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The Age Discrimination in Employment Act[1] became law in 1967, after numerous attempts to enact such legislation had failed.[2] The focus of the ADEA, like Title VII of the Civil Rights Act of 1964[3] is to ensure and promote the employment of individuals without regard to arbitrary, and therefore, forbidden criteria. The Act is specifically designed to:

> prohibit arbitrary age discrimination in employment [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.[4]

The Act was not vigorously enforced in the early years.[5] The increased public awareness of its prohibitions, however, along with a more active government enforcement policy, has resulted in significantly increased ADEA litigation. Employers, employment agencies, and labor organizations are consequently concerning themselves with the Act's provisions, and their interpretation.

This article attempts to explore these topics, and to anticipate future trends in the development of the ADEA. Part I discusses the

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1. 29 U.S.C. §§ 621-34 (1970) [hereinafter referred to as ADEA or the "Act"].

2. *See, e.g.*, H.R. REP. No. 805, 90th Cong., 1st Sess. 1-3 (1967) (individual views of Senator Javits). The Act was amended in 1974 so as to broaden its coverage to both the federal government and the states. The 1974 revisions were made in conjunction with amendments to the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-19 (Supp. June 1974) [hereinafter cited as the FLSA].

3. 42 U.S.C. §§ 2000e to e-15 (1970) [hereinafter cited as Title VII].

4. 29 U.S.C. § 621(b) (1970). As of latest count, 32 states also have age discrimination laws. This number represents an increase of eight state age laws over the number in existence on the date of the Act's passage. *Cf.* S. REP. No. 723, 90th Cong., 1st Sess. 2 (1967).

5. Chief Judge of the Northern District of Georgia, Sidney Smith, was able to state, as late as December 27, 1971, that "[t]here appear to be only two reported cases under the Age Discrimination in Employment Act of 1967." Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 233 n.1 (N.D. Ga. 1971).

general provisions contained in the ADEA and their relationship to other federal labor laws. Part II sets forth the general principles concerning the burden of proof required of a plaintiff in order to state a prima facie case of discrimination under the Act. Part III deals with the various defenses available to defendants after a prima facie case has been established. Finally, Part IV deals with the available remedies once age discrimination has been proven.

I. General Background

A. *Substantive Prohibitions*

The ADEA makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age, [or] to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .[6]

Prior to 1974, an employer was defined as any person "engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks . . . ."[7] The 1974 amendments, however, reduced the required number of employees to twenty,[8] and included both the federal and state governments in the definition of employer.[9]

Labor organizations are similarly prohibited from practicing age discrimination. The Act's provisions, both as to the prohibition of discrimination and as to the definition of a labor organization, virtually trace the language of Title VII.[10] There are, however, two minor differences in the manner in which the ADEA treats labor

6. 29 U.S.C. § 623(a)(1), (2) (1970).
7. *Id.* § 630(b).
8. 29 U.S.C.A. § 630(b) (Supp. June 1974).
9. *Id.* § 633(a) (included the federal government). In the interest of brevity, this article will concern itself only with the ADEA's application to the private sector. *Id.* § 630(b) effected the change as to state governments.
10. 29 U.S.C. §§ 623(c), 630(e) (1970).

organizations. While Title VII has five forbidden criteria,[11] the ADEA contains only the forbidden criterion of age. It also specifies that a labor organization must have a membership of twenty-five before it is covered by the Act's provisions.[12] Employment agencies are treated identically under the two statutes and thus they too are prohibited from discriminating on the basis of age.[13]

The ADEA prohibits those defined as employers, labor organizations, or employment agencies from engaging in age discrimination with respect to individuals who are at least forty years of age but less than age sixty-five.[14] These age limits, particularly the lower limit, have received both praise and criticism from the legal community.[15] The criticism stems from the fact that an employer may legally deny employment to an individual thirty-nine years of age on the basis of age, only to be forced to either hire him or face discrimination charges if the same individual reapplies for employment the following year.[16] Arguably, there exists no reason to presume that someone in his or her late thirties is not as much in need of protection against age discrimination as is someone forty years old.[17] Depending on the particular circumstances of the employment relationship, an individual of any age can suffer from age discrimi-

11. Race, color, religion, sex, or national origin.

12. Title VII only requires a minimum of 15 members for coverage to vest. The ADEA's higher minimum is probably a result of Congress' desire to gradually phase coverage down to a level comparable with Title VII, as was done with Title VII itself.

13. *Cf.* 29 U.S.C. §§ 623(b), 630(c) (1970); 42 U.S.C. §§ 2000e, 2000e-2 (1970). Employment agencies, regardless of their size, are covered by the Act. Brennan v. Paragon Employment Agency, 356 F. Supp. 286, 288 (S.D.N.Y. 1973).

14. Act of Dec. 15, 1967, Pub. L. No. 90-202 § 12, 81 Stat. 607, 29 U.S.C. § 631 (1970).

15. Indeed, there was extensive philosophical debate in the Congress concerning the Act's lower-end coverage even before its passage. The original Senate bill, S. 830, 90th Cong., 1st Sess. (1967), proposed coverage only for individuals at least 45 years of age but less than 65 years of age. The Senate Committee on Labor and Public Welfare agreed to reduce the lower-end age limit to 40 "since testimony indicated this to be the age at which discrimination in employment usually becomes evident." S. REP. No. 723, 90th Cong., 1st Sess. 6 (1967). A substantial number of congressmen proposed further reductions in the lower-end limit, and even no lower-end limit at all. These proposals were aimed primarily at overcoming certain airline company rules which required stewardesses to retire at anywhere between the ages of 32 and 35. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 13-15 (1967) (supplemental views). It now seems clear that unless stewards are also required to resign at the same age as are the stewardesses, these rules would violate Title VII. *See, e.g.*, Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971).

16. On the other hand, an employer must hire an individual at 64, while he can refuse that same individual employment, or even fire him the following year.

17. *See* Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y.L.F. 309, 321-23 (1973) [hereinafter cited as Agatstein].

nation, discrimination which the Congress should seek to outlaw.[18] It can, however, be maintained, as was successfully argued in Congress, that age discrimination does not "burden commerce" significantly unless practiced against individuals over age forty.[19] Apparently, Congress decided that the government's limited resources should be utilized only in protecting individuals over forty, who are presumably the persons who have the greatest difficulty finding and keeping employment.

