the same employee benefits as younger workers so long as the differential between them is in accordance with a bona fide benefit plan, be it a pension, insurance, health, or retirement plan.⁸¹

The presence of a bona fide employee benefit plan cannot allow an employer to justify his otherwise unprotected actions against nonparticipants. In *Hodgson v. American Hardware Mutual Insurance Co.*,⁸² an employer had a bona fide elective retirement plan that required participating men to retire at sixty-five and participating women to retire at sixty-two. The employer had the same mandatory retirement ages for nonparticipants, which the Secretary said violated the ADEA as to the nonparticipating women. Initially the court found that there was a violation of the Subsection 4(a) prohibition on discharge since, regarding protected nonparticipants, the compulsory retirement age was based merely on an employer's desires and not on a bona fide retirement plan. The fact that the employer may have "many sound business reasons" for wanting a uniform retirement age did not matter since Congress had determined that the "overall economic interests of the country, as served through older worker employment, override such parochial interests of employers."⁸³ Regarding the defendant's contention that Subsection 4(f)(2) only excepts hiring from the operation of the bona fide retirement plan, the court concluded that Subsection 4(f)(2) covered both situations, since "conceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old,"⁸⁴ and that the employer's interests are the same in both situations. By so reading this exception, the court clearly fulfills the purpose of the Act even though a literal reading might not allow that result.

4. *Good Cause*—Subsection 4(f)(3)⁸⁵ allows an employer "to discharge or otherwise discipline an individual for good cause."

⁷⁹ *Id.* § 860.105(c).

⁸⁰ *Id.* § 860.105(b).

⁸¹ *Id.* § 860.120(a).

⁸² 329 F. Supp. 225 (D. Minn. 1971).

⁸³ *Id.* at 228.

⁸⁴ *Id.* at 229.

⁸⁵ 29 U.S.C. § 623(f)(3) (1970).

Although this provision is not discussed in the legislative history or the Secretary's Interpretive Bulletin, it presents some interesting problems about arbitration. The question of what forum is to determine just cause and how much weight one forum must give to another's determination could raise more problems than the other exceptions. At present the courts are in a state of disarray in this matter.⁸⁶

III. ENFORCEMENT AND EDUCATION

Within limited exceptions, the ADEA prohibits arbitrary age discrimination in employment and promotes the employment of workers between forty and sixty-five years old. Yet the effectiveness of this Act, like any other, is not determined solely by the bare words of the congressional mandate but by the ability of the body charged with enforcement of the Act. Enforcement of the ADEA has been placed in the hands of the Secretary of Labor, who has in turn delegated enforcement and rulemaking powers to the Wage and Hour Division of the Labor Department and research and study powers to the Assistant Secretary for Manpower.⁸⁷

Before any legal action can be taken for an ADEA violation, the Wage and Hour Division is directed to conciliate, confer, and if possible persuade the allegedly discriminatory employer, employment agency, or labor organization and the older worker to reach a settlement.⁸⁸ When conciliation fails, the Wage and Hour

⁸⁶ For an example of conflicting court policies on the effect of a prior determination of discrimination, see *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), holding that an employee could not initiate a Title VII action after an adverse arbitration award, and *Hutchings v. United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970), holding that an arbitration award could not be conclusive as to the employee's Title VII rights.

⁸⁷ Secretary of Labor Order No. 11-68, 33 FED. REG. 9690 (1968).

⁸⁸ 29 U.S.C. § 626(d) (1970). In fiscal year 1971, the Division made 6,846 investigations and found one or more violations of the Act in 36 percent of them. SECRETARY'S 1971 REPORT, *supra* note 35, at 2. As a result of conciliation efforts, agreements to correct prohibited practices, which sometimes include payment of substantial sums to the older worker, were obtained without legal action against almost nine-tenths of the 2,522 establishments found in violation. *Id.* at 3. Although the absolute number of investigations is down from the fiscal year 1970 figure of 10,956, this does not indicate that the Division is being less diligent in its administration of the Act. Indeed, the opposite is probably true since of all the 1970 investigations, over three-quarters were accomplished while investigating other programs under the Wage and Hour Division's jurisdiction. Thus the ADEA investigation was merely an adjunct to the primary purpose of the investigation and probably was not as carefully done. This policy has ended, partially because of the realization that the ADEA was receiving second-class treatment and partially because of a study showing that ADEA violations were more likely to occur in businesses that were generally in compliance with the FLSA and other programs administered by the Division. *Hearings Before the Senate Special Comm. on Aging*, 91st Cong., 1st Sess., pt. 9, at 1172

