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Compensatory and Punitive Damages for Age Discrimination in Employment

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COMPENSATORY AND PUNITIVE DAMAGES IN AGE DISCRIMINATION IN EMPLOYMENT

INTRODUCTION

The opportunity to utilize one's abilities in gainful employment has long been recognized by American courts as a desirable goal. As expressed by Supreme Court Justice Bradley in 1884: "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence . . . ."[1] Although Bradley's attitude has often been adopted by the Supreme Court,[2] courts generally have failed to provide older workers with protection against job discrimination.[3] Until Congress enacted the Federal Age Discrimination in Employment Act of 1967[4] (ADEA, or Act), older workers throughout the country[5] were unprotected.[6] The ADEA was enacted for three reasons: to pro-

1. Butchers Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

2. In Truax v. Raich, 239 U.S. 33 (1915) the Supreme Court said: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] amendment to secure." *Id.* at 41, *cited in* Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 & n.23 (1976). *See* Barsky v. Board of Regents, 347 U.S. 442, 473 n.1 (1954) (Douglas, J., dissenting) (the right to work is the most precious liberty man possesses).

3. *See, e.g.*, Vance v. Bradley, 99 S.Ct. 939 (1979) (forced retirement of foreign service officer at age 60 does not violate equal protection); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (forced retirement of state highway patrolman at age fifty does not violate equal protection). *See also* Serwer, *Mandatory Retirement at Age 65—A Survey of The Law*, 1 INDUS. GERONTOLOGY 11, 22 (1974), where it is observed that "almost certainly unsuccessful have been those employees who have claimed their employer's retirement policy violates the equal protection clause of the Fourteenth Amendment." *See generally* Note, *Age Discrimination in Employment*, 50 N.Y.U. L. REV. 924, (1975); Note, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748 (1975); Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 SO. CAL. L. REV. 150 (1971); Comment, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. REV. 549 (1976); Comment, *Mandatory Retirement: The Law, The Courts, and the Broader Social Context*, 11 WILLAMETTE L.J. 398 (1975).

4. 29 U.S.C. §§621-634 (1976 & Supp. II 1978).

5. C. EDELMAN & I. SIEGLER, FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW 59-67 (1978). Prior to passage of the ADEA employment discrimination based on age was prohibited by a number of states, but not all. These statutes fell into three categories: (1) fair employment practices laws prohibiting employment discrimination on a broad range of grounds such as race, religion, national origin, sex and age; (2) statutes dealing only with age discrimiination in employment; (3) human rights laws prohibiting discrimination in, for example, housing, public accommodations, and employment. Colorado passed the first age discrimination law in 1903. About three-quarters of the states today have some such law. They vary widely in the protection given, the breadth of coverage, and the means of obtaining redress for violations. Only moderate success has been obtained in fighting age discrimination in employment at the state level. *Id.*

6. A limited federal step toward dealing with age discrimination in employment had been taken by President Johnson in 1964. By Executive Order No. 11,141 the President de-

mote employment of older persons based on ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers find solutions to problems arising from the effect of age on employment.[7]

Congress expected to eliminate age discrimination by educating the public about the aging process, thus dispelling misconceptions[8] which lead to age discrimination.[9] Therefore, enforcing the act would be less important than educating the public.[10] To inform the public about the aging process, the ADEA required the Secretary of Labor to undertake a continuing program to provide information[11] to labor unions, management, and the general public.[12]

From the inception of the ADEA, the Secretary of Labor's educational program has been a vital ingredient in administering and obtaining compliance

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clared the policy of the executive branch of the federal government that: (1) contractors and subcontractors of federal projects not discriminate against persons because of their age; and, (2) that these contractors and subcontractors not specify maximum ages for employment in their advertising unless it was based on a bona fide occupational qualification, retirement plan, or statute. Exec. Order No. 11,141, 3 C.F.R. 117 (1974). The executive order had no means of enforcement; its purpose was only to bring the policy to the attention of those doing business with the government, and to request their compliance.

7. 29 U.S.C. §621(b) (1976).

8. A recent study revealed that the general public considers the older worker to be less productive, more accident prone, and less flexible in dealing with other people than his younger counterpart. Rosen & Jerdee, *The Nature of Job Related Stereotypes*, 61 J. APPL. PSYCH. 180, 181-82 (1976). Productivity has been shown to decline for workers over 65, but the decline is very gradual. M. RILEY & A. FONER, AGING AND SOCIETY 426 (1968). Accident proneness is unrelated to age. Kunce, *Vocational Interests and Accident Proneness*, 51 J. APPL. PSYCH. 223 (1967).

9. STAFF OF SENATE COMM. ON AGING, 93D. CONG., 1ST SESS., IMPROVING THE AGE DISCRIMINATION LAW iii (Comm. Print 1973). The Senate Special Committee on Aging expressed this general opinion, saying, "[the] ADEA was enacted not only to enforce the law, but to provide facts that would help change attitudes." *Id.*

10. H.R. REP. NO. 805, 90th Cong., 1st Sess. 3 (1967) *reprinted in* [1967] U.S. CODE CONG. & ADM. NEWS 2213, 2216. The House of Representatives reported: "These functions [education and information] can do much to correct age discriminatory employment practices and are therefore vital to the overall effectiveness of the bill. They are means of affecting [sic] . . . the simple justice the proposal espouses, thereby making enforcement measures unnecessary." *Id.*

11. 29 U.S.C. §622(a) (1976).

12. U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 14-15 (1979). The program includes channeling information to the newspapers, supplying ADEA posters for display in places of employment, speeches by employees of the Employment Standards Administration, slide and film shows, and public service radio and television announcements. Two publications are also provided. One is the *Fact Sheet* which summarizes the provisions of the ADEA. The other is the *Employment Standards Digest* which reports on judicial, legislative, and administrative developments affecting the ADEA.

The educational program of the Secretary of Labor may not conform to the congressional instructions. An examination of the contents of the program reveals that much more emphasis is placed on informing the public, labor unions, and management of the black letter provisions of the ADEA than is placed on furnishing information about the needs and abilities of older workers. Repetitive lectures on the requirements of the law without equal emphasis on dispelling the stereotypes which underlie discrimination may foster resentment of the statute. Publicizing the irrationality of age discrimination in employment is more likely to foster the voluntary compliance which Congress intended.

with the Act.[13] There is evidence, however, that the program has failed to reduce age discrimination in employment.[14] There have been suggestions that awarding compensatory and punitive damages to successful plaintiffs would encourage compliance with the Act.[15] This note will explore the availability of compensatory and punitive damages and the capacity of those remedies to prevent age discrimination in employment.

Analysis of the remedies issue will be preceded by an overview of the ADEA regarding both prohibited and permitted practices. The methods and elements of proof in a plaintiff's discrimination case will then be discussed. The principal question of the availability of compensatory and punitive damages will be analyzed in terms of the present federal case law and a solution to the problem will be suggested.

PROHIBITED EMPLOYMENT PRACTICES

The ADEA prohibits age discrimination by employees,[16] unions[17] or employment agencies[18] against employees[19] or applicants[20] between[21] the ages

13. See note 10 *supra*. *See also* U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 14 (1979): "Such a program is a vital ingredient in administering this law and obtaining compliance with it."

14. See note 221 and accompanying text, *infra*.

15. Hassan v. Delta Orthopedic Medical Group, Inc., Civ. No. 79-206 slip op. (E.D. Cal. Oct. 1, 1979). The court suggested two ways in which the award of compensatory damages could increase compliance with the Act. First, the prospect of damage awards would act as an incentive for employers to comply. Second, employees would have incentive to vindicate their rights in the event of non-compliance. *Id.*

16. 29 U.S.C. §630(b) (1976). An "employer" is a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, any agent of such a person, a state, or political subdivision of a state, and any interstate agency but not the United States or a wholly-owned corporation of the United States. The reference to commerce provides a predicate for federal action. *Id.* The Commerce Clause of the United States Constitution gives Congress the power "[t]o regulate commerce . . . among the several states . . . ." U.S. CONST. art I, §8.

17. 29 U.S.C. §630(d) (1976). "Labor organization" is defined as a labor organization engaged in an industry affecting commerce in which employees participate which exists for the purpose of dealing with employers with respect to grievances, labor disputes, rates of pay, hours, wages, or other terms or conditions of employment, or any agent of such an organization, or any conference, general committee, joint or system board or joint council so engaged which is subordinate to a national or international labor organization. *Id.*

18. 29 U.S.C. §630(c) (1976). An "employment agency" is any person regularly undertaking to procure employees for an employer, with or without compensation, including an agent of such person, but excluding any agency of the United States. *Id.*

19. 29 U.S.C. §630(f) (1976). "Employees" are those employed by an included employer. See note 16 *infra*. The term excludes elected officials of states and their political subdivisions, the personal staff of such officials, appointed policy-makers or immediate advisors who are not subject to the civil service laws of a state government, agency or political subdivision. *Id.*

20. 29 U.S.C. §623 (1976 & Supp. II 1978).

21. Thus, it is unlawful in situations where this Act applies, for an employer to discriminate by giving preference because of age to an individual 30 years old over another individual who is within the protected age range. Similarly, an employer violates the Act when one individual within the protected age range is given job preference in hiring, assign-

of forty[22] and seventy[23] concerning compensation, conditions[24] or privileges of employment. Furthermore it is unlawful for an employer to classify protected employees so as to deprive them of employment opportunities or otherwise adversely affect their status because of age.[25] Reducing a younger employee's wages to match those of an older employee is also prohibited.[26]

The practices prohibited by the ADEA are similar to those prohibited by Title VII of the 1964 Civil Rights Act.[27] Title VII proscribes discrimination in employment on the basis of race, sex, religion, or national origin.[28] Although

ment, promotion, or any other term, condition, or privilege of employment, on the basis of age, over another individual within the same age range. The Act, however, does not restrain age discrimination between two individuals 25 and 35 years of age. 29 C.F.R. §860.91 (1979). Presumably, it would be lawful for an employer to favor an employee between 40 and 65 over an employee under 40. Likewise, since those over 70 are unprotected, favoring an employee over 70, over an employee between 40 and 70, would be unlawful. This latter result is an anomaly, however, when viewed against the general purposes of the Act, "to promote employment of older persons based on their ability rather than age. . . ." 29 U.S.C. §621(4)(b) (1976).

