UIC Law Review

Volume 14 | Issue 3 Article 12

Summer 1981

EEOC v. City of Janesville: Promoting Age Discrimination - The Exception Becomes the Rule, 14 J. Marshall L. Rev. 895 (1981)

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*EEOC v. CITY OF JANESVILLE**: PROMOTING AGE DISCRIMINATION—THE EXCEPTION BECOMES THE RULE

Mandatory retirement at a specified age is largely supported by misconceived notions concerning the effects of age on one's ability to perform.[1] Supporters of mandatory retirement maintain that the elderly are less efficient, experience a decline in intellectual capacity, and show a decrease in both stamina and strength.[2] Further, by retaining the older worker, an employer's insurance costs escalate, pension programs are difficult if not impossible to administer, and the younger workers' chances of promotion are seriously hampered.[3]

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

1. *See* Note, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116, 118 (1974). The most frequently cited reasons justifying mandatory retirement fall into two categories: the disabilities of the aged, and administrative problems created by their continued employment. Those arguing the disability justification state that the elderly: are less efficient; experience an intellectual decline; show a decrease in stamina and strength; are unable to adapt to change; and contract frequent illnesses. Administrative problems include: increased insurance costs; difficulty and costliness of administrating a selective retirement system on an individual basis; the discouragement of new blood from coming into the company; and hampering promotional opportunities for others within the company.

2. *Id.* at 118-20. This reasoning is, in part, based upon the inadequacy of the means used to test the elderly's performance. Tests used to indicate the intellectual ability of the aged do not accurately predict the intelligence of the older worker, since they are formulated to measure abilities most important during youth in accordance with the new educational philosophy. Education is now directed toward problem solving, whereas previously memorization was emphasized.

Further, decreases in strength and stamina are often offset by the position held by the older worker. Through the process of seniority, the duties involved in the older worker's position are often less physically demanding than the duties involved in a younger worker's job. *See also* Note, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748, 755-59, 773-77 (1975).

3. Note, *Age Discrimination in Employment*, 50 N.Y.U. L. REV. 924, 937-40 (1975). The argument of increased costs is illusory. Evidence shows that older workers are not more costly to cover under health and life insurance plans because these plans are based on the average age of the work force as a whole. Thus, unless there was a sudden deluge of older persons joining the work force, the addition of some older workers would have only a minor impact on the average age. Evidence has also shown that accident insurance costs would not escalate since a person becomes more cautious with age.

Pension costs would not necessarily increase if mandatory retirement were banned, since retirement age is a relevant factor for only one type of

In recent years, however, numerous studies have shown that these arguments do not comport with the facts of the effects of aging. Nor do they take into consideration the debilitating effects of forced retirement on capable workers who wish to remain employed.[4] Although it can be argued that age, at some point, has an adverse effect on one's ability to perform,[5] forced

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pension funding. The cost of administering this type of pension program may or may not be more costly if mandatory retirement were banned. Although an increase may occur, it should be kept in mind that under § 4 (f) (2) of the ADEA, employers are excused from including workers between the ages of 40 and 70 in employment benefit programs. *Id.* at 938 n.71. *See* Doppelt & Takefman, *The Retirement-Plan Exemption in Employment Act of 1967: Will the Exception Swallow the Rule?*, 53 CHI.-KENT L. REV. 597 (1976) (providing a more detailed analysis of the retirement plan exemption to the ADEA).

4. Note, *Age Discrimination in Employment*, 50 N.Y.U. L. REV. 924, 924-26 (1975). It has been conclusively established through scientific evidence that mandatory retirement harms the individual's physical, psychological, and economic well-being. The American Medical Association has stated that work is a meaningful activity which provides a person with a feeling of usefulness and self worth. By denying a capable person the opportunity to work merely because he has reached a certain age results in a loss of status and a feeling of dependency and isolation. Aside from the psychological effects, there is evidence that unemployment can exacerbate diseases and even produce new illnesses, including increasing the risk of heart disease and hypertension.

Forced retirement also ignores the fact that many older persons, because of the economy and increased inflation, must work to stay above the poverty level. As of 1975, the average monthly Social Security payment was less than $180 per month, while the average yearly benefit provided by private pension plans was less than $2,000 per beneficiary. Forced retirement has, therefore, failed to recognize the economic realities of the elderly which accounts for their comprising a substantial percentage of the nation's poor. By forcing able and productive persons to retire, society loses their productivity and they become public charges, vastly increasing public expenditures in the areas of both Social Security and welfare. For a more detailed analysis of the far reaching psychological and physiological effects which mandatory retirement has upon an older worker, *see generally* Kovarsky & Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 897-901 (1974); Whiteside & Batt, *The Effects of Mandatory Retirement*, 18 J. FAM. L. 761 (1980); Note, *Too Old To Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150, 154-59 (1971).

5. Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 383 (1976).

> Age discrimination is not the same as the invidious discrimination based on race or creed prejudices and bigotry. These discriminations result in unemployment because of feelings about a person entirely unrelated to his abilities to do a job. This is hardly a problem for the older job seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance. This is not the result of past societal discrimination but rather reflects the acknowledged connection between ability and the aging process.

In Houghton v. McDonnell Douglas Corp., 413 F. Supp. 1230, 1236 (E.D. Mo. 1976), the court listed many effects of the aging process. These effects include the slowing of reaction time, impairment of hearing and vision, inability to cope with stress, decrease in respiratory function and efficiency,

retirement at a specified age fails to recognize that aging is a process of individualized effect.[6]

The Age Discrimination in Employment Act (ADEA)[7] was enacted in 1967 to prevent dissimilar treatment of the older worker based on stereotyped assumptions concerning the effects of age on ability. The Act, amended in 1974 and 1978,[8] makes it illegal for any employer with more than twenty employees to hire, discharge, or otherwise discriminate against any individual between the ages of 40 and 70 based solely on the criteria of age.[9] The express purpose of these restrictions is to promote the employment of older workers based on their ability, rather than their age, thereby eliminating arbitrary discrimination affecting the older worker.[10] The older worker was to be afforded the same protection given to women under the statutory provisions of Title VII, which is similar to the ADEA in both purpose[11] and design.[12]

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and a decrease in the metabolic rate which diminishes resistance to fatigue. The court noted that although no one is immune to the aging process, different people are affected at different rates. *See also* Vance v. Bradley, 440 U.S. 93, 112 (1979), where the Court noted that "aging—almost by definition—inevitably wears us all down."