The Act's upper age limit, sixty-five, has been justified as bearing a reasonable relationship to the age when individuals, at least as a general rule, cease to effectively function as part of the work force.[20] To the extent that older individuals may suffer any dislocation, the problem is at least partially offset by the availability of Social Security benefits. Despite the merits of these views, the counter arguments are very convincing. Retirement at age sixty-five, first proposed by Otto Von Bismark when the average life expectancy was only thirty-five years, no longer reasonably reflects the age when an individual becomes a liability as an employee.[21] It is seemingly inconsistent that the government should argue for an individual to be judged on merit, and not on generalized assumptions until the age of sixty-five,[22] while simultaneously accepting the principle that all individuals over sixty-five are presumed incapable of remaining on the work force, and thus denied the Act's protection.

Nevertheless, after having heard all the legal and philosophical arguments in favor of change, Congress, when it amended the Act in 1974, decided to retain the original upper and lower age limits. Therefore, at least for the moment, the "relatively" old and young have been left without the benefits of federal law to aid them in protecting their employment status.

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18. The Labor Department's interpretative bulletin on the ADEA, 29 C.F.R. § 860 (1968), seems to legitimize exactly this type of discrimination in the apprenticeship area. Thus, under 29 C.F.R. § 860.106 (1969), an employer may limit apprentices to "youths under specified ages." It can be said, therefore, that an "adult" of 25 who is refused entrance into such an apprenticeship program has suffered arbitrary age discrimination. *See also* S. REP. No. 723, 90th Cong., 1st Sess. 15-16 (1967) (individual views of Senator Dominick); note 15 *supra*.

19. *See* S. REP. No. 723, 90th Cong., 1st Sess. 6 (1967). It also can be argued that age discrimination is "virtually" non-existent at ages under forty.

20. Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974).

21. Agatstein, *supra* note 17, at 322.

22. *See* 29 C.F.R. § 860.103(f)(1)(iii) (1968). *See* notes 74-110 *infra* and accompanying text.

B. *Procedural Requirements*

1. *Suits by Aggrieved Parties*

Unlike Title VII, the ADEA contains no specific provision for the filing of a charge with a federal agency.[23] The Act prescribes certain notice requirements which must be fulfilled before an allegedly aggrieved party may maintain any action, legal or equitable. Thus, no individual may commence a civil action unless he has given the Secretary of Labor sixty days notice of his intent to file such action.[24] This notification must be filed within one hundred eighty days of the alleged unlawful practice.[25] If, however, the practice has occurred in a state which has both a law prohibiting age discrimination in employment and a state agency authorized to seek relief for individuals suffering age discrimination, the notice must be filed within three hundred days of the alleged unlawful practice or within thirty days of the aggrieved individual's receipt of notice of termination of state proceedings, whichever is earlier.[26] Upon receipt of such notice the Secretary must promptly notify all prospective defendants and seek to resolve the problem through conciliation.[27]

The sixty day notice requirement has been held to be jurisdictional.[28] The courts have reasoned that since the conciliation requirement was essential,[29] the Labor Department was to be allowed a specific period of time, sixty days, to attempt an informal resolution of age discrimination claims prior to any litigation.[30]

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23. *Cf.* 42 U.S.C. § 2000e-5 (1970), which provides for the filing of a charge with the Equal Employment Opportunity Commission [hereinafter referred to as the EEOC] by or on behalf of a person claiming to be aggrieved. The ADEA's lack of such a statutory provision, however, does not prevent aggrieved parties from informally filing charges with the Labor Department, the agency which administers the ADEA. *See* Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973); 29 U.S.C. § 626 (1970).

24. 29 U.S.C. § 626(d) (1970).

25. *Id.*

26. *Id.*

27. *Id.* No court has yet decided whether the Secretary's failure to conciliate will bar a private suit. *Cf.* Brennan v. Ace Hardware, 495 F.2d 368 (8th Cir. 1974); note 59 *infra* and accompanying text.

28. Price v. Maryland Gas Co., 62 F.R.D. 614 (S.D. Miss. 1972); Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1971). The notice itself need meet no formal requirements, as long as it contains both the basic facts of the charge and the names of individuals involved. *Id.* at 621. "Notification and Intent to Sue," Wage-Hour Administrative Opinion, 8 LAB. REL. REP. § 401, at 5213 (1968).

29. Burgett v. Cudahy Co., 361 F. Supp. 617, 619-21 (D. Kan. 1971). The ADEA conciliation provision is identical to § 706 of Title VII, 42 U.S.C. § 2000e-5 (1970).

30. Burgett v. Cudahy Co., 361 F. Supp. 617, 621-23 (D. Kan. 1971). This notice require-

The one hundred eighty day time period for the filing of notice with the Labor Department has also been held to be a precondition to civil suit.[31] The court, in *Powell v. Southwestern Bell Telephone Co.*,[32] in holding that this provision was jurisdictional, rejected the purported discriminatees' claim that the notice provision was analogous to the one hundred eighty day "charging" requirements found in Title VII.[33] The court noted:

> The 180 day notice requirement of the ADEA is contained in the subsection expressly dealing with time limits on civil actions. On the other hand, the [180] day charging requirement of [Title VII] is found in an entirely separate subsection which precedes the subsection limiting the filing of civil actions under [Title VII] . . . .[34]

One court has held, however, that a complainant's failure to comply with such requirements is not fatal if it is found that the delinquency is "excused by the actions of the employer."[35]

Presently, a purportedly aggrieved party may also have to meet the requirements of § 633(b)[36] as a jurisdictional precondition to a

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ment also allows the Secretary time to investigate so he can decide if he wishes to bring suit himself. *See* Bishop v. Jelleff Associates, 7 FEP Cases 510 (D.D.C. 1974); text accompanying note 61 *infra*.

31. Powell v. Southwestern Bell Tel. Co., 494 F.2d 485 (5th Cir. 1974). *See also* Gebhard v. GAF Corp., 59 F.R.D. 504 (D.D.C. 1973); S. REP. No. 723, 90th Cong., 1st Sess. 10 (1967).

32. 494 F.2d 485 (5th Cir. 1974).

33. 290 U.S.C. § 706(d) (1970). While "not insensitive" to the policy considerations advanced by the claimant, the court was obviously more concerned with Congress' apparent desire to insure that potential defendants were rapidly informed of both the claims made against them and the possibility for civil suit. *See* 113 CONG. REC. 35,056 (1967) (remarks of Senator Javits).