22. H.R. REP. No. 805, 90th Cong., 1st Sess. 6 (1967), *reprinted in* [1967] U.S. CODE CONG. & ADMIN. NEWS 2213, 2219. The House Committee on Education and Labor set the lower age limit at 45 in the original bill, but altered the limit to 40 before passage. Testimony indicated that 40 was the age at which age discrimination becomes evident, and 40 was the lower limit in most state statutes on the subject. Representatives of airline stewardesses, many of whom are not permitted to work as stewardesses after age 52, argued strongly for a lower limit. The Committee recognized the gross and arbitrary discrimination which this represented, but declined to further lower the limit because expanding protection further would lessen the primary objective, the promotion of employment opportunities for older workers. In response to the stewardesses' plea, the Commission added subsection 3(b) to 29 U.S.C. §626 (1966), calling for the Secretary of Labor to undertake study in this area, and to report to Congress his recommendations for changing the age limits.

23. 29 U.S.C. §631(a) (Supp. II 1978). As originally passed the upper age limit of the ADEA was 65. No discussion was given to the question of the proper age for the upper limit. Presumably 65 was selected because that was the age at which male workers became eligible for social security. *See* S. REP. No. 493, 95th Cong., 1st Sess. 31 (1977), *reprinted in* [1977] U.S. CODE CONG. & ADMIN. NEWS 504, 531. The Social Security Act selected the age of 65 arbitrarily, in part because of the tradition of use of this age in the social security system of pre-war Germany. *Id.* The Age Discrimination in Employment Act Amendments of 1978 raised the upper age limit to 70, with minor exceptions. Age Discrimination and Employment Amendments of 1975, Pub. L. 95-256, 92 Stat. 190 (amending 29 U.S.C. §631(a) (1976)).

24. Some exceptions have been allowed for "terms" and "conditions." For example, bus drivers are required to take periodic physical examinations to assure that they meet certain minimum physical standards. The Wage-Hour Administrator has issued the opinion that requiring older drivers to take more frequent examinations is not unreasonable if the minimum standards are uniformly applied to drivers of all ages. Opinion Letter of Wage-Hour Administrator (WH-137) (June 24, 1971), [1977] 2 EMPLOY. PRAC. GUIDE (CCH) §5028. It is also permitted that fringe benefits, such as vacations or sick leave, be based on length of service if age plays no part in the establishment of those benefits. Opinion Letter of the Wage-Hour Administration (September 10, 1978), [1978] 8 LAB. REL. REP. (BNA) 401:5216.

25. 29 U.S.C. §623(a)(2) (1976).

26. 29 U.S.C. §623(a)(3) (1976). If an employer has violated the ADEA by paying a younger worker more than an employee within the protected age bracket, the employer must raise the wage of the protected worker rather than lower the wage of the younger worker. 29 C.F.R. §860.75 (1979).

27. 42 U.S.C. §§2000e to 2222e-17 (1976).

28. 42 U.S.C. §2000e-2 (1976).

Congress could have simply amended Title VII to include age as a protected classification,[29] a separate enactment was chosen. One reason for this choice was administrative. The Equal Employment Opportunity Commission (EEOC), which administered Title VII, was already overburdened.[30] Therefore, administration of the ADEA was shifted to the Wage and Hour Division of the Department of Labor.[31] It is still unsettled whether Congress implied different degrees of protection under Title VII and the ADEA by providing separate administration of the Acts.[32]

LAWFUL PRACTICES

In addition to sharing nearly identical language prohibiting discriminatory practices,[33] the ADEA and Title VII are similar in another respect: both acts recognize that not all differential treatment of employees is discriminatory. Accordingly, both acts permit exceptions, or defenses, to the statutorily prohibited practices.

The Bona Fide Occupational Qualification (BFOQ) Defense

Otherwise prohibited discrimination is permitted if "age is a bona fide occupational qualification reasonably necessary to the operation of the business."[34] This exception is also permitted under Title VII.[35] The parallel lan-

29. Several members of Congress felt that the ADEA should simply be an extension of Title VII. *See, e.g., Age Discrimination in Employment: Hearings on Age Discrimination Bills Before The Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 90th Cong., 1st Sess. 2, 35 (1967); (statement by Sen. Murphy); *Id.* at 29 (statement of Sen. Smathers). In 1974, despite the existence of the ADEA, two bills were introduced to amend Title VII to include age as a protected classification: H.R. 16972, 93d Cong., 2d Sess. (1974), 120 CONG. REC. H10598 (Daily Ed. Oct. 15, 1974). Both bills died in the House Education and Labor Committee.

30. *See* 113 CONG. REC. (1967). The EEOC was beyond its capacity in dealing with race and sex discrimination cases. To add to the burden would only lengthen the delays which were plaguing the agency. Delays in the case of the aged discriminatee were particularly undesirable. *Id.* (remarks of Sen. Javits, Senate sponsor of the ADEA).

31. *See* 113 CONG. REC. 7076 (1967). Sen. Javits offered the amendment to the ADEA to assign administration of the Act to the Wage and Hour Division of the Department of Labor. Senator Javits explained that the Wage and Hour Office was an existing, nationwide structure into which administration of the ADEA could be integrated. This would eliminate duplication of agencies and avoid the delays which plagued the EEOC. *Id.*

32. *Compare* Kentroti v. Frontier Airlines, Inc., 585 F.2d 967. 969 (10th Cir. 1978) (rules controlling a racial discrimination case apply to case of age discrimination) *with* Vasquez v. Eastern Airlines, Inc., 405 F. Supp. 1353, 1354-55 (D.P.R. 1975) ("[Congress] specifically rejected the proposed administrative agency and enforcement procedure, which were analogous to EEOC and Title VII . . . . Viewed in this legislative context, as well as the different structure of the two statutes, it is readily apparent that Title VII enforcement procedures cannot be fairly equated with those of the ADEA."), *rev'd,* 579 F.2d 107 (1st. Cir. 1978).

33. See note 29 *supra.*

34. 29 U.S.C. §623(f) (1) (1976).

35. The only difference between the language of the BFOQ exception under Title VII and under the ADEA is that "religion, sex or national origin" in Title VII are replaced with "age" in the ADEA. Race, a characteristic which may not be the basis for discrimination under Title VII, is not permitted as a BFOQ exception. *Compare* 29 U.S.C. §623(f) (1) (1976) *with* 42 U.S.C. §2000e-2(e) (1976).

guage of these laws suggests that Congress intended the courts to interpret the statutes similarly.[36] The Secretary of Labor, whom Congress charged with interpretation and enforcement of the ADEA,[37] construes the BFOQ defense under the ADEA according to current interpretation of parallel Title VII provisions.[38] Thus, judicial analysis of the BFOQ defense should be the same under Title VII and the ADEA. Although the courts have espoused this principle,[39] they have not always followed it.[40]

The BFOQ Defense Under Title VII

The Equal Employment Opportunity Commission (EEOC) has recommended that courts narrowly construe the BFOQ defense.[41] Stereotypes and general class-based assumptions of comparative abilities and qualifications cannot serve as a basis for a BFOQ defense.[42] Destroying such generalities is a necessary step toward eliminating class-based discrimination, the underlying goal of anti-discrimination legislation. The use of stereotypes by employers in defense of their actions tends to preserve the stereotype and perpetuate the effects of past discrimination.[43] Therefore, pursuant to the EEOC's suggestion, courts have generally applied a narrow construction to the BFOQ defense in Title VII cases.

In *Weeks v. Southern Bell Telephone & Telegraph Co.*,[44] the Fifth Circuit Court of Appeals found that an employer unlawfully discriminated against a female employee by refusing to allow her to bid for the position of switchman.[45] Southern Bell's BFOQ defense, that a switchman's job was "strenuous" and required lifting of heavy equipment,[46] was rejected because it was based on the stereotyped characterization that women could not lift heavy weights. The court noted that Southern Bell had introduced no evidence concerning

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36. *See* Arritt v. Grisell, 567 F.2d 1267, 1270 n.11 (4th Cir. 1977). For the general intent to follow a parallel analysis, see Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733 (5th Cir. 1977).

37. Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1979). Effective July 1, 1979, enforcement of the ADEA was transferred from the Department of Labor to the Equal Employment Opportunity Commission (EEOC). This transfer should increase the similarity of interpretation between the ADEA and Title VII, since the EEOC has enforced Title VII since its inception.

38. *See* 29 C.F.R. §860.102 (1979).

39. *See* Arritt v. Grisell, 567 F.2d 1267, 1270 (4th Cir. 1977); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 563 (8th Cir. 1977), *cert. denied,* 434 U.S. 966 (1978).

40. *See generally* Player, *Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection, and the 1978 Amendments,* 12 GA. L. REV. 746, 751-67 (1978). BFOQ defenses in Title VII cases may not be based on stereotypes of the aggrieved class. However, this defense has been allowed, if based on general assumptions about the physical effects of aging in ADEA cases. *Id.* at 766-67.

41. EEOC Interpretive Guidelines, 29 C.F.R. §1064.2 (1979).

42. 29 C.F.R. §1604.2(a)(1)(ii), (iii) (1979).

43. *See generally* Note, *The Age Discrimination in Employment Act of 1967,* 90 HARV. L. REV. 380, 396-97 (1976).

44. 408 F.2d 228 (5th Cir. 1969).

45. *Id.* at 235.

46. *Id.* at 234. At trial it was established that switchmen must routinely lift equipment weighing in excess of 30 pounds. *Id.*

the lifting abilities of women.[47] The court specifically disagreed with an earlier Title VII case which held that generally recognized physical capabilities and physical limitations of the sexes may be the basis for occupational qualifications.[48] The *Weeks* court conceded that an employer may apply a reasonable general rule when he demonstrates that it is impossible or impractical to deal with applicants on an individual basis, but observed that no such showing had been made in this case.[49] The court concluded that to rely on a BFOQ an employer must prove he had a factual basis for believing that all or substantially all women would be unable to perform the job safely and efficiently.[50]

The *Weeks* test was expanded by the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*[51] There the employer airline refused to allow men to serve as cabin attendants. Pan American defended this policy as a BFOQ on the grounds that airline passengers perferred female attendants and that women were better suited to serve the special psychological needs of airline passengers.[52] In rejecting these arguments, the court turned to that portion of the Title VII requiring that a BFOQ be "reasonably necessary to the normal operation of that particular business . . . ."[53] According to the court, necessity exists only if hiring both sexes would undermine the essence of the employer's business.[54] The court found the primary function of an airline was to transport passengers safely from one point to another. While female attendants might make the passenger section's environment more pleasant, that was not the essence of the airline business.[55] Therefore, sex discrimination as practiced by Pan American in hiring only female attendants was not justified as a BFOQ.