6. Note, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116, 122 (1974).

> The relegation of the elderly to a single role should not be permitted. They are individuals with different values, capacities, personalities and life styles. A person's worth should be measured by his individual capacity, unique to each human being, rather than the number of years he happens to be on earth.

7. Act of Dec. 15, 1967, Pub. L. No. 90-202, §§ 2-16, 81 Stat. 602-08 (codified as 29 U.S.C. §§ 621-34 (Supp. III 1979)).

8. R. MACDONALD, MANDATORY RETIREMENT AND THE LAW 2-6 (1978). Originally, the ADEA applied only to employers with twenty or more employees, employment agencies, and labor organizations. Amendments in 1974 extended jurisdiction to federal, state, and local governments. The 1978 amendments extended the protected group from the ages of 40 to 65 up through age 70.

9. 29 U.S.C. § 623(a), (b), (c) (1970 & Supp. III 1979).

10. H.R. REP. NO. 527, 95th Cong., 2d Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 505.

11. Title VII was part of the Civil Rights Act of 1964 and has been codified in 42 U.S.C. §§ 2000e(1)-(17) (1970). The purpose of the Civil Rights Act was to prohibit discrimination against persons based on classifications of race, national origin, color, sex, and religion. Since the purpose of the ADEA is to protect the elderly, making it illegal to discriminate against persons based on age, the ADEA seems to be an extension of the Civil Rights Act. *See generally* Note, *Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 380-83 (1976); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act*, 84 HARV. L. REV. 1109, 1113-19 (1971).

12. 42 U.S.C. §§ 2000e-2(a)(2)(1970) states in part:

> It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

Of the limited exceptions to both the ADEA and Title VII,[13] the one of immediate concern is where age or sex can be used as employment criteria if shown to be a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business. Under this exception, the employer must factually demonstrate that the duties of the job preclude the hiring of certain individuals.[14] Since the BFOQ de-

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employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(e) provides in part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

The ADEA, 29 U.S.C. §§ 621-34 (Supp. III 1979) (amending 29 U.S.C. §§ 621-34 (1970)), which prohibits most employers from discriminating against persons between the ages of 40 and 70 on the basis of age, also contains several exceptions to its provisions. Section 4(f)(1), now codified at 29 U.S.C. § 623(f)(1), provides that the Act's prohibitions against discrimination on the basis of age do not apply "where age is a bona fide occupational qualification [hereinafter BFOQ] reasonably necessary to the normal operation of the particular business, or where differentiation is based on reasonable factors other than age. . . ."

See Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972), where the court stated that "with a few minor exceptions the prohibitions of this enactment [ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex, and national origin.'" Because of the distinct similarities between Title VII and the ADEA, the courts have indicated they will afford both Acts similar interpretation, particularly in determining what constitutes a BFOQ. Arritt v. Grisell, 567 F.2d 1267, 1270 n.11 (4th Cir. 1977); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733 (5th Cir. 1977); Goger v. H.R. Porter Co., 492 F.2d 13, 17 (3d Cir. 1974) (Garth, J., concurring) (since the language of Title VII and the ADEA is so similar, "they are necessarily subject to the same construction").

13. Aside from the BFOQ exception to both Title VII and the ADEA, *see* note 12 *supra*, two other statutory defenses are available to an employer under the ADEA. Employers are allowed to discharge or discipline an employee for just cause or reasonable factors other than age. 29 U.S.C. § 623(f)(1), (3)(1970). A more limited exception is where, in observance of a bona fide seniority system or benefit plan, an employee may be forced to retire based solely on age. This exception, however, cannot be grounds for refusal to hire older workers since the employer is not required to include a newly hired older worker in such a plan. 29 U.S.C. § 623 (f)(2)(1970). *But see* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971) (court would not permit forced retirement of an employee participating in a benefit program even though the program called for retirement at age 62).

14. Once an employee or a prospective employee establishes a prima facie case, *see* note 29 *infra*, the burden of establishing that a BFOQ exception exists shifts to the employer. Marshall v. Westinghouse Elec. Corp. 576 F.2d 588, 591 (5th Cir. 1978). *See also* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 400 n.123 (1976).

fense is an exception to a remedial statute, the courts have been required to narrowly construe the statute in light of all attendant circumstances.[15]

Under a narrow construction, courts have concluded that a BFOQ defense is valid only where the employer factually demonstrates that all, or substantially all, persons in the group discriminated against would be unable to perform the duties of the particular job involved[16] or that the essence of the business operation would be undermined unless dissimilar treatment were allowed.[17] There are two exceptions to this rule of factual demonstration under the ADEA:[18] where the job is physically or psychologically demanding, or where inferior performance entails a high degree of risk to either fellow workers or the public in general.[19] The greater these risks, the lighter the correspond-

15. 29 C.F.R. § 1604.2(a) (1980) ("the commission believes that the BFOQ exception as to sex should be interpreted narrowly"). Similarly, § 623(f)(1)(1970) of the ADEA has been interpreted as follows:

> Whether occupational qualifications will be deemed to be 'bona fide' and 'reasonably necessary to the normal operation of the particular business', will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a [BFOQ] will have limited scope and application. Further, as this is an exception it must be narrowly construed, and the burden of proof in establishing that it applies is the responsibility of the employer. . . .

29 C.F.R. § 860.102(b) (1980). For a discussion of the broad construction of remedial statutes, and the narrow construction of their exceptions, *see* Argastein, *The Age Discrimination in Employment Act 1967: A Critique*, 19 N.Y.L.F. 307, 311-14 (1973).

16. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). The court stated that the employer, to sustain his burden of proof, must test individually each employee to determine his fitness for the job. Where such testing is impractical, the employer must factually demonstrate that he had reasonable cause to believe that all, or substantially all, women would be unable to perform safely and efficiently the duties which the job involved. This rule became known as the *Weeks* test.

17. This test was first formulated in Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971). In *Diaz* the defendant alleged that its practice of hiring only female cabin attendants was a BFOQ since airline customers overwhelmingly preferred female attendants. The court rejected this contention, stating that the defendant had failed to demonstrate that all, or substantially all, men were unable to perform these duties. Further, the *Weeks* test is not applicable unless the defendant first shows that the claimed BFOQ related to a quality necessary to his business operation.