34. 494 F.2d at 488. The court also noted that the Title VII charging requirement has been considered jurisdictional, although liberally construed. *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970), where it was held that an employee's resort to contractual grievance procedures tolls the 180-day charging period.

35. Bishop v. Jelleff Associates, 7 FEP Cases 510, 519 (D.D.C. 1974). The employer's failure to post informative notices required by § 627 excused the complainants' noncompliance with § 626(d). The court also relied on the relative "newness" of the Act in waiving its jurisdictional prerequisites. *See also* Gebhard v. GAF Corp., 59 F.R.D. 504, 507 (D.D.C. 1973). No appellate court has yet ruled on whether each claimant in a class action suit must independently satisfy the notice requirements of § 626(d). The district courts, however, have been split. *Compare* Burgett v. Cudahy Co., 361 F. Supp. 617, 623-25 (D. Kan. 1971), *with* Oshiro v. Pan Am. World Airways, 378 F. Supp. 80 (D. Hawaii 1974). Following the approach developed under Title VII, it would appear that each individual need not satisfy the notice requirement, as long as the class representative has done so. *See* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

36. 29 U.S.C. § 633(b) (1970).

civil suit. This section specifies that in a state having an age discrimination law and an appropriate agency to enforce it

> no suit may be brought under Section 626 of this title before the expiration of sixty days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated.[37]

Analogizing this section to the EEOC's jurisdictional deferral specified in § 706(b) of Title VII, the Third Circuit has decided that an aggrieved party must file a complaint with the state agency and wait the required period of time before he may proceed with his federal court remedies.[38] The court based its decision on Congress' purported desire to allow the states an opportunity to resolve age discrimination issues before involving the federal government.[39] Therefore, this requirement stands in addition to, and not in lieu of, the notice requirements of § 626.

Judge Garth's concurring opinion sets forth a more persuasive analysis leading to a quite different conclusion.[40] He argues that the prohibitions of § 633(b) take effect only when an aggrieved party has freely decided to first pursue state remedies. Having committed himself to a state agency, the aggrieved party is then obligated to allow these state proceedings a reasonable opportunity, *i.e.*, sixty days,[41] to function.

Judge Garth supports his position with several arguments. First, he notes that § 626,[42] and not § 633,[43] deals with the ADEA's jurisdictional prerequisites to civil suit. Standing alone, this reasoning would be unpersuasive in light of analogous treatment of Title VII. Section 706(e) of Title VII does not concern itself with preconditions to civil suit. Nevertheless, its one hundred eighty day charging pe-

37. *Id.*

38. Goger v. H.K. Porter Co., 492 F.2d 13 (3rd Cir. 1974). Presumably, the Secretary is also barred from instituting suit unless the aggrieved party complies with § 633(b). Nothing in the court's opinion, however, indicates that the aggrieved party is prohibited from filing his intent to sue notice during this state waiting period. *Cf.* Love v. Pullman Co., 404 U.S. 522 (1972).

39. 492 F.2d at 15-16.

40. Judge Garth's opinion is officially designated a concurrence, because the majority considered it inequitable to deny relief, in view of the total absence of any judicial decision construing § 633(b) during the period involved here. *Id.* at 15.

41. 29 U.S.C. § 626(d) (1970).

42. *Id.* § 626.

43. *Id.* § 633.

riod is considered jurisdictional.[44] Title VII, however, has no provision analogous to § 633(a) of the Act, which discusses the relationship of the federal and state governments in the areas of the Act's concern. More particularly, § 633(a) specifies that the ADEA shall in no way preempt any similar state law. Thus, it seems reasonable to assume that § 633 was directed primarily toward federal-state relationships, and only secondarily toward complainants' procedural obligations. This analysis leads to a conclusion that the § 633(b) prohibitions become operational only after the federal-state choice has been made in favor of the state, not that an aggrieved party must, in all cases, first proceed through a state agency.[45]

As a practical matter, Judge Garth's conclusions are sound for another reason. Under the majority's analysis, it would appear that the Secretary is also barred from suit unless an aggrieved party first goes to a state agency for relief. Section 633(b) is not limited to private suits, but applies to all suits brought under § 626. Thus, what would be forbidden to an aggreived party would also be forbidden to the Secretary. Yet, § 17 of the FLSA,[46] and now § 16(c)[47] as well, authorize the Secretary to bring suit without precondition. Since these sections have been incorporated into the ADEA,[48] modified only by a conciliation requirement,[49] it must be presumed that an aggrieved party's compliance with § 633(b) is not a precondition to government suit.

Despite the relative merits of the majority and minority positions in *Goger*, the law is clear. Section 633(b) is deemed to be jurisdictional, at least in the Third Circuit.[50]

Finally, in addition to the strictures of both §§ 626(d) and 633(b),

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44. Powell v. Southwestern Bell Tel. Co., 494 F.2d 485 (5th Cir. 1974).

45. *But see* Agatstein, *supra* note 17, at 319-23, who apparently accepts the majority opinion in *Goger*.

46. 29 U.S.C. § 217 (1970).

47. *Id.* § 216(c). This section was extensively revised in 1974, eliminating, *inter alia*, a phrase which prohibited the Secretary from bringing suit over an unsettled issue of law. 29 U.S.C.A. § 216(c) (Supp. June 1974).

48. 29 U.S.C. § 626(b) (1970).

49. *See* text accompanying notes 55-60 *infra*.

50. The § 633(b) prohibitions, if they continue to be construed as jurisdictional, become dangerous to an aggrieved party only in light of the applicable state law. Having missed the applicable state charging or notice period, an aggrieved party, in effect, can never comply with § 633(b). Having failed to meet its requirements, he is barred from suit, even if he has complied with § 626. Once in this position, an aggrieved party will have to rely on the Secretary to bring suit on his behalf, if, in fact, the Secretary can do so. *See* text accompanying notes 55-60 *infra*.

§ 626(e)[51] specifies that §§ 6 and 10 of the Portal-to-Portal Act[52] shall apply to all actions brought under the ADEA, whether by an aggrieved party or the Secretary. The Portal-to-Portal Act in turn places a two-year statute of limitations on civil actions, except that the period of limitation is increased to three years for willful violations.[53]

2. *Suits by the Secretary of Labor*

While authorizing private suits, the ADEA also incorporates the major enforcement provisions of the FLSA.[54] Thus, the Secretary may seek back pay for a discriminatory employment practice as though it were "unpaid minimum wages"[55] or "unpaid overtime compensation."[56] He may also seek appropriate individual or class-wide injunctive relief.[57] The Secretary's decision to bring suit, however, terminates a private party's right to sue.[58]

By taking part of its enforcement structure from Title VII, § 626(b) of the ADEA copies that Act's conciliation requirements. The Secretary must, therefore, seek to achieve voluntary compliance through conciliation, conference and persuasion before bringing suit against any defendant. Failure to follow these requirements, in substance as well as in form, can result in the dismissal of any subsequent suit.[59]

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51. 29 U.S.C. § 626(e) (1970).