Division, in the name of the Secretary of Labor, has not hesitated to start legal actions.⁸⁹

One recent case, *Hodgson v. First Federal Savings and Loan Association*,⁹⁰ may signal the approach the courts will take in enforcing the prohibitions of the ADEA. The case involved a forty-seven-year-old woman who had been denied employment as a teller at a savings and loan association that had followed a practice of not hiring tellers over the age of forty. The Secretary brought an action in federal district court under Subsection 7(b) of the Act to enjoin the defendant from violating the prohibitions against age discrimination and to require payment to the applicant of money lost as a result of the violation. The district court granted an injunction applicable to tellers only but refused to order payment of a wage recovery because the Secretary did not carry his burden of proof.⁹¹

The Fifth Circuit Court of Appeals broadened the injunction and granted the payment of wages to the individual complainant. Regarding the burden of proof problem, the court of appeals found that the district court had placed too heavy a burden on the Secretary. It held that as in all other discrimination cases, the plaintiff is required only to make a prima facie case of unlawful discrimination, at which point the burden shifts to the defendant to justify the existence of any disparities.⁹² Because of documentary evidence and evidence of specific instances of dis-

(1969) (remarks of Mr. Robertson) [hereinafter cited as *1969 Hearings*]. Thus in fiscal year 1971, only one-half of the ADEA investigations were conducted in conjunction with other programs. SECRETARY'S 1971 REPORT, *supra* note 35, at 14 (table 3). There were, therefore, more solely ADEA investigations conducted in fiscal 1971 than in fiscal 1970.

The Wage and Hour Division is also making a more determined effort to deal with the more subtle types of violations. For example, in fiscal 1970 two-thirds of the investigations dealt with illegal advertising, where the Wage and Hour Division does little more than issue a letter to the violator telling him to stop using age-related advertisements. Interview with Richard McMullen, Wage and Hour Division, Department of Labor, in Washington, D.C., Mar. 3, 1972. In fiscal 1971, illegal advertising complaints, while still constituting a majority of the investigations, were reduced by about 20 percent. SECRETARY'S 1971 REPORT, *supra* note 35, at 16 (table 5). Whether this is a result of a conscious shift in Division tactics or a showing of greater employer awareness, the fact is that the Division is undertaking investigations that will ultimately decide its administrative effectiveness and test fully its conciliation apparatus.

⁸⁹ During calendar year 1971, over fifty suits were filed, and over twenty-five judgments, some of them filed in previous years, were issued enjoining further ADEA violations. SECRETARY'S 1971 REPORT, *supra* note 35, at 3. Eight of these cases were dismissed on stipulations of further compliance. Despite the statistics very few of the cases have been reported, and many of those that have been reported do not help define the scope of the ADEA but merely decide whether there is enough evidence to grant an injunction or back pay. See, e.g., *Hodgson v. Poole Truck Line, Inc.*, 4 F.E.P. Cases 265 (S.D. Ala. 1972); *Hodgson v. Bellgrath Trust*, 2 F.E.P. Cases 1054 (M.D. Ala. 1970).

⁹⁰ 455 F.2d 818 (5th Cir. 1972).

⁹¹ *Hodgson v. First Federal Savings & Loan Ass'n*, 3 F.E.P. Cases 16 (S.D. Fla. 1970).

⁹² 455 F.2d at 822.

criminy conduct, the court had no trouble finding that the Secretary had made a prima facie case. More importantly, the court said in dicta that if the Secretary had shown merely that no one in the protected age group had been hired over the last year as a teller, those statistics alone might have been enough to establish a prima facie case.⁹³ This could have an important impact on the future enforcement of the Act as the methods of and excuses for avoiding its requirements become more subtle and sophisticated.