18. Although the tests formulated in *Weeks* and *Diaz* were in connection with establishing a BFOQ defense for sex under Title VII, the same tests have been employed in most ADEA cases. Comment, *Age Discrimination by Local Governmental Entities—The Defense of a Bona Fide Occupational Qualification*, 31 BAYLOR L. REV. 527, 532 (1979). *See also* Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

19. In Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230 (N.D. Ill. 1973), the court applied the *Weeks* test to the defendant's contention that no bus driver could be hired beyond the age of 35 due to the nature of the job and the high degree of risk which an unqualified driver would pose to the public

ing burden placed upon the employer to factually demonstrate the correlation between the age chosen and the ability to perform the job in question.[20] Under no circumstances, however,

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at large. For Greyhound to establish the age of 35 as a BFOQ, it had to demonstrate that there was a factual basis for believing that all applicants over the age of 35 would be unable to perform the duties of the job involved.

On appeal, however, the Seventh Circuit reversed, stating that the *Weeks* test is not applicable where due to the nature of the job, the concerns go beyond the welfare of the job applicant to include a consideration of the well-being and safety of the general public. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). The court, in applying the *Diaz* test, found that the essence of the defendant's business was the safe transportation of people and that the hiring of unqualified drivers would seriously impair this function. The court stated that all Greyhound was required to demonstrate to uphold the validity of its maximum hiring age as a BFOQ was that it had a rational basis in fact to believe its elimination would increase the risk of harm to its passengers. *Id.* at 863.

In *EEOC v. City of Janesville*, the Seventh Circuit attempted to distinguish its prior holding in *Hodgson* by stating that *Hodgson* dealt with age-based retirement of a generic class of employees. Such a statement is clearly in error. First, *Hodgson* dealt with the validity of a maximum hiring age, not the validity of a mandatory retirement age. Second, *Hodgson* did not deal with a generic class of employees. Rather the court distinguished between "extra-board" and "regular-run" bus drivers on the basis of the different duties involved in each type of position. Regular-run positions were shown to be less strenuous since they involved scheduled runs over familiar routes. Extra-board positions, which involved irregular runs through unfamiliar intercity routes, were found too strenuous for older drivers. Since all new drivers were assigned extra-board positions, those hired after age 35 would be incapable of accumulating the 20 to 40 years of seniority needed to become regular run bus drivers. The maximum hiring age requirement was, therefore, upheld.

The Seventh Circuit should have distinguished *Hodgson* on the basic differences between the jobs of bus driver and police chief, as well as the corresponding burden of proof applicable to each. The court in Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976), enunciated the distinction, stating:

> The risk is far greater that a slight error in judgment, or a slight physical defect, in a person who is piloting a jetliner or driving a bus would produce "magnified" tragic results than they would in the case of one participating in a joint effort to extinguish a fire.

Id. at 462. The same reasoning would be applicable in relation to the joint effort of law enforcement.

20. In Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976), the court stated the test to be applied in determining the validity of a BFOQ where the job involved is inherently dangerous and individualized testing impossible or impractical:

> A review of the federal regulations (promulgated by the United States Department of Labor pursuant to the Act) and the available case law reveals that it is the nature of the task and the risks to fellow personnel and the public inherent in any inability to adequately perform that task which deflnes the burden incumbent upon the employer who is attempting to establish the [BFOQ] exemption under the statute.

Id. at 461. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (risks involved define the burden of proof). Statutes mandating early retirement of airline pilots have been upheld under this rationale. Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977). The same reasoning has been applied in cases concerning bus drivers. Usery v. Tamiami Trail Tours, Inc., 531 F.2d

will a BFOQ exception be sustained without some empirical evidence to substantiate a correlation.[21]

Recently, the Seventh Circuit, in *EEOC v. City of Janesville*,[22] was required to determine the scope of the BFOQ exception to the ADEA in order to decide whether a preliminary injunction had been properly granted. The plaintiff maintained, in a somewhat novel argument,[23] that the Wisconsin legisla-

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224 (5th Cir. 1976); Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

The *Aaron* court stated that although the burden on the employer may be lighter in high risk jobs, "at no point will the law permit . . . the fixing of a mandatory retirement age based entirely on hunch, intuition, or stereotyping, . . . without *any* empirical justification." 414 F. Supp. at 461 (emphasis in original).

This theory was first advanced in Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972), where the court stated:

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related.

Id. at 219.

21. Aaron v. Davis, 414 F. Supp. 453, 461 (E.D. Ark. 1976).

22. 630 F.2d 1254 (7th Cir. 1980).

23. In the original private suit filed by Jones, the claim that the Wisconsin statute which mandated his retirement was unconstitutional as a violation of equal protection was not dismissed by the court. *See* note 26 *infra*. The court stated, however, that any pursuit of the claim would encounter "formidable obstacles." Jones v. City of Janesville, 488 F. Supp. 795, 797 (W.D. Wis. 1980). The court's reference was to cases in which similar statutes mandating early retirement were upheld as constitutionally valid against claims that they violated equal protection.

In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), the Court stated that since age was not a suspect classification and work was not a fundamental right, the strict scrutiny standard of review should not be applied. Instead, the Court adopted the rational relation test. Under this test, the statute is afforded the presumption of validity if there is any set of facts which can reasonably be conceived to establish that the statute furthers a legitimate state interest. *See* Frontiero v. Richardson, 411 U.S. 677, 683 (1973). The burden of persuasion then shifts to the plaintiff to rebut this presumption by showing that all, or substantially all persons over the specified age are still able to perform the duties of the job involved.

In *Murgia*, the record showed that although the defendant had provided some expert testimony indicating that at some point age does adversely affect ability, no concrete data was provided to establish a correlation between the specified age (50) and the ability of persons beyond that age to perform the duties of a police officer. The plaintiff, on the other hand, established that only four months prior to his dismissal, he had passed a vigorous examination which found him both mentally and physically capable of continued performance as a police officer. Nevertheless, because Murgia was only able to demonstrate that *he* was still capable of

ture's broad construction of the statutory BFOQ exception was in violation of the ADEA. He alleged that an exception to the generic class of law enforcement employees was invalid due to the different and distinct duties each job within that broader category encompassed. Essentially, the question was whether the phrase "bona fide occupational qualification reasonably necessary to the normal operation of a particular business" requires that the proponent of the BFOQ exception provide empirical data establishing that persons beyond the specified age are incapable of performing the duties of the particular occupation of police chief, or whether such evidence need only relate to the general business of law enforcement. In upholding the validity of the Wisconsin statute, the Seventh Circuit summarily dismissed the necessity of closely examining the distinction, stating that the words "particular business" are not subject to interpretation.