52. *Id.* §§ 251-62.

53. Parties bringing suit under the ADEA are entitled to a jury trial as to damages. Liquidated damages and attorney's fees are matters for the sound discretion of the court. Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974).

54. 29 U.S.C. § 626(b) (1970).

55. *Cf. id.* § 216(b).

56. *Id.*

57. *Cf.* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972); 29 U.S.C. § 217 (1970).

58. 29 U.S.C. § 626(c) (1970). Because individual suits are governed by the strictures of § 16(b) of the FLSA, 29 U.S.C. § 216(b) (1970), employees may bring suits for other "similarly situated" employees *only* upon such other employees' written consent, such consent to be filed in court. When compared with the much more liberal treatment given class action suits under Title VII, it can be seen that a private right to sue is not nearly the valuable plaintiff's litigation tool under the ADEA that it has been under Title VII. *See* Burgett v. Cudahy, 361 F. Supp. 617 (D. Kan. 1971).

59. *See, e.g.*, Brennan v. Ace Hardware Co., 495 F.2d 368, 376 (8th Cir. 1974). Three meetings between a compliance officer and company officials were deemed insufficient attempts at conciliation, where the compliance officer never requested back wages for the employee suffering the alleged discrimination.

II. The Plaintiff's Burden of Proof

The plaintiff has the burden of proving a prima facie case of age discrimination. Having made such a prima facie showing, the burden then shifts to the defendant to justify the existence of any disparities. Alternatively, he may show that the conduct was not motivated by age bias or that it was justified by a bona fide occupational qualification ("BFOQ").[60]

In determining what will constitute a prima facie showing of discrimination, the court, in *Bishop v. Jelleff Associates*,[61] stated that the plaintiff was required to show "more than simply the fact that he was within the protected age group and that he was adversely affected by an employment decision." The "more" requirement imposed by the *Jelleff* court is undoubtedly influenced by the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*.[62] Speaking for the Court, Mr. Justice Powell enunciated the four criteria necessary to create a prima facie case under Title VII: (1) the complainant must be within the protected group; (2) he must have applied for *and* been qualified for a job for which the defendant was seeking applicants; (3) despite his qualifications, he must have been rejected; and (4) after his rejection, the defendant must have continued to seek applicants for the position.[63]

While there has not yet been a Supreme Court case dealing with the ADEA, it is reasonably safe to assume that a plaintiff need not show a defendant's intent to discriminate in order to create a prima facie case.[64] As in cases brought pursuant to Title VII, it will probably be sufficient for a plaintiff to show the defendant's policy or practice has a "differential impact" on those in the protected class. It also seems clear that a plaintiff can sustain his burden of showing a prima facie case and a "differential impact" through the use of statistics. In *Hodgson v. First Federal Savings and Loan Association*,[65] the Secretary introduced evidence to show that in a specific time period (one year after the effective date of the ADEA),

60. *See* Hodgson v. Greyhound Lines, Inc., 7 FEP Cases 817 (7th Cir. 1974).

61. 7 FEP Cases 510, 520 (D.D.C. 1974).

62. 411 U.S. 792 (1973). Although *McDonnell Douglas* is a case brought under Title VII, the similarity between the substantive provisions of Title VII and the ADEA would lead to the conclusion that the same standards of proof will apply in cases of age discrimination. *See also* Wilson v. Kraftco Corp., 501 F.2d 84 (5th Cir. 1974).

63. 411 U.S. at 802.

64. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

65. 455 F.2d 818 (5th Cir. 1972).

the defendant had not hired one person within the protected age group. In *Schulz v. Hickok Manufacturing Co.*,[66] the Secretary introduced evidence to show that the average age of the alleged discriminatee's peers had been reduced from 53.39 years to 40.75 years during an eighteen month period surrounding the time of his allegedly illegal discharge. This "steep decrease" in employee ages was an instrumental factor in the court's decision, which found the discharge violative of the Act.[67] Conversely, it seems that a defendant may be able to successfully defend against an age discrimination charge, absent "specific acts of discrimination," by showing that it has hired numerous employees within the protected age class.[68]

Obviously, a plaintiff can also make out a prima facie case by showing specific incidents of discriminatory conduct. For example, a prima facie case has been established where an employer's personnel officer made notes during an employment interview indicating the applicant is too old for a position, or where a job description required individuals under forty years of age.[69]

III. The Defendant's Burden of Proof

Given the plaintiff's creation of a prima facie case of age discrimination, three defenses are available to a defendant. It is *not* unlawful for an employer, employment agency or labor organization

> to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differential is based on reasonable factors other than age.[70]

Similarly a defendant can defend his actions based upon the observance of "the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance

66. 358 F. Supp. 1208 (N.D. Ga. 1973).

67. *Id.* at 1213. *See also* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

68. It should be pointed out that, according to the Labor Department's ADEA interpretative bulletin, 29 C.F.R. § 860.91(b) (1968), it would also be unlawful for a defendant to show preference for the younger or older of two men within the protected class, *i.e.*, a job preference to a 42-year old man rather than a 52-year old man, or vice versa.

69. *See* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972); Marquez v. Omaha Dist. Sales Office, 440 F.2d 1157 (8th Cir. 1971); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973).

70. ADEA, 29 U.S.C. § 623(f)(1) (1970).

plan, which is not a subterfuge to evade the purposes of this chapter . . . ."[71] This exemption, however, does not permit an employer to refuse to hire any individual.[72] Any of these defenses, successfully proven, will be sufficient to rebut a plaintiff's prima facie showing and secure a dismissal of the case.