Taken together, *Weeks* and *Diaz* form a stringent test for an employer asserting a BFOQ defense to a Title VII action. Almost invariably, evidence by the employer purporting to show that substantially all of the aggrieved class could not meet the job requirements have been rejected as insufficient.[56] Judicial construction of the BFOQ defense under the ADEA, however, has been less protective of discriminatees than under Title VII, even though the same BFOQ test supposedly applied to both statutes.

The BFOQ Defense Under the ADEA

The first appellate treatment of the BFOQ defense under the ADEA was in *Hodgson v. Greyhound Lines, Inc.*,[57] a Seventh Circuit Court of Appeals case. *Hodgson* involved a challenge to Greyhound's policy of refusing to hire intercity

47. *Id.*
48. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).
49. 408 F.2d 235 n.5.
50. *Id.* at 235.
51. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).
52. *Id.* at 388.
53. 42 U.S.C. §2000e-2e (1976).
54. 442 F.2d at 388.
55. *Id.*
56. *E.g.*, Nance v. Union Carbide Corp., 397 F. Supp. 436, 455 (W.D. N.C. 1975), *cert. denied*, 431 U.S. 953 (1977).
57. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

bus driver applicants over age thirty-five.[58] Greyhound argued that its policy was premised on considerations of public safety,[59] and therefore constituted a BFOQ.[60] Newly hired drivers were assigned to "extra-board" driving,[61] which was more arduous and dangerous than regular assignments. When a driver accumulated sufficient seniority, he could acquire a less demanding regular run.[62] Thus, as the effects of age began to take hold, a driver would be in a position to move to easier tasks. If its hiring age limits were not observed, Greyhound's seniority system would prevent this beneficial progression of older drivers to easier runs. Older drivers would be working on the most demanding routes with a possible detrimental effect on safety.[63] To support these arguments, Greyhound introduced evidence of the demanding nature of extra-board work, including statistical evidence of a higher accident rate with extra-board duty and of the general physical and sensory decline which begins around age thirty-five.[64] The government admitted that these degenerative changes occur, but countered that these effects were compensated in the older driver by increased maturity and experience.[65] In addition, the government argued that any such infirmities would be detected during the course of elaborate physical, psychological, and functional examinations conducted by Greyhound in screening intercity driver applicants.[66] The district court ruled for the plaintiffs, citing *Weeks*' "factual-basis" test, and finding Greyhound's evidence inadequate to meet that test.[67]

In overturning the district court's decision, the Seventh Circuit rejected the *Weeks* test for cases where consideration goes beyond the welfare of the job

58. *Id.* The suit was brought on behalf of only those applicants over the age of 40. Applicants 35-39 years of age were unprotected by ADEA.

59. *Id.* at 865. Greyhound argued that a driver is maximally safe after 16 years of interstate driving experience, and that this length of experience could not be acquired by newly-employed older drivers before the age of 65. There was no explanation why this would prevent the hiring of drivers with no experience who were less than 49 years old, since such a driver could attain 16 years experience before the retirement age. Furthermore, there was no explanation why bus driving experience with another company would not be considered, thus reducing the driving time necessary with Greyhound and elevating the maximum hiring age.

60. *Id.* at 861.

61. Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230, 235 (N.D. Ill. 1973), *rev'd*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). Greyhound divided drivers into two general classifications: those who drive "regular" runs and those who drive "extra-board" runs. Regular runs are scheduled service between two given points. All other assignments are "extra-board." They are in response to passenger demand and consist of special operations, towns, charters, and extra sections of regular runs if there is a need for more than one bus on a regular run. Extra-board drivers do not have scheduled routes and work off the board on a first-in, first-out basis. 354 F. Supp. at 235.

62. 499 F.2d at 864. Generally 10-40 years of extra-board driving were necessary before a driver had enough seniority to acquire a regular run. *Id.*

63. *Id.*

64. *Id.* at 863-65. There was no discussion of the fact that older drivers could drive the extra-board if they so desired. Advanced age did not automatically prevent this election.

65. *Id.* at 863.

66. *Id.*

67. Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230 (N.D. Ill. 1973), *rev'd*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

applicant to a consideration of public safety.[68] The court found the holding of *Diaz* more appropriate, noting significant similarity between the "essence" of the airline's business in *Diaz,* and the "essence" of Greyhound's business. Both were concerned with the safe transportation of their passengers. Thus, Greyhound needed to establish only that the safety of its passengers would be lessened if it were forced to hire drivers over forty.[69] The court then looked to *Spurlock v. United Airlines, Inc.*[70] in which the Tenth Circuit had addressed the validity of pre-employment job qualifications for airline flight officers.[71] There the court stated that the employer's burden to show that his employment criteria are job-related becomes lighter when the job requires a high degree of skill and the human and economic risks of hiring an unqualified applicant are great.[72] Noting that essentially the same risks were present in *Greyhound,* the court found it unnecessary to show that all or substantially all bus driver applicants over forty could not perform safely. Greyhound needed to demonstrate only a rational basis in fact for believing that changing its hiring policy would minimally increase the danger to its passengers, by jeopardizing the life of even one person.[73] Upon review of the evidence, the Seventh Circuit concluded that Greyhound had made this minimal demonstration.

In *Usery v. Tamiami Trail Tours, Inc.,*[74] a case with facts virtually identical to *Greyhound,*[75] the Fifth Circuit disagreed with the Seventh Circuit's dropping of the *Weeks* test, yet upheld the bus company's BFOQ defense by another method. The court believed that *Weeks* and *Diaz* taken together formed a test which was sufficiently flexible to take public safety into account. The court reasoned that *Diaz* required that a job be analyzed to determine if the job qualifications which the employer had invoked were reasonably necessary to the essence of his business — in *Tamiami,* the safe transportation of passengers.[76] As the safety factor increases, measured by the likelihood and potential severity of harm, the more stringent the job qualifications may be to insure safety.[77]

68. 499 F.2d at 861.

69. *Id.* at 862.

70. 475 F.2d 216 (10th Cir. 1972).

71. *Id.* at 217-19. *Spurlock* was a Title VII discrimination case in which the plaintiff attacked United's minimum standards for hiring flight officers. Applicants were not considered unless they had, *inter alia,* 500 hours of flight time, a commercial pilot's license and instrument rating, and a college degree. The college degree could be waived if the applicant's other qualifications were superior. The plaintiff alleged these facially neutral requirements had an adverse discriminatory effect on blacks. *Id.*

72. *Id.* at 219. This test was taken from the EEOC Guidelines. 29 C.F.R. 1607.5(e)(2)(iii) (1979).

73. Hodgson v. Greyhound Lines, Inc., 499 F.2d at 863.

74. 531 F.2d 224 (5th Cir. 1976).

75. *Id.* at 230-33. Tamiami Trail Tours, Inc., is the oldest bus company in Florida. It serves Florida, Georgia and Alabama as a participant in the non-profit association known commercially as "Trailways." Tamiami's hiring procedures required that an applicant be less than 40 years old and pass a thorough physical examination. Thereafter, bus drivers were examined annually and were continuously rated with respect to job performance, safety record, attitude, and physical fitness. The use of the extra board and Tamiami's seniority system were identical to Greyhound's. See notes 59-61 and accompanying text, *supra.*

76. 531 F.2d at 236.

77. *Id.* Thus, if there was low probability of an accident and the consequences of the

The court concluded that Tamiami satisfied the *Diaz* prong of the test because there had been no suggestion that the minimum hiring age was either unrelated to the essence of the business or unreasonable in light of the safety risk.[78]

The second step of the test was taken from *Weeks*. The defendant must show that either there was a factual basis for believing all, or substantially all, persons over forty would be unable to perform the job safely, or that it was impractical to deal with the applicants over forty on an individualized basis.[79] Since Tamiami had not attempted to establish a factual basis for believing that substantially all job applicants over forty would be unable to drive buses safely, it was necessary that it demonstrate that unsafe characteristics of drivers over forty could not be ascertained on an individual basis.[80] After reviewing the evidence, the court found no clear error in the district court's holding that individual testing would be ineffective to meet the defendant's safety needs, and upheld the discriminatory hiring policy.

In *Arritt v. Grisell*[81] the Fourth Circuit chose between the BFOQ tests of *Greyhound* and *Tamiami*. The plaintiff in *Arritt* was an applicant for a police officer's position in a city which refused to consider applicants over thirty-five. The district court had granted the defendant's motion for summary judgment,[82] relying on the *Greyhound* test.[83] The Court of Appeals reversed on this point, citing *Tamiami* as the proper standard for evaluating the BFOQ defense.[84]

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accident, measured in human and monetary terms, were not serious, the job qualifications could not be stringent. Conversely, stringent qualifications were permitted if the probability of an accident was high and severe injury or economic loss could result. *Id.*

78. *Id.*

79. *Id.* It might be practical to deal with applicants individually if a test for functional age, as opposed to chronological age, were developed. Some work has been done toward this goal. *See generally* McFarland, *The Need For Functional Age Measurements In Industrial Gerontology*, INDUS. GERONTOLOGY 1 (Fall 1973).

80. 531 F.2d at 236-37.

81. 567 F.2d 1267 (4th Cir. 1977). A primary issue in *Arritt* was whether the ADEA could be enforced against local governments. The Supreme Court decision in National League of Cities v. Usery, 426 U.S. 833 (1976), held that the extension of the wage and overtime provisions of FLSA to local and state government employees engaged in traditional functions of government could not be upheld as a constitutionally valid regulation of interstate commerce, because the tenth amendment limits exercise of the powers of Congress under the commerce clause. *Id.* at 855. The defendants in *Arritt* argued that this same rationale would prevent application of the ADEA to local and state governments. The court rejected this argument, finding the ADEA to be grounded on §5 of the fourteenth amendment rather than the commerce clause. 567 F.2d at 1270.