FACTS & LOWER COURT OPINION

Kenneth Jones joined the Janesville police department in 1948. In 1975, he was appointed to the position of police chief, which he held until 1979, when he reached the age of 55. At that time he was notified that he was being retired pursuant to a Wis-

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performing beyond 50, the Court concluded that he had failed to rebut the presumption of the statute's validity.

The *Murgia* decision ignored the criticism of many commentators who have urged that, to carry out the underlying intent of the ADEA, statutes which infringe upon the protected class must be held to a stricter level of review than the rational relation standard. *See generally* Gunther, *The Supreme Court, 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1096 (1974); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutionality*, 61 VA. L. REV. 945 (1975). These authors' arguments are persuasive since a stricter level of review would require the state to factually prove the validity of the statute, rather than presuming a valid correlation between the specified age and the state interest. Shifting this burden to the proponent of the statute would ensure that the legislative determination was not arbitrary, and would comport with the BFOQ exception as being an affirmative defense. It would also alleviate the tremendous burden the plaintiff has to rebut the statute's presumed validity.

The courts, however, have been unwilling to follow these suggestions in spite of their persuasive logic. *See* Vance v. Bradley, 440 U.S. 93 (1979); Slate v. Noll, 474 F. Supp. 882 (W.D. Wis. 1979), *aff'd*, 444 U.S. 1007 (1980); Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979). Therefore, although the district court would not summarily dismiss Jones's constitutional challenge "for failure to state a claim," the similarities between the Wisconsin statute and those statutes already challenged seem to dictate that the former will be upheld. Jones v. City of Janesville, 488 F. Supp. 795, 797 (W.D. Wis. 1980).

consin statute mandating the retirement of all protective service employees at age 55.[24] Jones, believing the statute to be in violation of the ADEA by requiring retirement regardless of actual ability, filed a private suit against the city and its officers.[25] Two days later the private suit was dismissed[26] when the Equal Employment Opportunity Commission (EEOC) filed suit to enforce Jones's rights.[27]

The EEOC immediately sought a preliminary injunction ordering the city to reinstate Jones pending a trial on the merits. The district court concluded that the EEOC had a high probability of ultimate success,[28] having established a prima facie case of age discrimination.[29] Further, the court determined

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24. WIS. STAT. ANN. § 41.02(23), (11)(a) (West 1978) provides:

(23) after June 30, 1969, for purposes of § 41.11(a), normal retirement date for each protective occupation participant means the day on which such participant attains the age of 55 years.

(11)(a) 'Protective occupation participant' means any participant whose principal duties involve active law enforcement or active fire suppression or prevention, provided such duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning. This definition is deemed to include any . . . policeman, including the chief and all other officers, fireman, including the chief and all other officers. . . .

25. Jones v. City of Janesville, 488 F. Supp. 795 (W.D. Wis. 1980).

26. Under the procedural guidelines of the ADEA, the complainant must first notify the EEOC of his intent to sue before instituting a private suit. Should the EEOC decide to bring an action on behalf of the complainant, the private suit is dismissed, if the claims presented in both suits are identical. In the private suit instituted by Jones, two claims were presented: 1) Forced retirement at age 55 violated the ADEA since Jones was within the age group that the statute sought to protect; and 2) the Wisconsin statute which mandated his retirement, was an unconstitutional violation of equal protection. Since the EEOC only presented the claim that forced retirement violated the ADEA, only that claim could be dismissed from the private suit. Jones was allowed to maintain his additional constitutional claim in the private suit. To date, this private suit has not been pursued further.

27. 29 C.F.R. § 860.102 (1977), effective July 9, 1979, transferred the enforcement of the ADEA from the Department of Labor to the EEOC.

28. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975), provided that "[t]he traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." In *Doran*, the district court found the EEOC's ultimate success likely, and that unless relief was granted, there would be irreparable harm to both Jones's morale and skill.

29. EEOC v. City of Janesville, 480 F. Supp. 1375 (W.D. Wis. 1979). *See* Comment, *Age Discrimination By Local Governmental Entities—The Defense of a Bona Fide Occupational Qualification*, 31 BAYLOR L. REV. 527, 528 (1979), where the author stated:

[A] prima facie violation of the act is established by showing that the plaintiff is within the age bracket protected by the ADEA, that he applied and was qualified for the job or was an employee at the time of the discriminating practice, that he was rejected, discharged or discrimi-

that the city's alleged defense, that age was a BFOQ for the position of police chief, was not valid. In narrowly construing the BFOQ defense, the court concluded that the city had failed to provide any empirical data establishing the correlation between age 55 and the ability to perform the duties of police chief.[30] Although the city had demonstrated that mandatory retirement at age 55 was a BFOQ for policemen engaged in the more vigorous activities of law enforcement,[31] the court stated that the same argument could not be extended to the administrative position of police chief. In light of the city's failure to establish a valid defense, the court issued the preliminary injunction.[32]

OPINION OF THE SEVENTH CIRCUIT

On appeal, the Seventh Circuit Court of Appeals[33] was presented with three issues. The court, however, limited its discussion to the appropriateness of the preliminary injunction granted by the district court.[34]

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nated against in some other prohibited manner, and that the employer sought younger applicants with plaintiff's qualifications.

See Cova v. Coca-Cola Bottling Co., 574 F.2d 958 (8th Cir. 1979); Bonham v. Dresser Indus. Inc., 569 F.2d 187 (3d Cir. 1978); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

30. In requiring a presentation of empirical data, the court seems to be in accordance with previous holdings. In Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), the court established the definitive test in requiring employers to factually demonstrate that all or substantially all persons over the age in question are unable to perform the duties of the particular job involved. Although Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976), recognized that the burden may be somewhat lessened in certain high risk occupations, the court concluded that a BFOQ will not be held valid unless the employer provides some empirical data demonstrating the correlation between the specified age and the particular high risk job involved. *See also* H. R. REP. NO. 527, 95th Cong., 2d Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 513, which states that "in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to . . . perform. . . ."