A. *The BFOQ*

Unlike race, which can rarely qualify as a BFOQ, an applicant's age, depending upon the circumstances surrounding each particular situation, may qualify as a BFOQ. The Labor Department, however, has sought to restrict utilization of this defense. The Department's interpretative bulletin states that the BFOQ defense

> must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer . . . which relies upon it.[73]

Prior to the preparation of this article, there has been only one reported appellate case dealing with the BFOQ defense to a claim of age discrimination.[74] In that case, the defendant, Greyhound, refused to hire any individual over the age of 35 for the position of inter-city bus driver, claiming this policy was necessary both to the safe and efficient operation of its business and to the public welfare.[75] The district court found Greyhound's policy violated the ADEA.[76] The Seventh Circuit reversed, finding that the essence of Greyhound's business, safe public transportation, would be undermined absent its ability to utilize its maximum-age hiring policy.[77]

The Seventh Circuit's decision indicates that courts may be more responsive to age BFOQ defenses than they have been to BFOQ defenses in Title VII litigation. While the court engaged in a complex analysis detailing the standards which a defendant must meet in sustaining its burden of proof when alleging a BFOQ defense, the court's actual findings are quite simple:[78] degenerative physical

71. *Id.* § 623(f)(2).
72. *Id.*
73. 29 C.F.R. § 860.102(b) (1968).
74. Hodgson v. Greyhound Lines, Inc., 7 FEP Cases 817 (7th Cir. 1974).
75. These inter-city runs require a driver to be on call 24 hours daily and to work an excessive number of consecutive hours. Since the runs are generally considered to be undesirable, the drivers who staff them are inevitably low on the company seniority list.
76. Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230 (N.D. Ill. 1973).
77. 7 FEP Cases at 822.
78. *Id.* at 820.

changes caused by aging have a detrimental impact on skills requiring, *inter alia*, fast reflex reaction. Since inter-city bus drivers must possess such skills without impairment, Greyhound's policy of excluding applicants over thirty-five years of age was legitimate. Of particular note was the court's apparent acquiescence in the general proposition that *all* people undergo the same type of degenerative physical changes as they age, and that each "over 35" applicant therefore need not be given an individualized test to discover whether or not he qualifies for employment.[79] This decision thus rejected the Labor Department's position that

> a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age . . . becomes physically unable to perform the duties of [the] job . . . [Each case must] be determined on an individual case by case basis, not on the basis of any general or class concept . . . .[80]

As the court noted, generalized objective hypotheses concerning an average driver's ability to efficiently perform his work should be sufficient justification for a BFOQ, because it is virtually impossible to predict how each individual driver will perform.[81]

While the *Greyhound* case represents somewhat of a breakthrough for the BFOQ defense, its significance should not be exaggerated. The essence of the decision still revolves around this specific employer's absolute need for employees with the ability to rapidly react to unexpected driving situations during an extended workday. Most employees will simply not be faced with such demanding working conditions, nor will there be such an intimate relationship to the public welfare. For example, the average assembly-line worker probably does not need the same reflexive reactions required in *Greyhound* in order to effectively perform his work. The presumptively slower reflex reactions in the older individual should not, in that case justify a BFOQ. Further, the length and pressures of the workday may be such that older employees can, in any event, adequately perform the job. If the inter-city bus drivers

79. *See also* Hodgson v. Tamiani Trail Tours, Inc., 4 FEP Cases 728 (S.D. Fla. 1972).

80. 29 C.F.R. §§ 860.103(d), (f)(1)(iii) (1968).

81. 7 FEP Cases at 820-21. *See also* Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 898 (2d Cir. 1960). "[P]resent medical knowledge is such that it is impossible to predict with accuracy those [specific] individuals most likely to suffer [heart] attacks."

in *Greyhound* were only required to work an eight, instead of a twelve hour day, the "reflex impairment factor" may have been non-existent or so negligible as to invalidate a BFOQ defense. Finally, even in situations where individuals in the covered class cannot meet the job criteria, the employer may still have to show that the criteria themselves are reasonable, *e.g.*, that inter-city bus drivers actually need all the skills Greyhound claims they need.[82] Thus, the fact that individuals in the protected class may not meet certain job criteria could conceivably force a recision of such criteria.[83]

B. *Reasonable Factors Other Than Age*

Additionally, a defendant may show that its personnel action was based "on reasonable factors other than age." Like the judicial precedent created under the National Labor Relations Act,[84] a decision motivated partially by age factors and partially by factors other than age remains unlawful.[85] If, however, an employer's decision is motivated by an employee's faulty work record, a reduction in force whereby only the most efficient employees are retained, or even a personal dislike for the employee in question, the decision will be upheld as a valid exercise of managerial discretion.[86] As the Labor Department's interpretative bulletin clearly states,

> It was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job.[87]

As in Title VII, however, potential problem areas must immediately be recognized. Just as certain allegedly "reasonable" criteria, on which employment and especially hiring decisions are based,

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82. Consider the courts' refusals to accept customer preference as a basis for a BFOQ under Title VII. *Cf.* Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971).

83. Several of the Wage-Hour Administrator's opinion letters confirm this analysis. In specific cases dealing with newspaper work, Wage-Hour Administrative Opinion, 8 LAB. REL. REP. § 401, at 5213 (1969); outdoor labor, *id.* at 5211 (1969); and oil field work, *id.* at 5205 (1968), the government has insisted on a case-by-case decision regarding covered employees' ability to perform the work in question. Absent the peculiar circumstances of the *Greyhound* case, these rulings, which are entitled to great judicial deference, may be controlling. *See* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 228-29 (D. Minn. 1971).

84. 29 U.S.C. § 151-68 (1970).

85. Bishop v. Jelleff Associates, 7 FEP Cases 510 (D.D.C. 1974).

86. *See, e.g.*, Gill v. Union Carbide Corp., 368 F. Supp. 364 (E.D. Tenn. 1973); Brennan v. Reynolds & Co., 367 F. Supp. 440 (N.D. Ill. 1973).

87. 29 C.F.R. § 860.103(c) (1968).

have been found to hinder black employment, thereby violating Title VII, these same criteria may violate the ADEA. For example, the Labor Department has already indicated that written tests will be considered highly suspect under the ADEA.[88] This position stems from its belief that "protected" applicants, who are presumably further removed from an educational environment than their younger counterparts, are not test wise, and will therefore score poorly on such tests.[89] Similarly, the Labor Department has argued that employment application questions which ask an applicant's age, although not per se illegal, are highly suspect.[90] Therefore, in order to at least partly offset their own suspicions, the Labor Department has advised employers to include the following sentence in their employment application:

> The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 65 years of age.[91]

Finally, the Labor Department considers the higher cost of employing or training a protected employee to be insufficient justification for adverse personnel decisions affecting a protected employee. The government reaches this conclusion even though the economics involved surely present an employer with reasonable factors other than age on which to base its decision. The ADEA interpretative bulletin takes the view that a comparison of employment costs based on age in itself evidences a determinative, and therefore invalid, reliance on age.[92] Labor Department opinions are not in and of themselves binding. As noted above, these opinions have been rejected by the courts in both the *Greyhound* and *Paragon Employment Agency* cases. In view of the judiciary's general policy of deferring to agency guidelines, however, employers, employment agencies and labor organizations act at great peril when they ignore the

88. *Id.* § 860.104(b) (1969).