The court also dealt with remedies available for ADEA violations. Since the Act incorporates Section 17 of the FLSA, the court said the trial judge could have used a broad range of remedies, including "the issuance of injunctions to effectuate future compliance with the Act and to restrain the continued withholding of unpaid wages owing because of unlawful past discrimination."⁹⁴ In light of these powers, the court found that limiting the injunction to tellers was unjustified.⁹⁵ Citing economy of administration and the lack of burden on the employer, the court made the injunction a permanent one covering *all* the defendant's operations without any direct evidence that it had in the past violated the Act in any of its other departments.

These views on burden of proof, use of statistics, and remedies available for past discrimination, coupled with the tendency of other courts to accept the Secretary's broad interpretation of the Act's prohibitions and his narrow interpretation of the Subsection 4(f) exceptions,⁹⁶ make the prospects bright for future fulfillment of the ADEA's purposes. Yet age discrimination will not be ended by vigorous enforcement of the ADEA alone. Potentially the most significant part of the Wage and Hour Division's activities is its educational efforts. So far the Division has distributed a large number of nontechnical pamphlets and a few short audio-visual presentations.⁹⁷ One of the Division's innovative activities has been the establishment of Compliance Utilizing Education (CUE).⁹⁸ Under this program, company officials are taught by Wage and Hour representatives to conduct systematic analyses of their firms' wage, salary, and employment practices to assure that such practices comply with the ADEA and other

⁹³ *Id.* at 823.

⁹⁴ *Id.* at 820.

⁹⁵ *Id.*

⁹⁶ See cases cited in note 63 *supra*.

⁹⁷ SECRETARY'S 1971 REPORT, *supra* note 35, at 5.

⁹⁸ *Id.*

requirements.⁹⁹ Since age discrimination is related to employer misconceptions about age and ability, having an "inside man" in a company point out the fallacies may be an effective way to reduce the problem. However, this assumes that those whose actions made the ADEA necessary are capable of policing themselves.

Training is another area where some efforts have been made to help the older worker. Unfortunately, these efforts have had only limited impact.¹⁰⁰ Indeed, there is only one program specifically designed to aid the older workers. Operation Mainstream concentrates on ways to provide work opportunities for older workers to improve the environment of their communities. Admirable as this program is, it does little to put the older person back into the labor market with skills to offer prospective employers. The greatest hope for the older worker is the Middle-Aged and Older Workers Employment Bill.¹⁰¹ If enacted, this bill would direct the Secretary of Labor to establish a mid-career development service to provide training, counseling, and other supportive services to upgrade the work skills of persons forty-five and older.

IV. STRENGTHENING THE PROTECTION OF OLDER WORKERS

The ADEA is an important first step in attempting to deal with a largely unrecognized problem in the employment setting. The Act does have its shortcomings, however, and it is necessary to examine some of the more important problems with current efforts to eliminate age discrimination.

A. The Wage and Hour Division as an Enforcement Agency

The Wage and Hour Division may not be the proper agency to administer the ADEA. During the Senate hearings on the ADEA, Senator Javits, a sponsor of the legislation, expressed the view that the Act should be administered by the Division because he feared a new enforcement agency would become another inefficient and overworked bureaucracy like the Equal Employment Opportunity Commission (EEOC).¹⁰² However, there are

⁹⁹ *Id.*

¹⁰⁰ In 1971, in all the programs under the Manpower Development and Training Act only 4 percent of the enrollees were over forty-five. 1971 *Hearings, supra* note 6, at 279.

¹⁰¹ S. 1307, 92d Cong., 1st Sess. (1971).

¹⁰² 1967 *Hearings, supra* note 5, at 204.

certain disadvantages to putting the enforcement of the ADEA under the jurisdiction of an agency already charged with administering other major legislation.¹⁰³ One is the possibility that the ADEA will receive low priority. There is evidence that this has happened.¹⁰⁴ Priorities must be set in the Division, of course, but if there were a special agency charged only with eliminating age discrimination this conflict would not arise. Moreover, the Division does not have a special group of expert investigators to oversee enforcement of the Act since it believes that all of its 1,000 employees should be generalists.¹⁰⁵ This practice deprives proponents of the fledgling ADEA of a stronger voice in Division policy-making.