31. The City of Janesville submitted seven reports, compiled by the Retirement Research Committee, which were the basis for the legislature enacting the retirement statute. These reports contained evidence that beyond the age of 55, ability generally declined. However, the reports contained no empirical data that persons beyond the age of 55 were incapable of performing the duties of a protective service occupation. There was no data showing a correlation between the specified age and the particular position of police chief. EEOC v. City of Janesville, 480 F. Supp. 1375, 1379-80 (W.D. Wis. 1979).

32. *Id.* at 1381.

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

34. The issues presented were: (1) whether the application of the ADEA mandates upon the states, by the federal government, constitutes an impermissible intrusion into state affairs, thus violating the 10th Amendment; (2) whether the city has established a valid BFOQ defense; and (3)

The court concluded that the district court had applied an excessively narrow construction of the BFOQ exception.[35] Thus, the district court's ruling that the city was required to produce empirical data to establish the relationship between the mandatory retirement age and the performance of the particular position of police chief was erroneous.[36] The Seventh Circuit stated that, according to the BFOQ exception, all that must be established is that dissimilar treatment is reasonably necessary to the normal operation of a particular *business*. The district court erred in construing the BFOQ exception as only applicable to particular positions within the general business of law enforcement.

The court of appeals concluded that the city had maintained its burden by demonstrating that the vigorous duties involved in the "business of law enforcement" required mandatory retirement to ensure optimum protection of the public.[37] The city was under no obligation to establish a correlation for the particular position of police chief since the legislature[38] had already determined that that position was within the law enforcement busi-

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whether the district court abused its discretion in granting the preliminary injunction. 630 F.2d at 1256.

The constitutionality of the ADEA as applied to the state and local governments has already been decided. The court in Usery v. Board of Educ., 421 F. Supp. 718 (D. Utah 1976), held that the ADEA as applied to state and local governments was constitutional under the Commerce Clause and the fourteenth amendment. The court further stated that "[t]he Fourteenth Amendment is particularly applicable . . . where allegations of arbitrary discrimination in employment practices by a state employer, contrary to . . . the ADEA, if proven, would constitute [denial of] equal protection . . . ." *Id.* at 721. *See also* National League of Cities v. Usery, 426 U.S. 833 (1976) (the imposition of the ADEA on state and local governments was not within the authority granted Congress under the Commerce Clause, but was valid under the Fourteenth Amendment). For a general discussion of the constitutionality of the ADEA as applied to the states, *see* Comment, *Age Discrimination by Local Governmental Entities—The Defense of a Bona Fide Occupational Qualification*, 31 BAYLOR L. REV. 527, 528-30 (1979).

35. EEOC v. City of Janesville, 630 F.2d 1254, 1258 (7th Cir. 1980).

36. *Id.* at 1258.

37. *See* note 31 *supra*.

38. In McGowan v. Maryland, 366 U.S. 420, 425 (1961), the Court stated that "legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality." *Id.* at 426. Under this presumption of validity, there is no requirement that the legislature provide empirical data substantiating the correlation between the specified age and the ability to perform, provided there is any conceivable basis upon which to believe that a legitimate state interest is furthered. Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1975). Therefore, the only way to have a statute declared invalid under the rational relation test is to show that it is "patently arbitrary." This requires a showing by the one challenging the statute that it bears no rational relation to a legitimate governmental interest. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Dandridge v. Williams, 397 U.S. 471 (1970).

ness.[39] Since the city had maintained its burden of proof in demonstrating that 55 years of age was a BFOQ for the generic class of law enforcement employees, the court concluded that the preliminary injunction should be dissolved.

ANALYSIS

The Wisconsin retirement statute[40] requires mandatory retirement of all protective service employees at age 55. The statute is based upon the similar exception enacted by Congress in regard to federal protective service employees and employees of other arduous occupations.[41] The federal statute requires that all air controllers, law enforcement officers, and firefighters must be retired at age 55 since age, with respect to these high risk occupations, has been determined to be a valid BFOQ under the ADEA.[42] Wisconsin, in fashioning its statute concerning mandatory retirement for employees involved in similar arduous work, specifically included the position of police chief on the basis that such a position fell within the category of law enforcement officers. This broad definition, however, runs contrary to congressional intent in allowing a BFOQ exception. The definition also fosters the very evils the ADEA was enacted to prevent.[43]

Congressional Intent Behind the BFOQ Exemption

The Seventh Circuit stated that its examination of the legislative history concerning the BFOQ defense yielded no support

39. The challenge in *City of Janesville* is not that the retirement statute is an unconstitutional violation of equal protection. Rather, the EEOC is arguing that under the terms of the ADEA, the position of police chief should not be included within the BFOQ exempt class of protective service employees since the duties involved in that job are far different than those involved in the more "normal" police work. The reasons for this line of attack is undoubtedly due to the Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 93 (1979) decision, wherein the court stated that legislatures can retire protective service employees mandatorily due to the arduous requirements of those jobs. Thus, if Jones is considered to be a protective service employee, he will not prevail in challenging the retirement statute. By arguing that the position of police chief does not require the strenuous physical requirements for normal policemen, Jones hopes to exempt himself from the BFOQ established for protective service employees.

40. WIS. STAT. ANN. § 41.02 (23), (11)(a) (West 1978); *see* note 24 *supra*.

41. 5 U.S.C. § 8335 (f), (g) (1976) provides that federal air traffic controllers, law enforcement officers, and firemen must be retired at age 55 unless an extension is granted. However, under no circumstances shall any employees engaged in these occupations be allowed to remain beyond the age of 61.

42. *See* Vance v. Bradley, 440 U.S. 93 (1979); Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979); O'Donnell v. Shaffer, 491 F.2d 59 (D.C. Cir. 1974).

43. This would allow persons to be mandatorily retired regardless of ability by merely being a member of the class affected. *See* Slate v. Noll, 474 F. Supp. 882 (W.D. Wis. 1979) *aff'd* 440 U.S. 1007 (1980).

for any distinction between particular occupations within the general business of law enforcement.[44] While initially there was little discussion regarding the scope of the BFOQ,[45] later debates attempting to further define the BFOQ exception have established that its requirements relate to particular jobs.[46] Despite this clear congressional mandate, the court determined that reference to the legislative history was unnecessary since the plain meaning of "particular business" is not susceptible to interpretation. This determination ignores the language of the exception, which states that age can only be used as an employment criteria when it is a bona fide *occupational* qualification reasonably necessary to the normal operation of a particular business.