89. *Id.*

90. *Id.* § 860.95 (1968).

91. *Id.* In line with this reasoning, the Labor Department has taken the substantive position that any help wanted notices or advertisements which contain words such as "young," "boy" or "college student" are prohibited by the ADEA. *Id.* § 860.92. This blanket prohibition seems both extreme and inflexible. Indeed, it already has been struck down in one court test. Brennan v. Paragon Employment Agency, 356 F. Supp. 286, 289 (S.D.N.Y. 1973).

92. 29 C.F.R. § 860.103(h) (1968). *See also* "Age as a Factor in Training," Wage-Hour Administrative Opinion, 8 LAB. REL. REP. § 401, at 5227 (1969).

strict manner in which the Labor Department interprets, and is attempting to enforce the ADEA.

C. *Bona Fide Seniority Systems and Benefit Plans*

Section 623(f)(2) of the Act provides that:

> It shall not be unlawful for an employer, employment agency or labor organization . . . (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual.

This provision is unique to the ADEA, and, in fact, was not even included in the original Senate bill. But as Senator Javits, the sponsor of the amendment including the provision, has noted:

> The lack of any such provisions was a serious defect . . . since in its absence an employer might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them.[93]

To date, both judicial and administrative rulings on § 623(f)(2) have been middle-of-the-road, in line with both the exemption and the proviso which appears in the section's last phrase. Thus, while an employer is allowed to mandatorily retire an employee under the age of sixty-five pursuant to a company retirement plan, he is forbidden from mandatorily retiring the same employee if he is not a participant in such plan.[94] Similarly, an employer need not provide covered workers with insurance benefits as liberal as those benefits provided to younger workers. The employer must, however, expend an equal amount of money for all workers.[95]

The most significant aspect of the exemption, the legal meaning of the words "bona fide," remains to be defined by the government and tested in the courts.[96] Under current interpretations, an em-

93. S. REP. No. 723, 90th Cong., 1st Sess. 14 (1967).

94. Brennan v. Taft Broadcasting Co., 7 FEP Cases 222 (N.D. Ala. 1973), *aff'd*, 8 FEP Cases 565 (5th Cir. 1974); Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 228 (D. Minn. 1971). *See also* 29 C.F.R. § 860.110 (1969).

95. 29 C.F.R. § 860.120 (1969). For reasons which remain unarticulated, pension plans have been excused from this equal cost approach, "Pension Plan: Exclusion of New Hires," Wage-Hour Administrative Opinion, 8 LAB. REL. REP. § 401, at 5227 (1970). In view of the interpretative bulletin, this Opinion undoubtedly will be rescinded.

96. The Labor Department's interpretative bulletin, at least with respect to retirement, pension and insurance plans, is currently quite vague.

ployer may be able to mandatorily retire employees at age fifty, or even age forty, if such retirement is pursuant to a pension or retirement plan in which the employee participates. Similarly, employers may be able to deny newly-hired employees covered by the Act, the right to participate in such plans.[97] If a plan, however, is viewed as a "subterfuge to evade the purposes of this Act," and not as "bona fide," such practices would be forbidden.[98] Currently, no governmental guidelines on mandatory retirement ages have been issued. This task, which undoubtedly means coming to grips with complex actuarial and statistical data of the type presented in *Greyhound*, looms as an area where increasing litigation will be inevitable.[99]

The validity of an employer's mandatory retirement age policy is but one issue which must be considered in determining whether a benefit plan is bona fide under the Act. As the Fifth Circuit's recent decision in *Brennan v. Taft Broadcasting Co.*[100] indicates, the type of plan involved is also an important factor in determining legality.[101]

The facts in *Taft* were relatively simple. An employee, who was a participant in the company's "Profit Sharing Retirement Plan," was forced to retire at age sixty, the plan's normal retirement age. Notwithstanding a clause in the plan which allowed the company, in its discretion, to postpone the employee's departure, the company refused the employee's request for later retirement. Subsequently, the company also refused to treat the employee as a "new" job applicant, thus denying his request for rehire. The Profit Sharing Retirement Plan was itself funded solely through company profits.[102]

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97. Under the equal cost approach, an employer would be obligated to expend an equal amount on the covered employee. Intangible benefits, however, may still motivate an employer to restrict participation of covered employees. *See also* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 202, 88 Stat. 829, which specifically permits exclusion of a new hire from a plan if his age is within five years of the plan's normal retirement age.

98. The Labor Department could argue, for example, that forced retirement at age 50, even in the context of a retirement plan, is per se a subterfuge. *Cf.* Murgia v. Massachusetts Bd. of Retirement, 8 FEP Cases 18 (D. Mass. 1974).

99. As in so many other areas of the law, no simple guidelines will solve the current ambiguities. Thus, a bona fide retirement age could vary from industry to industry. Similarly, it may vary by sex, or even location. Therefore, legal guidelines probably will be developed quite slowly and, at least initially, on a case by case basis.

100. 8 FEP Cases 565 (5th Cir. 1974).

101. As a secondary concern, the *Taft* opinion dealt with the factors which might determine legality of mandatory under-65 retirement. *See* note 104 *infra*.

102. The yearly contribution was set at ten percent of company profits.

At the end of the year, each employee received a certain number of benefit "units" based on his salary, length of service and age. The plan also specified that once an employee reached sixty years of age, he could no longer accumulate additional units, even though he might be allowed to continue working.

On these facts, the court, with a dissent, ruled the company's plan to be a bona fide benefit plan for ADEA purposes. It, therefore, sanctioned the company's decision to mandatorily retire the employee involved. Quite clearly, the *Taft* decision represents the first appellate attempt to interpret § 623(f)(2).