82. 567 F.2d at 1269.

83. *Id.* at 1271.

84. *Id.* The court stated that the proper standard was the two-pronged test formulated in *Usery*, where the burden was on the employer to show: (1) that the BFOQ which it invoked was reasonably necessary to the essence of the business (in *Arritt* the business was the operation of an efficient police department for the protection of the public), and (2) that the employer had reasonable cause, i.e., a factual basis for believing that all or substantially all persons in the class (persons over 35) would be unable to perform the duties involved efficiently and safely, or that it was impossible or impractical to deal with persons over that age limit on an individual basis. *Id.* at 236.

The case was remanded to give the plaintiff an opportunity to rebut the evidence offered by the defendants, with no opinion on whether the facts and conclusions set out by the defendant were sufficient to sustain its burden under *Tamiami*.[85]

Of the two BFOQ tests examined, *Tamiami* appearently offers the greater protection to the plaintiff, since *Greyhound* lowers the evidentiary standard to simply showing a rational basis for defendant's belief that older persons should not be hired, while *Tamiami* requires a factual basis for that belief. On the other hand, the implication of the second alternative of the *Tamiami* test, permitting arbitrary age qualifications if it is impractical to individually determine an applicant's true qualifications, is that age alone may be an acceptable basis for making employment decisions. Judicial acceptance of this view has the effect of reinforcing the stereotypes[86] which Congress sought to defeat by enactment of the ADEA.

Houghton v. McDonnell Douglas Corp.[87] is an Eighth Circuit decision more in harmony with the spirit of the Act. In *Houghton* the question was whether McDonnell Douglas could transfer a fifty-two year old test pilot to a non-flight position because of his age. There, as in *Greyhound* and *Tamiami*, the defendant presented evidence showing that reflexes and health decline with age in the general population.[88] The plaintiff responded with specific evidence that he was in excellent health and virtually certain not to suffer a heart attack or stroke while in flight,[89] and with statistical evidence that the accident rate of professional pilots decreases with age.[90] The court recited the *Tamiami* standard, but proceeded with a careful scrutiny of the evidence. The court concluded that allowing the defendant's overbroad evidence to prevail would allow the exception to swallow the rule and held that the district court's finding that age constitutes a BFOQ for this plaintiff was clearly erroneous.[91]

Superficially, the results of the cases are bizarre. Age is a BFOQ for bus drivers, but not for test pilots. The difference lies not so much in the mechanics of the test employed, but in the care with which the courts weigh the evidence presented. In the bus driver cases, the courts accepted generalized assumptions about the decline of ability with age. The *Houghton* court looked to evidence that the *individual* was qualified, ignoring generalizations. Certainly this approach is more in keeping with the purpose of the ADEA.[92]

Bona Fide Retirement, Insurance, Pension, or Seniority Plans

For many years there has been an increasing tendency in the United States

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85. 567 F.2d at 1271.
86. See note 8 *supra*.
87. 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).
88. *Id.* at 563.
89. *Id.*
90. *Id.* at 564.
91. *Id.*
92. See note 7 and accompanying text, *supra*.

for workers to retire before age sixty-five.[93] A parallel trend has been increased inclusion of compulsory retirement provisions in union contracts and in corporate personnel practices.[94] These trends led to the drafting of another exception to the ADEA's prohibitions. The Act was not violated by an employer acting under a bona fide retirement, insurance, pension, or seniority plan unless the plan was designed to evade the purposes of the Act.[95] The Act provided, however, that no such plan excused discrimination in hiring individuals in the protected age range.[96] Furthermore, the plan may not require the involuntary retirement of any protected individual.[97]

As originally enacted, however, the ADEA did not specifically prohibit the involuntary retirement of protected employees under a bona fide pension plan. The circuit courts of appeal differed over whether a plan which existed prior to enactment of the ADEA could be a subterfuge to evade the purposes of the Act. The plan would obviously have been drafted without contemplation of the Act.[98] In *United Air Lines, Inc. v. McMann*[99] the Supreme Court decided that

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93. The percentages of those eligible to receive social security benefits before age 65 are:

Year	Men	Women	Both Sexes
1965	32	47	38
1970	34	46	39
1973	41	52	46
1974	44	54	48
1975	46	55	50

A. MUNNELL, THE FUTURE OF SOCIAL SECURITY 74 (1977) [hereinafter cited as MUNNELL].

94. *Id.* at 62-74.

95. 29 U.S.C. §623(f)(2) (Supp. II 1978).

96. *Id.* The ADEA provides "that no such employee benefit plan shall excuse the failure to hire any individual." 29 U.S.C. §623(f)(2) (1976). This was intended to allow an employer to hire an older worker without including this worker in the benefit plan. See note 102 *infra*. An older worker would have relatively fewer years to contribute to the plan than other employees, thus, his inclusion would drain resources from the plan fund. An unanswered question is whether an employer may use such a plan to discriminate among employees. A benefit plan may be a primary reason for preferring a particular employer. If the employer is free to withhold the benefits from the older worker, the opportunity to discriminate is presented. Section 623(a)(1) prohibits discrimination with respect to "terms, conditions, or privileges of employment." 29 U.S.C. §623(a) (1) (Supp. II 1978). Congress, however, appears to permit such discrimination in employee benefit programs.

97. 29 U.S.C. §623(f)(2) (Supp. II 1978).

98. The Fifth Circuit, in Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974), had little difficulty with this problem. "Taft's 'plan' was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion." *Id.* at 215. The court refused to look to the legislative history for guidance on this question, relying on the 'unambiguous language of the statute," and asserting that if Congress had meant terms in the statute to have other than their ordinary accepted meanings, it would have specially defined them. *Id.* at 216-17.

The Fourth Circuit, in McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977), agreed with the Fifth Circuit that the meaning of the statute was clear, but disagreed about that meaning. The court held that "what is forbidden [by 29 U.S.C. §623(f)(2) (Supp. II 1978)] is not a subterfuge to evade the *Act*, but a subterfuge to evade the *purposes* of the Act." *Id.* at 220. The relevant purpose was the Act's prohibition of arbitrary

the ADEA permitted forced retirement of employees within the protected age range if the plan was adopted before the ADEA became effective.[100] The Court stated that the ADEA's legislative history showed Congress was aware of plans which required early retirement. Therefore, the Court felt Congress intended that such plans remain in effect.[101] Congress soon overruled the Court's reading of its intent,[102] however, by enacting legislation which prohibited plans re-

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age discrimination. Accordingly, a plan drafted prior to the Act could still be a subterfuge to evade the purposes of the Act, because those purposes speak to concerns older than the Act itself. The court went on to hold that no plan which arbitrarily forced the retirement of a protected employee could be in compliance with the ADEA. *Id.* Any other conclusion would produce the absurd result that an employer could discharge an employee based solely on age pursuant to a retirement plan, yet be in violation of the Act if the employee applied for work the next day, since "no such employee benefit plan shall excuse the failure to hire any individual. . . . [29 U.S.C. §623(f)(2) (Supp. II 1978)]." *Id.*

In Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), the Third Circuit took a different perspective. The court agreed with *McMann* decision of the Fourth Circuit, that a plan may antedate the ADEA, yet still be a subterfuge to evade the purposes of that act. *Id.* at 904. This, however, did not close the matter. The court observed that while the Act forbade discharge on the basis of age, there was no prohibition of early retirement on pension. Examination of the legislative history demonstrated to the court that Congress looked with favor on retirement plans, and chose to legislate with respect to discharge only. *Id.* at 905-06. The court then found that the pension involved was certainly not so small as to brand the plan a subterfuge to evade the purposes of the act." *Id.* at 909-10.

99. 434 U.S. 192 (1977). McMann was a technical specialist-aircraft systems when he was retired over his objections in 1973 shortly after his 60th birthday. 542 F.2d at 218-19. He joined United Airlines in 1944 and voluntarily joined the retirement income plan in 1964. The normal retirement age for plan members was 60, and this fact was on the application when McMann signed. *Id.* at 219. The plan was initiated by United in 1941. 434 U.S. at 195. See note 98 *supra.*

100. The Court followed the reasoning of Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974), that a plan in existence before the ADEA could not have been designed to evade the ADEA's purposes. *Id.* at 198. The Fourth Circuit's distinction between the Act and its purposes was dismissed as untenable because the Act was the vehicle by which its purposes were carried out. If a plan was not a subterfuge to evade the Act, it was also not a subterfuge to evade the Act's purposes. *Id.* at 203.

101. *Id.* at 198. The legislative history to which the court referred was a conversation between Senators Yarborough and Javits, majority and minority leaders of the bill, respectively. In explaining §623(f)(2) Senator Yarborough stated that this section would not disrupt bargained-for pension plans. Senator Javits concurred. 113 CONG. REC. 31255 (1967).

102. H.R. REP. No. 950, 95th Cong., 2d Sess., 8 *reprinted in* [1978] U.S. CODE CONG. & AD NEWS 528, 529: "The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age." *Id.*

In *McMann*, the Supreme Court held to the contrary, reversing the Fourth Circuit Court of Appeal in McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976). The conferees specifically disagreed with the Supreme Court's holding and reasoning in *McMann*. Plan provisions in effect prior to the date of enactment are not exempt under §4(f)(2) because they antedate the act or these amendments. U.S. CODE CONG. & AD. NEWS 529 (1978).

As for Congress' positive intent: "During the Senate debate, Senator Yarborough, the floor manager of the bill, stated that this section . . . 'will not deny any individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement or insurance plan.' Senator Javits at the time states: 'An employer will not be

quiring retirement of employees within the protected age range.[103] There were, however, two minor[104] caveats: first, high executives could be automatically retired at age sixty-five or older if their total pension from the employer was $27,000 per year or more,[105] and second, tenured college professors could be retired at sixty-five or older.[106] This action by Congress clearly precludes the use of retirement plans to compel early retirement.

Other Defenses

The Act permits discrimination against an employee in the protected age range if the discrimination is based on reasonable factors other than age.[107] Furthermore, it is permissable to discipline any employee for good cause.[108] These two defenses are merely denials of any discrimination.[109] Thus to prevail, the employee-plaintiff must establish a prima facie case of age discrimination.