The phrasing of the exception suggests that the focus is initially on the particular job as it relates to the broader category of a particular business. This interpretation is borne out by the congressionally enacted federal exception to the ADEA which deals with early retirement of individuals employed in certain jobs.[47] Air traffic controllers, a specific job within the larger

44. EEOC v. City of Janesville, 630 F.2d at 1258.

45. When the ADEA was initially being considered for passage in 1966, there was little mention or discussion of the BFOQ exemption. In the Senate hearing, it was mentioned twice in relation to whether costly training programs could be a basis for excluding older job applicants. The House hearings were also void of any explanatory reference; the House report merely restated the language of the exception. *See* James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEV. ST. L. REV. 1, 9 (1977).

46. The district court, in EEOC v. City of Janesville, 480 F. Supp. 1375, 1379 (W.D. Wis. 1979), stated that the legislative history of the exception demonstrated that the BFOQ defense was rationally related to the requirements for particular jobs. In the debates concerning the 1978 Amendments to the ADEA, Congress defined what its intentions were in allowing for a BFOQ exemption. "[I]n certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of *their particular jobs*. . . ." [1978] U.S. CODE CONG. & AD. NEWS 504, 513-14 [emphasis added].

When considering the extension of the ADEA to the state and local governments, the House report stated:

> It is not intended that the bill prohibit retirement or other employment practices where age is a BFOQ reasonably necessary to the normal operation of a particular business. It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, jobs such as those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends. The committee, however, expects that age will be a relevant criteria for only a limited number of jobs.

H.R. REP. NO. 527, 95th Cong., 2d Sess. 12 (1977).

47. *See* note 41 *supra*.

business of air transportation, were singled out for early retirement because of the unique stress involved in their occupation. Similarly, those persons actively engaged in the arduous occupations of fire fighting and law enforcement were forced to retire early.[48] To expand the application of the exception to all those involved in the business of law enforcement or fire prevention without regard to whether particular occupations are arduous or have high physical requirements would be illogical[49] and illegal.[50]

In amending the ADEA to extend its jurisdiction to the state and local governments, Congress intended for the BFOQ exception to be similarly interpreted. Specifically, it was to be applicable only to those jobs where public security depends upon the imposition of strict physical requirements.[51] Following this requirement, the Wisconsin retirement statute is only applicable to occupations which require frequent exposure to a high degree of danger and which demand strenuous physical conditioning.[52] The position of police chief was purposely included within this definition. Yet, by the city's own admission, the duties of the

48. Those people included under the federal provision requiring the early retirement of law enforcement employees and firefighters are those eligible for immediate retirement under 5 U.S.C. § 8336(c). This section "applies to employees whose duties are primarily the investigation, apprehension or detention of individuals suspected or convicted of offenses against criminal laws of the United States or employees whose duties are primarily to perform work directly connected with the control and extinguishment of fires." [1974] U.S. CODE CONG. & AD. NEWS 3698, 3702-03. The expressed purpose of forced retirement was to ensure that certain occupations would be composed of persons physically capable of meeting the vigorous demands of those occupations which require the strength and stamina of the young rather than the middle aged. *Id.* at 3699. *See* Poston v. United States, 289 F.2d 321 (Ct. Cl. 1961) (the court, in interpreting language similar to 5 U.S.C. § 8336(c) (1976), distinguished the hazardous positions involved in law enforcement from administrative and supervisory positions).

49. There are many varied positions within the broader category of law enforcement, including patrolman, detective, chief, radio dispatcher, filing clerks, and secretaries. Clearly, the duties involved in these positions vary. This variance is provided for in both the federal statute, which applies only to those involved in arduous occupations, and the Wisconsin statute which is applicable only to those who are frequently exposed to a high degree of danger. *See* 5 U.S.C. § 8335(a) (1976); WIS. STAT. ANN. § 41.02 (11)(a) (West 1979).

50. In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1975), the Court held that mandatory early retirement will be held valid if there is any conceivable set of facts upon which the classification could bear a rational relation to a legitimate state end. Under both the federal statute and Wisconsin's statute, earlier retirement of those involved in arduous occupations is required to ensure optimum public protection. Retiring those persons whose occupations are not arduous would not be furthering the state interest of public safety and would be held invalid.

51. *See* note 46 *supra*.

52. WIS. STAT. ANN. § 41.02(11)(a) (West 1979).

position are primarily administrative.[53] The police chief is responsible for the efficient operation of the police department and the efficient coordination of the department's activities with other law enforcement agencies. Accordingly, the chief would rarely be exposed to a high degree of danger, and the position would not require an unusually high degree of physical conditioning.

The Seventh Circuit, by focusing its attention solely on the phrase "particular business," refused to recognize the differentiation of duties required of particular jobs within the general business. In broadly construing the exception to relate to the general business, the court ignored Congress's clear intention that the BFOQ exception be narrowly construed to apply only to *particular* jobs where age is a legitimate factor.[54] Further, the court's decision is contrary to the findings of other courts which have been faithful to Congress's intentions.[55]

The Judicial Determination of the Scope of the BFOQ Defense

Virtually all courts considering the BFOQ defense have "related the age requirement at issue to the duties of the particular job involved."[56] This has been true whether the employer was claiming the exception under Title VII or the ADEA, both of which have BFOQ exceptions framed in identical language.[57] This narrow construction is necessary for the BFOQ to be valid, and it is the only means by which either the ADEA or Title VII can be given effect.

The requirement that the BFOQ exception be construed narrowly to relate only to particular jobs was originally formulated in *Weeks v. Southern Bell Telephone and Telegraph Co.*[58]

53. In EEOC v. City of Janesville, 480 F. Supp. 1375, 1377 (W.D. Wis. 1979), the court defined the complete list of duties required of the chief of police. These duties include:

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

54. *See* note 46 *supra*. 29 C.F.R. § 860.102(b)(1979) states that "[i]t is anticipated that this concept of a BFOQ will have limited scope and application. Further, as this is an exception, it must be narrowly construed and the burden of proof in establishing that it applies is on the employer. . . ."

55. Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976).

56. EEOC v. City of Janesville, 480 F. Supp. 1375, 1379 (W.D. Wis. 1979).

57. *See* note 11 *supra*.

58. 408 F.2d 228 (5th Cir. 1969).