Initially, the court rejected the Labor Department's contention that the combination profit sharing-retirement plan was basically a profit sharing plan, and thus not within the § 623(f)(2) exemption.[103] In seeking to promote this interpretation, the government emphasized that the sole purpose of § 623(f)(2) was to immunize American business from maintaining and funding costly benefit programs for newly hired, older workers. The type of profit sharing plan maintained by *Taft*, however, did not present the company with those financial difficulties. The government argued that this conclusion followed, because the expenses of funding the Taft plan bore no relation to any employee's age, or to any actuarial computations. Instead, funding expenses were based upon a fixed percentage of company profits. Therefore, the purpose of the exemption would not be served by including this plan. Indeed, the general purposes of the Act would be undermined by allowing the company to force the retirement of a covered individual.

In rejecting the government's arguments, the court concluded that the operative words of the exemption, "employee benefit plan" were quite broad, and surely included a profit sharing retirement plan.[104] Moreover, the court emphasized the practical difficulties in judging each case on the basis of Congress' purported desires, *i.e.*, the avoidance of virtually insurmountable heavy cost burdens. Such

103. Brennan v. Taft Broadcasting Co., 7 FEP Cases 222, 223 (N.D. Ala. 1973).

104. Judge Tuttle, dissenting, also appeared to adopt this position. He disagreed with the majority because he believed that the company's right, in its sole discretion, to allow post-sixty employment took the plan out of the bona fide catagory. To be bona fide, a plan "must state in categorical terms that its members are subject to compulsory retirement at a time or under conditions differing from those of the statute (age 65)." 8 FEP Cases at 571. This rationale was specifically rejected in Steiner v. National League, 8 FEP Cases 941 (C.D. Cal. 1974). The *Steiner* rationale seems more appropriate, since it allows the employer to delay retirement age of those who are capable of continuing employment, thereby effectuating the broad aims of the Act.

actions should thus be shunned, especially when the Act's words are so clear.

The court's conclusion is unwarranted. The Act's legislative history seems to leave little doubt that Congress' intention was precisely and solely as the Labor Department had represented. Granting use of the exemption to benefit plans whose costs bore no relation to employee ages created a statutory loophole which Congress had not intended. Furthermore, it is highly questionable whether the wording of the exemption is as clear and as broad as characterized by the court. While it may be true that the words "retirement, pension or insurance plan[s]" served to describe types of "employee benefit plan[s]," and were not words of limitation, it is equally true that each of these plans is generally presumed to be based on actuarial formulae. One can make an entirely reasonable argument, therefore, that these words have been employed to describe the *type* of plan eligible for the exemption,[105] and that Taft's plan did not qualify.

Braunstein v. Commissioner,[106] upon which the court relied heavily, is readily distinguishable. In that case a disgruntled taxpayer sought to avoid the clear meaning of a section of the tax code by arguing that Congress had not intended the provision to apply to his situation. The Supreme Court rejected his claim, using the argument which was later adopted in *Taft*. The only similarity between the two cases, however, is their result. *Braunstein* sought to create a legal loophole; the government in *Taft* sought to close one. Given the presumptively narrow construction of statutory exemptions, it is surprising that the *Taft* court treated *Braunstein* with such deference. More significantly, the factual situations in the two cases were entirely different. The *Braunstein* Court specifically noted that nothing in the legislative history of the tax code indicated a Congressional intent to exempt the taxpayer.[107] The ADEA's legislative history, however, clearly indicates Congress' concern over an increase in business costs if employers were obligated both to employ older workers and to maintain benefit plans for them. It was this concern, and this concern alone, which prompted inclusion of §

105. Under this analysis, a plan which was not a retirement, pension or insurance plan could still qualify, as long as there was some nexus between funding costs and employee ages.

106. 374 U.S. 65 (1963).

107. *Id.* at 69, 71. The *Taft* opinion entirely overlooks this aspect of the *Braunstein* decision.

623(f)(2) in the Act.[108] The legislative guidance that was lacking in *Braunstein* was not lacking in *Taft*, and, as previously emphasized, this guidance mitigated in favor of the government.

Finally, the court's decision makes it difficult, if not impossible, to harmonize § 623(f)(2) with its proviso. The proviso obligates employers, as a class, to hire covered employees who may have been mandatorily retired by their previous employer. The exemption, however, allows the former employer to retire the employee in the first place. At first glimpse, the arrangement makes little sense. The possibility of rehire with a new employer is far less desirable than the right to stay on a specific job one might have held for numerous years. Congress, however, has allowed this more desirable employment to be denied employees as they age. The reasons for this legislative decision are plain; Congress presumed the new employer could employ the same individual at a more reasonable cost than the former employer, even if the employee were paid the same salary.[109] Thus, when read together with its proviso, § 623(f)(2) speaks entirely toward balancing the cost problems inherent in keeping older employees on the payroll against such covered employees' rights to continued productivity and employment. The court's opinion, however, eliminates the basis for Congress' decision. If a specific employer experiences no cost benefit in forcing his employees into pre-sixty-five retirement, as was true in *Taft*, there is simply no statutory reason to allow him to retire these employees, especially when every other American employer is thereafter required to consider hiring them. Considerations of business efficiency alone dictate against such a result.

In sum, the *Taft* opinion seems at odds with both Congress' intentions and the actual wording of § 623(f)(2). One would expect, therefore, that the government will continue to urge acceptance of its position.

IV. Remedial Relief

Having proved a violation of the ADEA, a plaintiff is entitled to

108. *See, e.g.*, S. Rep. No. 723, 90th Cong., 1st Sess. (1967).

109. Notwithstanding even a new employer's obligation to expend equal benefit plan moneys on all employees, the above conclusion follows. The former employer might have actually been obligated to spend more money on older employees than younger employees, if those older employees had acquired certain vested rights during their job tenure.

> such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing [monetary] liability . . .[110]

Liquidated damages, up to an amount equal to actual damages, are also recoverable.[111] The award of liquidated damages, however, is restricted to cases of willful violations.[112] In the case of a private suit, costs and reasonable attorneys' fees are also recoverable.[113]

As a general matter, ADEA litigation has not yet entered the "recovery stage." Therefore, "[f]ew courts have actually confronted this complex phase in its practical implementation."[114] In view of the Act's purposes and prohibitions, however, which parallel both the aims and language of Title VII, one must assume that remedial relief will be dispensed in accord with that statute.[115] Thus, back pay probably will be awarded to a discriminatee even if a defendant's actions were based on his own "good faith" belief of their legality.[116] Similarly, the the speculative nature of both the amount of back pay owing, and the persons to whom it is owed, should not prevent courts from awarding it.[117]

The ADEA has also inherited much of its enforcement machinery from the FLSA. Until 1974, the FLSA prohibited a § 16(c) suit, "involving an issue of law which has not been finally settled by the courts . . . ."[118] This provision has now been deleted from § 16(c)

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110. 29 U.S.C. § 626(b) (1970).