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compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers.' " *Id.*

103. 29 U.S.C. §623(f)(2) (1976) was amended, adding the provision: "[A]nd no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this Title because of the age of such individual. . . ." 29 U.S.C. §623(f)(2) (Supp. II 1978).

104. Ross, *Retirement at Seventy: A New Trauma for Management*, FORTUNE, May 8, 1978, at 106, 112 S. REP. No. 493 95th Cong., 2d Sess. 33, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 527. These exceptions should be of little effect. General Motors estimated that only 12-15% of its top executives would have pension benefits large enough to qualify. See note 105 *infra*. Only 0.027% of tenured faculty who are eligible work past the age of 65. See note 106 *infra*.

105. 29 U.S.C. §631(c)(1) (Supp. II 1978). "Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2 year period immediately before retirement is employed in a bona fide executive or high policy-making position, if such employee is entitled to an immediate nonforfeitable annual retirment benefit from a pension, profit-sharing savings or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least $27,000." *Id.*

106. 29 U.S.C. §631(d) (Supp. II 1978). "Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of title 20." *Id.*

107. 29 U.S.C. §623(f)(1) (1976). There is an important question surrounding this exception which the courts have not yet addressed. Because employers frequently give periodic increases in pay based on length of service, older employees are often paid at higher rates than younger employees working at the same task. When retrenchment occurs a practical business decision may be to lay off employees with the highest rates of pay, thus decreasing unit costs. This will indirectly discriminate against older, higher paid employees. The question is whether such action is prohibited as discriminatory, or whether it is permissible to discriminate on the basis of pay on the grounds that this is a reasonable factor other than age.

108. 29 U.S.C. §623(f)(3) (1976).

109. The defenses of BFOQ and bona fide pension, retirement, insurance or seniority plan are affirmative defenses. An affirmative defense assumes the complaint to be true, yet still constitutes a defense to the complaint. BLACK'S LAW DICTIONARY 82 (4th Ed. 1975). The defenses of "reasonable factors other than age" and "good cause" do not admit the facts of the complaint.

ESTABLISHING THE PLAINTIFF'S CASE

Discrimination is often very subtle and difficult to prove.[110] Considerable difficulty, therefore, could be expected in developing rules to determine whether a particular employment decision was based on age. Suggested tests have been extensively litigated under the ADEA, but the courts have been aided by their experience in Title VII discrimination cases.

Proving Discrimination Under Title VII

In most civil cases the plaintiff must initially present enough evidence to support a judgment in his favor. If he fails, the defendant is entitled to a directed verdict.[111] Different rules govern, however, if the plaintiff alleges employment discrimination under Title VII. These rules create presumptions in favor of the plaintiff which ease the task of proving discrimination.[112] In *McDonnell Douglas Corp. v. Green*,[113] a Title VII case alleging racial discrimination, the Supreme Court clarified the rules for assigning the burden of proof in a racial discrimination case. The Court held that the plaintiff must initially show only a prima facie case of employment discrimination. This can be done by showing: (1) that the plaintiff belonged to a racial minority, (2) that he applied for and was qualified for a job for which the employer was seeking applicants, (3) that despite his qualifications he was rejected, and (4) that after his rejection, the position remained open and the employer sought other applicants with the plaintiff's qualifications.[114] After a prima facie case is established, the burden[115] shifts to the employer to state a legitimate reason

110. *See, e.g.*, State Div. of Human Rights v. Kilian Mfg. Corp., 35 N.Y.2d 201, 318 N.E.2d 770, 360 N.Y.S.2d 603 (1974), *appeal dismissed*, 420 U.S. 915 (1975). In *Kilian* the court pointed out that discrimination today is rarely obvious, and its practices are not so overt that recognition of the discrimination will be instantaneous and conclusive. *Id.* at 209-10, 318 N.E.2d at 774, 360 N.Y.S.2d at 609. It is much more likely that one intent on violating laws against discrimination will be devious, subtle, and elusive.

111. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§337-338 (2d Ed. 1972).

112. *See id.* §337.

113. 411 U.S. 792 (1973). The plaintiff in *Green* worked as a mechanic and laboratory technician for McDonnell Douglas from 1956 until 1964, when he was laid off as part of a general reduction in force. He was a long-time civil rights activist and protested vigorously that his lay-off was racially motivated. In protest, he participated in a "stall-in," blocking traffic coming into McDonnell's main gate at the morning rush hour. He was charged with, and pleaded guilty to obstructing traffic. *Id.* at 194. Later a "lock-in" occurred in which McDonnell's employees were prevented from leaving a building by a chain and padlock on the door. The plaintiff knew of the plan beforehand, but the extent of his complicity was uncertain. *Id.* at 195. Following the lock-in, McDonnell advertised for mechanics. The plaintiff applied for the job, but was turned down because of his participation in the "stall-in" and "lock-in." The complaint which initiated this case was then filed with the Equal Employment Opportunity Commission, charging McDonnell Douglas with racial discrimination. *Id.* at 796.

114. 411 U.S. at 802. The Court was convinced the plaintiff had proved his prima facie case. *Id.* at 803.

115. The Court did not make clear the nature of the burden which shifted. One reading is that only the burden of going forward with the evidence shifted, and that the defendant need only produce some evidence of a non-discriminatory reason for his action to rebut the plaintiff's prima facie case. A second interpretation is that the entire burden of persuasion

for the employee's rejection.[116] If the employer gives a legitimate reason for rejection, the employee then has an opportunity to prove that the employer's stated reason was a pretext.[117]

Proving Discrimination Under ADEA

The Fifth Circuit Court of Appeals was the first appellate court to examine the proof issue under the ADEA. The matter was addressed in *Hodgson v. First Federal Savings & Loan Association.*[118] This case was decided before *Green*, but the pattern for shifting the burden to the defendant was the same. The court held that the plaintiff was required to establish a prima facie case of discrimination. The court would then give the defendant a chance to justify his actions.[119] In later cases, the Fifth Circuit expressly adopted the *Green* pattern of proof for use in ADEA cases;[120] many other courts have followed suit.[121]

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shifts to the defendant. Initially the federal courts took the position that the entire burden of persuasion shifted to the defendant. *See, e.g.*, Rodriquez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974). In Furnco Constr. Corp. v. Waters, 438 U.S. 57 (1978), the Supreme Court indicated only that a burden of going forward with the evidence shifted, not the entire burden of proof. *Id.* at 576-78. *See generally* 9 J. WIGMORE, EVIDENCE §§2485, 2487 (3d ed. 1940); James, *Burdens of Proof*, 47 VA. L. REV. 51, 58-60, 62-63 (1961).

116. 411 U.S. at 802. The Court did not detail every matter which could constitute a refusal to hire. However, defendant's assertion that plaintiff's unlawful conduct was the reason for his rejection was accepted by the court as an adequate response to the prima facie case. *Id.* at 803.

117. *Id.* at 804. This step had not been considered by the district court. *See* Green v. McDonnell Douglas Corp., 318 F. Supp. 846 (E.D. Mo. 1970), *rev'd*, 463 F.2d 337 (8th Cir. 1972), *remanded*, 411 U.S. 792 (1973).

118. 455 F.2d 818 (5th Cir. 1972). The defendant savings and loan association had been requested to hire the plaintiff as a teller. Plaintiff was a 47 year-old woman who was as qualified as younger applicants. The interviewer who met with the plaintiff wrote "too old for teller" on his interview notes. The order which defendant placed with the personnel firm called for applicants for the teller position between the ages of 21 and 24. Out of thirty-five hirees for the position none were over 40. In response the savings and loan asserted that age had not been a factor in its decision, but that plaintiff had been rejected because she was too heavy to be a teller. *Id.* at 821-25.

119. *Id.* at 822. The court reviewed defendant's affirmative defenses and found "that defendant has not successfully *established* that Mrs. Hall was not hired as a teller because of her alleged physical incapacity." *Id.* at 825 (emphasis added). The requirement that the defendant establish that its action was non-discriminatory is tantamount to a complete shifting of the burden of proof, which is appropriate when the defense is affirmative. See note 124 *infra*. However, the assertion that the defendant's action is based on reasonable factors other than age is not a true affirmative defense. See note 109 *supra*. Thus, the court in this instance placed too heavy a burden upon the defendant.

120. Wilson v. Sealtest Foods, 501 F.2d 84 (5th Cir. 1974). The plaintiff was 62 at the time he was required to take early retirement. He was replaced by a 50 year-old employee, also within the protected age range, though younger. *Id.* at 86. The fact the replacement employee is also within the protected age range does not protect the employer's action from an age discrimination charge. See note 21 *supra*.

121. *See, e.g.*, Hughes v. Black Hills Power & Light Co., 585 F.2d 918, 919 n.1 (8th Cir. 1978); Kentroti v. Frontier Airlines, 585 F.2d 967, 969 (10th Cir. 1978); Rodriquez v. Taylor, 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). *Cf.* Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (*Green* standards may apply to ADEA cases, but not automatically).

The Fifth Circuit clarified the scope of the burden which was shifted to the defendant in *Bittar v. Air Canada*.[122] After the plaintiff's prima facie showing of age discrimination, the employer produced evidence of unsatisfactory job performance. The district court held that the plaintiff failed to prove her case by a preponderance of the evidence.[123] The plaintiff appealed, contending that after a prima facie showing of discrimination, the employer must prove nondiscrimination by a preponderance of the evidence. The court held that only the burden of going forward with the evidence was shifted to the defendant after the prima facie case was established. The burden of proving discrimination by a preponderance of the evidence remained with the plaintiff.[124]

The *Bittar* case presents the traditional rule of evidence. Although the burden of going forward with the evidence may shift, the burden of proof does not.[125] Many courts in Title VII cases have ignored this maxim, however, stating that upon a prima facie showing by the plaintiff the burden of proof shifts to the defendant.[126]

The Supreme Court rejected the shifting burden of proof approach in the Title VII case of *Board of Trustees of Keene State College v. Sweeney*.[127] The Court held that an employer's burden under *Green* was satisfied if he simply explained what he had done or produced evidence of nondiscriminatory reasons. An employer need not prove absence of a discriminatory motive.[128]

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122. 512 F.2d 582 (5th Cir. 1975).