In *Weeks*, the Fifth Circuit found that the defendant had violated Title VII by refusing to allow women to bid on the position of switchman. The court rejected Southern Bell's alleged BFOQ defense that the duties involved in the position of switchman were too strenuous to be performed by a woman.[59] Southern Bell had failed to provide any empirical data evidencing a correlation between sex and the ability of those excluded to perform the duties of the job.[60] The court held that the proponent of the BFOQ must factually demonstrate that all, or substantially all, women would be unable to perform the duties of the job before an alleged BFOQ will be deemed valid.[61]

Similar reasoning has been employed by virtually every court which has determined the validity of alleged BFOQ's under Title VII.[62] The focus of the *Weeks* test is on the particular duties of the job in question. If the duties inherent within the job require the exclusion of all, or substantially all, members of a particular sex and the employer is able to factually demonstrate this requirement, sex may validly be used as an employment criteria. Therefore, unless every job within the general business required the performance of identical duties, a valid BFOQ for one particular job could not preclude the employment of those persons in different jobs within the same general business.

This proposition is clearly illustrated in *Houghton v. McDonnell Douglas Corp.*[63] In *Houghton*, the employer was involved in the business of manufacturing, testing, and marketing jet airplanes. Houghton was employed as a test pilot to fly supersonic fighter aircraft over heavily populated areas. At the age of 52, Houghton was informed that he was being removed from flight status because the company felt he could no longer safely and efficiently perform the duties of test pilot. Although offered the job of flight simulator instructor, Houghton refused, and filed suit against his employer alleging that his removal was in violation of the ADEA.

The district court upheld the validity of age as a BFOQ for the position of test pilot, but noted that such a defense would

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59. *Id.* at 233.

60. *Id.* at 234.

61. *Id.* at 235.

62. *See, e.g.*, Dothard v. Rawlenson, 433 U.S. 321 (1977) (Court invalidated alleged BFOQ height and sex requirement for correctional counselors); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980) (court upheld the alleged BFOQ defense which required that only males be employed as guards at a state correctional facility).

63. 413 F. Supp. 1230 (E.D. Mo. 1976), *rev'd*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

not apply to other positions within the business that did not require the flying of aircraft.[64] The Eighth Circuit reversed[65] on the ground that "medical technology can predict a disabling physical condition in a test pilot with fool-proof accuracy."[66] Thus, unless it were shown that Houghton was incapable of performing the duties of test pilot, his removal from flight status could not be considered a valid BFOQ. The defendant was unable to sustain its burden and the court found that its treatment of Houghton violated the ADEA. Although a high risk occupation was involved, the court still required the employer to factually demonstrate that Houghton was incapable of performing the duties of test pilot.[67]

Similarly, in *Aaron v. Davis*,[68] the court narrowly construed the BFOQ defense, stating that the defendant must factually demonstrate a correlation between the age of 62 and the ability of persons beyond that age to perform the duties of fire chief.[69] The court implied that facts establishing a correlation between the age of 62 and the ability of persons beyond that age to perform the duties of a "regular" firefighter would be insufficient

64. The court stated that the "defendant has carried its burden of proof with regard to establishing age as a BFOQ for the occupation of test pilot." and that the exception was applicable to the plaintiff only "while acting as a production test pilot," since only in that position was he a safety risk. Houghton v. McDonnell Douglas Corp. 413 F. Supp. 1230, 1239 (E.D. Mo. 1976).

65. Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977).

66. *Id.* at 564.

67. Justice Clark, sitting by designation, quoted *Weeks* in stating that "to uphold the finding of the District Court would [allow] the exception [to] swallow the rule." 553 F.2d at 564. Thus, in spite of Houghton's high risk occupation, the court still required empirical data to substantiate the necessity of early retirement. Since individualized testing was practical and the results would be conclusive, the defendant was required to show that Houghton was incapable of performing the duties of test pilot.

Had individualized testing been impractical, the *Houghton* court would probably have followed the *Weeks* test and required the defendant to provide evidence showing that all, or substantially all, persons beyond the specified age were incapable of performing the duties of test pilot. *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), wherein the Seventh Circuit required individualized testing to establish sex as a BFOQ for the particular *job* in question. The court stated that "there is a significant difference in job requirements which must be considered just as carefully as the physiological capabilities of individual employees." *Id.* at 718.

The Seventh Circuit, however, has not followed the *Houghton* court's reasoning when confronted with alleged BFOQ's in high risk occupations. Rather than requiring the employer to meet the *Weeks* test, the court has been willing to accept generalized assertions by the employer that to disallow the BFOQ defense would increase the risks to the public. *See* note 20 *supra*; James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEV. ST. L. REV. 1, 8-10 (1977).

68. 414 F. Supp. 453 (E.D. Ark. 1976).

69. *Id.* at 462.

since the "duties and responsibilities of those in higher ranks differ materially from those of the lower echelon personnel."[70] The court concluded that "a claim for exemption from the [ADEA's] proscriptions will not be permitted on the basis of the employer's stereotypical assumption that most, or even many, employees *in a particular type of job* become physically unable to perform *the duties of that job* after reaching a certain age."[71]

In *City of Janesville*, by the city's own admission, the duties of the police chief are mainly administrative,[72] and therefore differ materially from those of a regular patrolman who is frequently exposed to great danger.[73] Despite this distinction, and in seeming disregard of both Congress's intent in allowing for a BFOQ exception and prior judicial decisions dictating the narrow construction of the BFOQ defense, the Seventh Circuit held the Wisconsin retirement statute valid as applied to the position of police chief. The court's sole justification for the decision was that "the mandatory retirement age is an expression of the Wisconsin legislature's judgment that being younger than 55 is a BFOQ for the generic *class* of protective service employees"[74] including the position of police chief. Consequently, the statute is presumed valid since "the wisdom of a legislative act is not subject to judicial scrutiny".[75]

The Effective Frustration of the ADEA's Purpose

Ordinarily, to establish a valid BFOQ defense, the employer must produce factual data to support his contention that the individual in question is unable to perform the duties of the occupation involved.[76] Where individualized testing is either impractical or the results would be inconclusive, it is sufficient that the employer provide data showing that all, or substantially all, persons beyond the specified age would be incapable of adequately performing the duties of the job.[77] Although the "quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees . . . at no point will the law permit

70. *Id.* at 457.

71. *Id.* at 461 (emphasis added).