111. *Id.*

112. *Id.* A willful violation will be found only where there is "a bad faith evasion of the Act and a definite knowledge of its applicability." Bishop v. Jelleff Associates, 7 FEP Cases 510, 520 (D.D.C. 1974).

113. Monroe v. Penn-Dixie Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971); Foster v. Irwin, 258 F. Supp. 709 (E.D. La. 1966); 29 U.S.C. § 216(b) (1970).

114. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 (5th Cir. 1974).

115. As mentioned, at note 58 *supra*, private parties will have some difficulty maintaining class actions. As a practical matter, therefore, large ADEA monetary judgments may result very infrequently. Moreover, administrative delay will not financially prejudice defendants in a way they have suffered under Title VII, for the ADEA two-year statute of limitations dates from the bringing of a civil action, not from the date a plaintiff first contacts the Labor Department. *Cf.* 42 U.S.C. § 2000e-5 (1970).

116. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379-80 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002 (9th Cir. 1972). A court's opportunity to assess liquidated damages for willful violations also implies that "non-willful" violations will not be excused.

117. United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1973), *aff'g* 328 F. Supp. 429 (S.D.N.Y. 1971), *cert. denied*, 412 U.S. 939 (1973).

118. 29 U.S.C. § 216(c) (1970) (as incorporated into 29 U.S.C. § 626(b) (1970).

and, thus, from the ADEA as well.[119] Therefore, whatever Congress' past intentions concerning remedial relief for "unsettled issues of law," it now seems clear that such relief, including back pay, can be awarded. Implicit in the government's newly created right to bring § 16(c) "unsettled issue" suits is its right to recover back pay if such suits are successful. This right also should accrue in "unsettled issue" suits brought by private parties, and would be in accord with court practice under Title VII.[120] Therefore, even in the initial cases concerning the validity of employer or labor organization benefit plans,[121] potential defendants may well face back pay liability if they are unsuccessful on the merits.[122]

A defendant can avoid back pay liability in one other way. A good faith reliance on, and actions in conformity with, any written Labor Department opinion, ruling, or regulation will preclude liability from being imposed on such defendant, even if the applicable ruling, regulation or opinion is struck down by a court or rescinded by the Labor Department.[123] The exemption, however, has been narrowly construed, and the defendant bears the burden of proof.

In sum, a defendant who loses a case on the merits should realistically expect to face a damaging back pay award, and the prospect of injunctive relief. As the Fifth Circuit has now stated:

> [A]ny doubts about entitlement to back pay should be resolved against the [defendant. For] it is [he] who created the discriminatory situation . . . in the first instance . . . .[124]

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119. *See* Conf. Rep. 93-358, 93rd Cong., 1st Sess. 33-34 (1974).

120. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1377 (5th Cir. 1974).

121. 29 U.S.C. § 623(f)(2) (1970).

122. This analysis itself must wait testing in the courts. Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 (1970), which is also incorporated into the ADEA by virtue of § 626(e), specifies, *inter alia*, that liability shall not accrue if an unsuccessful defendant has relied in good faith on the Labor Department's prior "administrative practice or enforcement policy." Thus, it certainly might be argued that an "unsettled issue" suit, even by a private party, represents a radical change in government "enforcement" policy such that liability is proscribed by § 10. A more reasoned interpretation of § 10, however, is that it applies only to actual government policies or positions, not to newly emerging areas of concern, for it was precisely these "new" areas which were the concern of the former § 16(c) of the FLSA.

123. 29 U.S.C. § 626(e) (1970), incorporating the Portal-to-Portal Act § 10, 29 U.S.C. § 259 (1970). A defendant's good faith reliance herein should not be confused with his own, independently-formed good faith belief that he is acting in a legal manner.

124. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 (5th Cir. 1974).

Conclusion

Although the ADEA has been law for over six years, both scholarly and judicial interpretation of its provisions has been slow to develop. Existing analysis has focused primarily on Title VII, from which the ADEA draws the bulk of its statutory heritage. With the exception of the *Goger* decision, which requires an aggrieved party to pursue state remedies before exercising his federal rights, this "Title VII analysis" appears to be in harmony both with the Act's purposes and its statutory language. The Seventh Circuit's *Greyhound* decision, for example, acknowledges one of the basic realities of human existence—that the elderly are, as a rule, more susceptible to sudden and disabling illness than are the young. Therefore, BFOQ's under the ADEA must be given the type of interpretation which would never be justified on the basis of race, and only rarely by sex. On the other hand, the courts, where possible, have sought to give the Act the munificent substantive reading intended by Congress. Thus, in both the *Goger* and *Jelleff* cases, relief has been allowed even though the plaintiffs failed to meet what the courts involved considered to be the Act's procedural mandates.

Unquestionably, the most significant judicial and philosophical work lies ahead. For while employer and labor organization benefit plans are fast becoming as integral a part of an employee's working environment as is his actual take-home salary, the Labor Department and the courts have just begun to detail when and if these plans will be considered bona fide under the ADEA's unique statutory scheme. In view of the difficulty inherent in altering any plan legally deemed either a "subterfuge," or not bona fide, as well as the possibility of a large financial liability if a plan is so adjudicated, the Labor Department should immediately set forth its own determination of which type of plans meet the requirements of the ADEA and which do not. Only in this way can employers and labor organizations alike understand what the law requires, and thus formulate plans assured to be in compliance with its terms.

Finally, there is the issue of the Act's coverage. The arguments advanced for eliminating or revising its jurisdictional scope, presently forty to sixty-five years of age, do contain merit. These arguments will undoubtedly be aired in the Congress, particularly since it already has shown its willingness to consider substantial liberalization of Title VII within a decade of its enactment. One must acknowledge, however, that the jurisdiction arguments now being

advanced are basically the same ones which Congress rejected in 1967. Since there has not yet been expansive litigation under the ADEA, it seems highly unlikely that Congress will soon decide to expand its scope. Unless and until it can be clearly shown that individuals under forty and over sixty-five are actually suffering from arbitrary age discrimination, the Act will probably remain intact.