123. *Id.* at 583.

124. *Id.* at 582-83. This is true, however, only if the employer's defense amounts to no more than a denial of plaintiff's charge. If the defendant chooses an affirmative defense, such as a BFOQ, the employer bears the burden of persuasion. Establishment of a BFOQ allows the employer to apply a general exclusionary rule to otherwise protected individuals based solely on age. The tendency of the court to place the burden of proof on the party desiring change and special policy considerations disfavoring statutory exceptions justify the shift of the burden of persuasion. Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591 (5th Cir. 1978) *See* C. McCORMICK, EVIDENCE §338 (2d ed. 1972).

125. 9 J. WIGMORE, EVIDENCE §2498 (3d ed. 1940) "[T]he risk of non-persuasion of the jury *never shifts*, since no fixed rule of law can be said to shift." *Id.* What Wigmore refers to as the risk of non-persuasion is commonly called the burden of proof. *See generally* James, *Burdens of Proof*, 47 VA. L. REV. 51, 58-60, 62-63 (1961).

126. *E.g.*, Rodriquez v. East Texas Motor Freight, 505 F.2d 40, 58 (5th Cir. 1974). "[Defendant] would have us reverse the burden of proof, placed firmly on the defendant by plaintiffs' prima facie case. . . . We stated earlier that the burden rested on the defendants. . . . The point we were endeavoring to underscore is that a showing of racially disproportionate impact puts on the municipal or state defendants not simply a burden of going forward but a burden of persuasion." Vulcan Soc. v. Civil Serv. Comm'n, 490 F.2d 387, 393 (2nd Cir. 1973). *See also* Holthaus v. Compton & Sons, Inc., 514 F.2d 651, 652, 654 (8th Cir. 1975); Gates v. Georgia-Pacific Corp., 492 F.2d 292, 295-96 (9th Cir. 1974). *But see*, Long v. Ford Motor Co., 496 F.2d 500, 505-06 (6th Cir. 1974).

127. 439 U.S. 24 (1978).

128. *Id.* The court relied on its previous opinion in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) in which it had instructed that "to dispel the adverse inference from a prima facie showing under *McDonnell Douglas* [*Green*], the employer need only 'articulate some legitimate, non-discriminatory reason for the employee's rejection.'" *Id.* at 578. The Court of Appeals in *Sweeney* stated that by requiring the defendant to prove absence of discrimination motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence. Board of Trustees v. Sweeney, 439 U.S. at 24-25. The Supreme Court

Therefore, the burden which shifted to the defendant was the burden of merely going forward with the evidence.

Sweeney is in accord with the Fifth Circuit's clarification of the *Green* test announced in *Bittar*. Undoubtedly, those courts which follow *Green* for age discrimination[129] will incorporate this clarification into the test. The decision not to place the burden of proof on the defendant comports with traditional rules of law.[130] To place the burden of persuasion on the employer would lead employers to be more cautious in decisions concerning employees in the protected age range. While this might be advantageous to older workers, it would violate the ADEA's policy of promoting employment of older persons based on ability rather than age.[131]

Statistics

Instead of establishing a prima facie case of age discrimination under the *Green* test, a plaintiff may meet his prima facie burden through statistical evidence.[132] Courts have consistently permitted this use of statistical data in Title VII cases,[133] and ADEA decisions have followed Title VII practice.[134] In *Hodgson v. First Federal Savings & Loan Association*.[135] the Fifth Circuit announced that statistics by themselves could support a finding that the defendant had violated the Act.[136] The evidence presented in *First Federal* was that, out

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pointed out that the articulation of a legitimate reason was a lighter burden than proving absence of discriminatory motive, and it was the lighter burden which shifted to the defendant. *Id.*

129. See note 121 *supra.*

130. See note 125 *supra.*

131. 29 U.S.C. §621(b) (1976). Encouraging employment of older workers on the basis of their age would be just as contradictory to the Act as taking adverse action based on age.

132. For a general discussion of the use of statistics in discrimination cases see Gilfix, *First Hired-First Fired: Age Discrimination in Employment*, 50 CAL. ST. B.J. 462 (1975); Montlack, *Using Statistical Evidence to Enforce Laws Against Discrimination*, 22 CLEV. ST. L. REV. 25 (1973); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975); Comment, *Statistical Evidence in Employment Discrimination Litigation: Selection of the Available Population, Problems and Proposals*, 29 SW. L.J. 859 (1975).

133. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). "Statistics are . . . competent in proving employment discrimination. We caution only that statistics are not irrefutable, . . . they may be rebutted." *Id.* at 339-40. Stamps v. Detroit Edison Co., 365 F. Supp. 87, 110 (E.D. Mich. 1973), *rev'd on other grounds, sub nom.*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

134. *See, e.g.*, Hodgson v. First Fed. Sav. & Loan Ass'n. 455 F.2d 818 (5th Cir. 1972); Polstorff v. Fletcher, 452 F. Supp. 17 (N.D. Ala. 1978). *But see* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976) (court concluded that statistics cannot be used exclusively to establish a case of age discrimination).

135. 455 F.2d 818 (5th Cir. 1972).

136. *Id.* at 823. Though the court announced that statistics alone might support the age discrimination case, its reliance was not solely on numbers. The court also looked to evidence of specific incidents of discriminatory conduct by the employer, such as notes from employment interviews and job orders on file with personnel consultants in which the employer asked for applicants between the ages of 21 and 24. *Id.*

of thirty-five tellers hired during one year, none were in the protected age range.[137]

Statistical evidence has also been used to make a prima facie case of age discrimination by showing that the average age of workers in a company decreased following employer action. The cases have left unclear, however, what degree of disparity between average age before and after employer action will be sufficient to establish the prima facie case. In *Schulz v. Hickock Manufacturing Co.*,[138] the district court held that showing a decline of thirteen years in the average age of district managers following a change in top management demonstrated age discrimination.[139] In a Sixth Circuit case, a decrease in the average age of salaried employees from forty-three to thirty-seven was held adequate for jury considertion on the issue of age discrimination.[140] In *Mastie v. Great Lakes Steel Corp.*,[141] however, a reduction of 1.29 years in the average age of employees was found insignificant.[142]

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137. *Id.* This fact alone would not support a finding of discrimination. While the applicants for a given job might be dispersed throughout the working age range for an entry level job, such as teller, the population of applicants might well be skewed towards youth. Thus, an inference of discrimination based only on the ratio of protected individuals in the group of new hirees, with no analysis of the age of the pool of applicants does not seem reasonable. *See* Mistretta v. Sandia Corp., No. 74-536, Slip op. (D.N.M. Oct. 20, 1977) (employer who concentrates on college recruiting for new technical hirees does not violate ADEA despite the fact that 90% of new hirees are not in protected age group).

138. 358 F. Supp. 1208 (N.D. Ga. 1973).

139. *Id.* at 1213, 1216. The statistics offered by plaintiff were based on an analysis of only seven positions. In February 1970, six of the seven positions were held by employees in the protected age range, and their average age was 53.39. In July, 1971, only three of the seven were within the protected age range, and the average age had declined to 40.75. New management had come into the company in February, 1970. *Id.* at 1213. The small sample size casts doubt on whether great weight was given to the statistical evidence. With such a small sample the replacement of even one protected employee by a younger worker could lead to a significant change in average age. In such a case, the court would probably focus on the individual incident, rather than the statistical result of the incident. Indeed, in *Schulz* the court also relied on testimony that plaintiff's discharge was the result of a "youth movement." *Id.* at 1212.

140. Laugesen v. Anaconda Co., 510 F.2d 307, 311-12 (6th Cir. 1975). Plaintiff was appealing the district court's denial of his motion for a directed verdict. The jury had rendered a verdict for the defendent. The Court of Appeals held that plaintiff's circumstantial evidence (statistics) would be sufficient to sustain a directed verdict only if the defendant failed to "articulate some legitimate and non-discriminatory reason" for the discharge. See note 116 and accompanying text, *supra*.

141. 424 F. Supp. 1299 (E.D. Mich. 1976).

142. *Id.* at 1320. The court termed the decrease nominal, and went on to say that less weight should be given to statistics in age discrimination cases, as opposed to race and sex cases, because of the natural pattern of older workers leaving the job market and younger workers entering. The court concluded that statistics could never be used exclusively to establish a prima facie case of age discrimination. *Id.* at 1320-21. The court's conclusion is overbroad, and when extended to particular factual settings yields ludicrous results. Given a hypothetical situation in which a company with a large labor force discharged all its employees over the age of 50 and replaced them with employees under 25, it is hardly imaginable that a court would not find a prima facie case on those facts alone. Further, if such action were unexplained by the defendant, a directed verdict would be appropriate.

No court had yet relied exclusively on statistics to support a finding of age discrimination.[143] *Schulz* and *Mastie* indicate that substantial reduction in the average age of a work force will be given weight by the court, but minor changes will be disregarded.

REMEDIES

The provision of adequate remedies under the ADEA is crucial to offset the expense of proving age discrimination. Remedies available under the Act are found in subsections (b) and (c) of Section 626. To a great extent, the remedies available under the Fair Labor Standards Act of 1938[144] (FLSA), are extended to the ADEA.[145] The FLSA provides that employers who violate its provisions shall be liable to the affected employees for unpaid minimum wages, unpaid overtime compensation, and an equal amount as liquidated damages for willful violations.[146] Section 626 provides further, however, that a court may grant "such legal and equitable relief" as is necessary.[147] This section applies whether the action is brought by the Secretary of Labor[148] or the affected employee.[149]

The inclusion of the narrowly-defined remedies of the FLSA with the broad phrase "such legal or equitable relief" has resulted in a split in the federal courts on the issue of whether punitive and compensatory damages for pain and suffering are allowable under the ADEA. A majority of the district courts[150]

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143. See note 134 *supra*.

144. 29 U.S.C. §§201-219 (1976 & Supp. II 1978).

145. The sections of FLSA which are adopted into ADEA are sections 211(b), 216 (except subsection (a) thereof), and 217.

146. 29 U.S.C. §216(b) (1976).

147. 29 U.S.C. §626(b) (1976).