72. *See* note 53 *supra*.

73. *See* note 49 *supra*.

74. EEOC v. City of Janesville, 630 F.2d 1254, 1258 (7th Cir. 1980).

75. *Id.* at 1259.

76. *See* Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

77. *See* note 16 *supra*.

. . . the fixing of a mandatory retirement age . . . without any empirical justification."[78]

The reasons for imposing upon the employer the burden of providing facts supporting early retirement are two-fold. First, in accordance with the purpose of the ADEA, requiring factual support ensures that early retirement is necessary by showing that persons affected are unable to adequately perform the job in question. Second, consistent with the BFOQ's being an affirmative defense,[79] the burden is placed upon the defendant to factually establish the existence of the defense.

However, where a legislature has enacted a mandatory retirement statute, as in *City of Janesville*, courts have not required any empirical data establishing a correlation between age and ability.[80] Rather, courts have presumed the validity of these statutes if there is any set of facts which exist or can be conceived by the court that demonstrate a rational relation between the dissimilar treatment and the furtherance of a legitimate state purpose.[81] In *City of Janesville*, the alleged state interest furthered by retiring the police chief was the optimum protection of the public. Although the city provided no evidence showing that his retirement enhanced public safety,[82] the court stated that such evidence was not needed because the city was acting pursuant to a legislative statute that is presumed valid.[83]

By presuming the statute valid, the Seventh Circuit was faced with a dilemma. Although Congress intended for the BFOQ exception to be narrowly construed to apply only to particular jobs, the Wisconsin legislature had enacted a statute applicable to the generic class of law enforcement personnel which includes all jobs within that business. To comply with Congress's intentions, the city should have been required to pro-

78. Aaron v. Davis, 414 F. Supp. 453, 461 (E.D. Ark. 1976) (emphasis in original).

79. Note, *Age Discrimination in Employment Act*, 90 HARV. L. REV. 380 (1976). Consistent with a BFOQ being an affirmative defense, "the burden of persuasion with regard to Title VII affirmative defenses rests on the defendant. The same rule appears to obtain under the ADEA." *Id.* at 400 n. 123. *See also* 29 C.F.R. § 860.102(b) (1979) (Secretary of Labor stated that the burden of proof is on the defendant to establish a valid BFOQ).

80. Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

81. *See* note 23 *supra*.

82. *See* note 31 *supra*.

83. EEOC v. City of Janesville, 630 F.2d 1254, 1259 (7th Cir. 1980) ("[B]ut for the failure of the City's evidence to address a BFOQ for the position of police chief, which we have determined was not required, the district court was apparently willing to accept the statutory *presumption* that age is a BFOQ for the class of protective service occupations. . . .") (emphasis added).

duce data establishing that persons beyond the age of 55 were unable to perform the duties of every job affected, including the position of police chief. Yet, the Seventh Circuit summarily dismissed this requirement stating that the lack of evidence was not dispositive since the legislature had determined early retirement was necessary for all those affected.[84] In giving precedence to the statute's presumed validity, the court broadened the exception and so narrowed the remedial nature of the law that the exception swallowed the rule.[85]

The remedial purpose of the ADEA was to counter the assumption that older workers are less efficient or less qualified than their younger counterparts. The production of empirical data is the only means by which the court can decide whether forced retirement is a necessary employment criteria or an arbitrary decision based on the stereotyped assumptions the ADEA was enacted to eliminate.

By presuming the validity of the statute, there is no judicial scrutiny of the underlying basis for the statute's enactment.[86] The legislature is granted a license to act with impunity as to the specified age and the persons affected, provided the virtually impenetrable boundary of "patently arbitrary" is not crossed.[87] Rather than placing the burden upon the employer to establish a BFOQ as an affirmative defense, the older worker faces the nearly insurmountable burden of rebutting the presumption of the statute's validity.[88] It is difficult to discern how a plaintiff

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84. *Id.* The court stated that it would not question the wisdom of a legislative act.

85. Houghton v. McDonnell Douglas Corp. 553 F.2d 561, 564 (8th Cir. 1977). Without requiring proof that a BFOQ is necessary, there is no way to distinguish between an early retirement policy that is factually based, and a plan which is arbitrarily imposed.

86. *See generally* Gunther, *The Supreme Court, 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protecton*, 86 HARV. L. REV. 1 (1972). Gunther argues that the intermediate test must be employed; the Court should examine the means chosen by the legislature to see if they substantially further some articulated, rather than judicially imagined, state purpose. This standard would remove the Court's automatic and toothless deference to most legislative enactments.

87. *See* Frontiero v. Richardson, 411 U.S. 677, 683 (1973) ("a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relation to a legitimate government interest").

88. In Slate v. Noll, 474 F. Supp. 882, 885 (W.D. Wis. 1979), the court stated that "the burden is upon the challenger to show that no legitimate state interest is at stake or, if a legitimate state interest is at stake, that the particular age discrimination chosen is not rationally related to furthering the legitimate state interest." This standard would require the challenger to establish that there is no set of conceivable facts which could demonstrate the furtherance of a legitimate state interest.

required by statute to retire is in any better position now than he was prior to the enactment of the ADEA.[89]

CONCLUSION

The decision of the Seventh Circuit in *City of Janesville* frustrates the purpose of the ADEA. Although the ADEA was enacted to prevent arbitrary discrimination based on stereotyped assumptions concerning the effect of age on ability, the courts' "toothless deference" to statutes mandating early retirement has hindered rather than promoted this purpose. These statutes have been presumed valid in the absence of any empirical data establishing a correlation between the specified age and the inability of those beyond that age to perform the duties of the job affected. The Seventh Circuit's opinion goes even further by presuming the validity of the scope of the exception. This presumption permits the retirement of a generic class of employees regardless of the duties each employee is required to perform. The exception has been so broadly construed that it has swallowed the rule. Rather than prohibiting retirement based on assumptions concerning the effect of age on ability, the court has allowed retirement of a competent worker by disregarding his actual ability and presuming him incapable. Should other courts follow this precedent, the congressionally mandated goal of promoting employment based on ability rather than age will remain unfulfilled.

James E. DeBruyn

89. It appears that, regardless of whether the challenge is on constitutional grounds, courts will apply the rational relation test to determine the validity of mandatory retirement statutes. The courts would, therefore, follow the same reasoning whether the challenge was a denial of equal protection or a violation of the ADEA.