B. Education and Attitudes

The possible impact of education on age discrimination in employment is unknown. Since in large part age discrimination is based on erroneous employer assumptions about older workers, effective distribution of information about age and ability can be important. Unlike other forms of discrimination, a solution to age discrimination is not shackled by the transmission of prejudices outside the work setting. Realizing this, Congress made education one of the main purposes of the ADEA.¹⁰⁶ Yet the total budget for all ADEA educational activities is only \$3 million,¹⁰⁷ and the Wage and Hour Division has not had a single workshop dealing solely with the ADEA.¹⁰⁸

C. Involuntary Retirement

Involuntary retirement is an aspect of age discrimination about which there is a paucity of information, but nevertheless it may have a significant effect on the employment patterns of American society. In an attempt to measure this effect, Congress directed

¹⁰³The Wage and Hour Division has major responsibility for enforcing the Fair Labor Standards Act, Public Contract Acts, Service Contract Act, Davis-Bacon and related acts, and the federal wage garnishment restriction of the Consumer Credit Protection Act.

¹⁰⁴In congressional testimony, Ben Robertson, then Deputy Administrator of the Wage and Hour Division, said an important study of three major industries with markedly low percentages of older workers was cancelled because priority had been given to a study of the effects of the minimum wage on hospitals and educational institutions. *1969 Hearings, supra* note 88, at 1180.

¹⁰⁵*Id.* at 1179.

¹⁰⁶*See* 29 U.S.C. § 622 (1970).

¹⁰⁷*Id.* § 634.

¹⁰⁸*1969 Hearings, supra* note 88, at 1178.

the Secretary of Labor "to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement."¹⁰⁹ Although the Secretary has not completed his study, the Social Security Administration has recently published a study called the "Survey of Newly Entitled Beneficiaries."¹¹⁰ The survey covered a total of 4 percent of the three million males within the sixty-two to sixty-five age group on July 1, 1968.¹¹¹ Asked for the most important reason for leaving their jobs, 13 percent specified compulsory retirement.¹¹² The percentage of respondents giving that answer increased in the higher age groups, with 34 percent of men aged sixty-five specifying compulsory retirement. This is natural since the general retirement age is still sixty-five. Of this 34 percent of those who were sixty-five, 41 percent said they had no work limiting factors when they left the job.¹¹³ The significance of this figure lies in the fact that over two-fifths of those men who retired at sixty-five could have continued to be productive members of the work force had they not been required to retire. The economy is losing many experienced workers because of arbitrary retirement limits. If the purpose of the ADEA is to prevent the use of arbitrary age barriers, then Congress should increase the protected class to include people over sixty-five or at least make more flexible rules for this age group.¹¹⁴

V. CONCLUSION

The Age Discrimination in Employment Act of 1967 is an important step toward ending the use of age as a basis for excluding a large number of able people from productive service in the labor market. The Act attempts to aid the older worker by prohibiting arbitrary age discrimination, by promoting his employment, and by educating employers, employment agencies, and labor unions about the true relationship between age and ability. Through strong enforcement and zealous proselytization the Act may be able to achieve most of its purposes. Yet the ADEA focuses on only one aspect of the problem, namely employers and

¹⁰⁹ 29 U.S.C. § 624 (1970).

¹¹⁰ SECRETARY'S 1971 REPORT, *supra* note 35, at 7-9.

¹¹¹ *Id.* at 8.

¹¹² *Id.*

¹¹³ *Id.* at 9.

¹¹⁴ It is interesting to note that between one-half and one-third of the people over sixty-five find it necessary to work to supplement their social security and/or pension benefits. 1967 Hearings, *supra* note 5, at 70.

other conduits to employment. Age discrimination is also caused by the employment pattern and structure of the labor market. Institutional arrangements, automation, technology, and shifting occupational patterns all contribute to the age discrimination problem. Unlike the effects of human prejudice, one cannot legislatively prohibit unwanted consequences of accepted societal structures. The structures or patterns themselves must be changed. In the meantime, the older worker should be offered a full range of services with regard to work, placement, training, rehabilitation, volunteer service, and retirement. By this approach, along with the ADEA, age discrimination in employment, at least in its most easily remedied forms, can be reduced substantially with a concomitant increase in benefits to the older worker and society in general.

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