148. 29 U.S.C. §626(b) (1976). The ADEA requires that the Secretary initially attempt to eliminate discriminatory practices through conciliation, conference, and persuasion. If these methods fail, the Secretary is empowered to bring an action for compliance. *Id.*

149. 29 U.S.C. §626(c)(1) (Supp. II 1978). If the Secretary does not bring an action, the right to sue devolves to the discriminatee. *Id.* The aggrieved individual must notify the Secretary of Labor of his intent to sue sixty days before bringing an action. 29 U.S.C. §626(d) (1976 & Supp. II 1978). The notification must be within 180 days of the alleged discriminatory act if not in a "deferral" state or within 300 days of the alleged discriminatory act, or within 30 days after the individual has received notice of termination of state proceedings, whichever is earlier in a "deferral" state. 29 U.S.C. §626(d)(1) (1976 & Supp. II 1978). A "deferral" state is one that has its own statute prohibiting age discrimination in employment. *Id.* Deferral of federal actions is governed by 29 U.S.C. §633 (1976 & Supp. II 1978). Federal courts differed over the question of whether the 180-day notice period was of jurisdictional quality and rigid, or whether it was like statutes of limitation and subject to equitable considerations. *Compare* Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976) (180-day notice requirement subject to equitable modification), *aff'd per curiam*, 434 U.S. 99 (1977), *with*, Powell v. Southwestern Bell Tel. Co., 494 F.2d 485 (5th Cir. 1975) (180-day notice requirement is jurisdictional and an absolute bar to suit). Congress amended the ADEA in 1978 to permit equitable modification of the notice requirement. See 29 U.S.C. §626(d) (Supp. II 1978). For a complete discussion of the procedural requirements of the ADEA, see Note, *The Procedural Requirements of the Age Discrimination in Employment* Act of 1967, 9 RUT.-CAM. L.J. 540 (1978).

150. *See, e.g.*, Ayres v. Federated Dep't Stores, Inc., Civ. No. 78-5946 slip op. (S.D.N.Y. Jan. 25, 1980); Newkirk v. General Elec. Co., No. 78-2537 (N.D. Cal. Aug. 31, 1979); Douglas

and all circuit courts of appeal which have addressed the issue[151] have ruled that neither compensatory nor punitive damages are recoverable. A sizable minority of district courts, however, have held that one or both are recoverable.[152] Only one court has treated the two remedies inconsistently, permitting compensatory damages while disallowing punitive damages.[153]

Such controversy in the courts over the interpretation of a federal statute is undesirable because the parties will be less likely to settle their differences without litigation. More cases will be tried and the workload of the courts will be increased. The next section of this note discusses the damages controversy as it presently exists in the federal courts and suggests a solution.

The Controversy

In *Rogers v. Exxon Research & Engineering Co.*,[154] Dr. Dilworth T. Rogers, a research scientist for Exxon, was forced to retire at age sixty. A bifurcated trial was held, the first part to decide liability, the second to determine damages. There was no dispute that Exxon had forced the retirement. The liability question was whether Exxon acted because of Dr. Rogers' age, or, as Exxon alleged, because of his mental instability. The jury found age to be the reason, thus Exxon was liable.[155]

In the damages portion of the trial, the sole issue was the amount of award for pain and suffering, since plaintiff's out-of-pocket expenses were stipulated.[156] Dr. Rogers' suffering was allegedly the result of pressure put on him by Exxon to retire. During this time he experienced severe abdominal pain, vomiting, impotency, nervousness, and lack of confidence and ambition.[157] He also became afraid to drive because of his feelings of uncertainty.[158] During his career Dr. Rogers was a man of notable accomplishment.[159] It was understandable, therefore, that his reaction to his employer's harrassment would be severe. He died of a heart attack three and one-half years after his forced retirement,

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v. American Cyanamid Co., 472 F. Supp. 298 (D. Conn. 1979); Jaffee v. Plough Broadcasting Co., No. 78-1254 slip op. (D. Md. Mar. 2, 1979.

151. *See* Slatin v. Stanford Research Inst., 590 F.2d 1292 (4th Cir. 1979); Vasquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Security Ins. Co., 559 F.2d 1036, (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

152. *See, e.g.*, Wise v. Olan Mills, Inc. of Texas, 485 F. Supp. 542 (D. Col. 1980); Hassan v. Delta Orthopedic Medical Group, Inc., No. 79-206 slip op. (E.D. Cal. Oct. 1, 1979); Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676 (E.D.N.Y. 1979).

153. Gifford v. B.D. Diagnostics, 458 F. Supp. 462 (N.D. Ohio 1978) (compensatory damages permitted, punitive damages denied).

154. 404 F. Supp. 324 (D. N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

155. 404 F. Supp. at 326.

156. *Id.*

157. *Id.* at 330.

158. *Id.* at 330 n.2.

159. *Id.* at 329. Dr. Rogers held B.S. and M.S. degrees from Renssalaer Polytechnical Institute and M.S. and Ph.D. degrees from Harvard. He was a scientist and inventor of recognized merit and had developed 50 patents in his 30 years with Exxon. *Id.*

while the action against Exxon was proceeding. The jury returned a damage award of $750,000 for pain and suffering.[160]

The judge reduced the award to $200,000,[161] but only after carefully reviewing his reasons for granting pain and suffering damages. He felt that the ADEA established a new statutory tort. This was supported by *Curtis v. Loether*,[162] a Fair Housing Act[163] case in which the Supreme Court characterized a damages action under the statute as basically a tort action. The statute created a legal duty and authorized courts to compensate for injuries caused by defendants' breaches.[164] The district court in *Rogers* pointed to a Title VII racial discrimination case in which the Supreme Court determined that Congress intended to make persons whole for unlawful employment discrimination.[165] Finding that Title VII and the ADEA were similar both in purpose and scope,[166] and recognizing that other courts had permitted compensatory damages in racial discrimination cases,[167] the court concluded that the award of

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160. *Id.* at 326.

161. *Id* at 338.

162. 415 U.S. 189 (1974).

163. 42 U.S.C. §§3601-3631 (1976).

164. 415 U.S. at 195. The district court in *Rogers* did not mention that actual damages, and punitive damages in an amount up to $1000, are specifically provided by the Fair Housing Act. 42 U.S.C. §3612(c) (Supp. II 1978). The issue in *Rogers* was not whether a new legal duty had been created by the ADEA; clearly it had. The issue was whether the statute permitted compensatory and punitive damages. While the Fair Housing Act is clear on this matter, the ADEA is ambiguous.

165. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). The district court perhaps should have noted that there was a significant difference between the statute which the Supreme Court was addressing and the ADEA. Title VII specifically permits the award of back pay. The issue was whether back pay should be advanced in the absence of bad faith by the employer. *Moody* did not address a problem of statutory construction, while *Rogers* did.

166. 404 F. Supp. at 328. The language of the ADEA and Title VII are virtually identical in their prohibition sections. The difference is that "race, color, religion, sex, or national origin" of Title VII are replaced by "age" in the ADEA. When the legislation which later became Title VII of the Civil Rights Act of 1964 was being considered in Congress, it was suggested that age discrimination be prohibited in that statute. The proposal was rejected because consideration of the age characteristic might have delayed passage of the statute which was needed quickly to deal with racial discrimination. *Hearings on H.R. 405 Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 1st Sess. 22, 38-39, 69, 92, 109, 430, 478-79 (1963). There was, however, included as Section 715 of Title VII, a provision requiring the Secretary of Labor to report to Congress on age discrimination with recommendations for legislation. 42 U.S.C. §2000e-14 (1976). This was the first congressional step which ultimately led to passage of the ADEA.

167. *See, e.g.*, Williams v. Matthews Co., 499 F.2d 819 (8th Cir.) (compensatory damages for humiliation and punitive damages allowed in Fair Housing Act violation), *cert. denied*, 419 U.S. 1021 (1974); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) ($5000 allowed for emotional distress in §1983 suit for intentional tort of dismissal from public employment for exercise of first amendment rights) Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973) (award of $1200 for psychic injuries under Title VII), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974). *See* Comment, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1259-1261 (1971).

compensatory damages should be allowed.[168] The court supported its conclusion by citing the ADEA's legislative history indicating that Congress intended mental suffering of the age discriminatee to be compensated.[169]

On appeal, the Third Circuit reversed on the issue of compensatory damages. Its decision was grounded on the ADEA's silence on such damages, congressional intent, and potential disruption of the administrative conciliation effort if such awards were permitted in lawsuits. With respect to the ADEA's silence, the court stated that compensation for psychic or emotional stress was not universally accepted even in routine tort cases,[170] and almost never in contract cases.[171] In the court's opinion, Congress would not have intended national application of a measure of damages not otherwise uniformly accepted. Equitable reinstatement sufficed to redress pain and suffering, because the resumption of productive work removed the source of emotional anxiety and monetary deprivation which distressed the worker.[172] Finally, the court found that Congress favored enforcement of the ADEA through conciliation and mediation, with the private lawsuit as a secondary measure. Haggling over the appropriate sum for compensatory damages would produce a three-sided conflict among the employer, the claimant, and the secretary. If damages for pain and suffering were allowed in private lawsuits, but not in the administrative process or in a suit by the secretary, attempts at conciliation would be further jeopardized. The prospect of receiving a large verdict would make a complainant less likely to settle for out-of-pocket losses in the administrative phase of the case.[173]

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168. 404 F. Supp. at 331-33.

169. *Id.* at 330. In his Older American Address to Congress, 1967, President Johnson remarked that "the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes. . . ." During the House debate on the ADEA, at least one member pointed out that the Act was designed to protect older workers from more than the economic effects of job discrimination: "To deny a person the opportunity to compete for a job because of unfounded age prejudice is a most vicious, cruel, and disastrous form of inhumanity." 113 CONG. REC. at 34745 (remarks of Rep. Eilberg).

170. Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 840 (3rd Cir. 1977). The court relied on W. PROSSER, LAW OF TORTS §12 (4th Ed. 1971) as authority for this statement. The court's reading of Prosser's treatise was erroneous, as Prosser only points out that courts have been reluctant to award damages for psychic injury standing *alone*. In the presence of physical injury, however slight, there has been no reluctance to grant awards for mental anguish. Dr. Rogers' death by heart attack should rank as physical injury. See text accompanying notes 158-165 *supra*.

171. 550 F.2d at 840. Here the circuit court relied on 5 A. CORBIN, CONTRACTS §1076 (1964). This reference to contract law is puzzling because a contract theory was not mentioned anywhere in the proceeding. The cited section of the contracts treatise is equivocal support for the court at best, because it acknowledges that in tort cases involving physical injury damages for psychic injury are permitted. See note 170 *supra*.

172. 550 F.2d at 840. The court was likely referring to the general case and ignoring the instant case. Dr. Rogers' death removed the possibility of reinstatement.

173. *Id.* at 841. The court did not discuss the possibility that in the absence of the threat of a large verdict employers would have little incentive to settle. If the employer was subject to a payment of twice the amount of lost wages there would be an incentive for employers to avoid settlement. Individual claimants would not ordinarily have the funds to wage a battle in court to collect. Therefore, the employer has much to gain and little to lose by recalcitrance.

Rogers dealt only with whether damages for pain and suffering were available under the ADEA. The court's interpretation and rationale, however, is equally applicable to punitive damages. Accordingly, in *Dean v. American Security Insurance Co.*,[174] the Fifth Circuit extended the Third Circuit's arguments in *Rogers* to include punitive damages. The district court in *Dean* permitted a prayer for both compensatory and punitive damages.[175] The decision was based on the ADEA language incorporating the FLSA remedies and allowing "such legal and equitable relief as may be appropriate to effectuate the purposes of this chapter."[176] The district court saw in these words an intent to increase the scope of remedies under the ADEA beyond that under the FLSA. Therefore, the court concluded that Congress was concerned with the myriad ways in which an individual could be harmed by willful discriminatory conduct by the employer.[177]

This reasoning, however, did not impress the Fifth Circuit Court of Appeals. The circuit court found it easier to infer that Congress intended to prevent psychic injury through compliance, or through reinstatement, promotion, restoration of lost wages, or, where appropriate, through liquidated damages in the event of non-compliance. The court saw no reason to read into the simple phrase "legal relief"[178] an intent to authorize general damages.[179] Similar arguments were applied against allowing punitive damages. The Fair Housing Act,[180] a congressional effort to eliminate racial discrimination in housing, expressly authorized the award of punitive damages.[181] Thus, the court concluded that because other protective legislation expressly authorized punitive damages, the ADEA's silence on the subject impliedly disallowed punitive damages.[182]

After *Rogers* and *Dean*, two events added further confusion in the federal courts to the issue of compensatory and punitive damages under the ADEA. First, the Supreme Court decided the case of *Lorillard v. Pons*.[183] *Lorillard* did

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See, e.g., Vasquez v. Eastern Air Lines, Inc., 579 F.2d 107, 111 (1st Cir. 1978); Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676, 679 (E.D.N.Y. 1979).

174. 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

175. Dean v. American Security Ins. Co., 429 F. Supp. 3, 4 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). The district court in *Dean* was following a series of cases in the district which had permitted recovery of compensatory and punitive damages. *E.g.*, Murphy v. American Motors Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976); Davis v. Adams-Cates Co., No. 76-136 slip op. (N.D. Ga. June 30, 1976); Wilson v. American Motors Sales Corp., No. 76-125 slip op. (N.D. Ga. April 16, 1976).

176. 29 U.S.C. §626(b) (1976).

177. 429 F. Supp. at 4.

178. Early drafts of the ADEA authorized equitable relief, but not legal relief. 113 CONG. REC. 2199, 2467, 31248-49 (1967). This change suggests that the phrase was added purposely and should be given meaning. The Fifth Circuit in *Dean* found that this addition referred only to "lost wages" of the FLSA, not to the full range of legal remedies. 559 F.2d at 1038 n.6.

179. 559 F.2d at 1039.

180. 42 U.S.C. §§2601-3631 (1976).

181. 42 U.S.C. §3612(c) (1976). "The court . . . may award to the plaintiff actual damages and not more than $1,000 punitive damages . . . ." *Id.*

182. 559 F.2d at 1039.

183. 434 U.S. 575 (1978).

not deal directly with the question of damages, but with whether jury trials were always available in actions under the ADEA. The Court made several statements, however, which have had an effect on the damages issue. Second, Congress passed amendments to the ADEA in 1978[184] and added statements to the legislative history of the Act which may bear on its intent with respect to damages.

Lorillard v. Pons

In *Lorillard,* the Supreme Court decided that the right to jury trials existed in ADEA actions. In reaching this decision, it became necessary to define the term "legal" as used in the phrase "legal and equitable relief" of section 626(b) of the ADEA. The Court explained that the word "legal" is a term of art. In cases where legal relief is available and legal rights are determined, the seventh amendment provides a right of jury trial.[185] When words having a well known meaning at common law are used in a statute they are presumed to have been used with that meaning.[186] The Court inferred, therefore, that Congress knew that the term "legal" implied a right to trial by jury and that by using that term it meant to include that right in the statute.[187]

Further, the Court found that Congress had directed that the ADEA be enforced in accordance with the powers, remedies, and procedures of the FLSA.[188] Long before Congress passed the ADEA the right to jury trial was established among the procedures attendant to the FLSA.[189] Congress is presumed to be aware of judicial interpretations when it re-enacts a statute without change.[190] Likewise, when Congress adopts a new law incorporating sections of a prior law, prior interpretations of the old law are presumed to apply to the new law.[191] Therefore, Congress intended that the procedural rights of the FLSA, including the right to jury trial, be adopted in actions under the ADEA.[192]

The impact of *Lorillard* on the question of damages under the ADEA is in

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184. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978).

185. U.S. CONST. amend. VII. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be perserved. . . ." *Id.*

186. Standard Oil v. United States, 221 U.S. 1, 59 (1911). *See also* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 535-38 (1947). "Words of art bring their art with them. They bear the meaning of their habitat . . . and if a work is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id.* at 537.

187. 434 U.S. at 583.

188. 29 U.S.C. §626(b) (1976).

189. *See, e.g.,* Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965); Lewis v. Times Publishing Co., 185 F.2d 457 (5th Cir. 1950); Olearchick v. American Steel Foundries, 73 F. Supp. 273, 279 (W.D.pa. 1947). *See also* Note, *The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts,* 44 U. CHI. L. REV. 365, 376 (1977); Note, *Fair Labor Standards Act and Trial by Jury,* 65 COLUM. L. REV. 514 (1965).

190. 434 U.S. at 580.

191. *Id.* at 581.

192. *Id.*

dispute. In *Kennedy v. Mountain States Telephone & Telegraph Co.*[193] the district court used the reasoning and definition of "legal remedy" given in *Lorillard*. The award of punitive damages has long been recognized as a legal remedy. Because Congress was presumptively aware of this when it included the term in the ADEA, the implication arose that Congress meant for punitive damages to be available in ADEA actions.[194] Other courts, however, have taken the approach of the Fourth Circuit Court of Appeals in *Slatin v. Stanford Research Institute*.[195] The *Slatin* court focused on the Supreme Court's statement in *Lorillard* that the ADEA incorporated the powers, remedies, and procedures of the FLSA. Judicial interpretations of the remedies available under the FLSA had never permitted the recovery of compensatory damages.[196] Therefore, since Congress presumably knew of these holdings when grafting the FLSA remedies onto the ADEA, it meant for the ADEA to be similarly limited.[197]

A majority of courts facing the damages issue since *Lorillard* have used reasoning similar to *Slatin*.[198] There appears to be a flaw in this reasoning, however. While the ADEA, in section 626(b), incorporates the specific remedies of the FLSA, it goes beyond the FLSA to add "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter."[199] It is in this additional language that remedies beyond the FLSA can be found. The limitations of the FLSA do not apply to this grant of power.[200] Furthermore, even if section 626(b) were properly limited to FLSA remedies, the issue would not be settled. Though most courts have assumed that appropriate relief is delineated in subsection (b), that is not the only subsection dealing with damages. Subsection (c)(1) allows for "such legal and equitable relief as will effectuate

193. 449 F. Supp. 1008 (D. Col. 1978).

194. *Id.* at 1011. The issue in *Kennedy* was whether punitive damages were available under the ADEA. The question of pain and suffering damages was not raised. There should be no difference under the *Kennedy* rationale, however, because pain and suffering damages and punitive damages are both forms of "legal" relief. Only one court which has permitted the recovery of one of these forms of relief has not permitted the other. In Gifford v. B.D. Diagnostics, 458 F. Supp. 462 (N.D. Ohio 1978), the court allowed pain and suffering damages, following the *Rogers* district court opinion, but did not permit punitive damages. The argument was that punitive damages were precluded by the liquidated damages provision for willful conduct. *Id.* at 464.

195. 590 F.2d 1292 (4th Cir. 1979).

196. *Id.* at 1296. The *Slatin* court did not document its statement that compensatory damages were not available under the FLSA, although this is the predominant holding. Most courts which have considered the matter have held that neither a private right of action nor compensatory damages may be had under the FLSA. *See* Martinez v. Behring's Serv., Inc., 501 F.2d 104 (5th Cir. 1974); Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959); Bonner v. Elizabeth Arden, Inc., 177 F.2d 703 (2d Cir. 1949). However, the conclusion is not universal. In Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969), the court stated that Congress had created a "right by legislation" in the FLSA, and that "the federal courts have a duty to implement the statutory intent by providing the appropriate remedy." *Id.* at 410.

197. 590 F.2d at 1296.

198. *See, e.g.*, Knerr v. Norge Co., Civ. No. 99-2080 slip op. (S.D. Ill. Sept. 26, 1979); Douglas v. American Cyanamid Co., 472 F. Supp. 298, 304 (D. Conn. 1979); Dunwoodie v. Chrysler Corp., 459 F. Supp. 971, 973 (E.D. Mich. 1978).

199. 29 U.S.C. §626(b) (1976). See text accompanying note 144 *supra*.

200. *See* Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676, 678 (E.D.N.Y. 1979).

the purposes of this chapter" in private suits with no reference to the FLSA and no other limitations.[201] A central rule of statutory construction requires that, where possible, a statute should not be construed in such a way as to render any of its parts superfluous or redundant.[202] To avoid redundancy between subsections (b) and (c)(1), it must be concluded that Congress provided for relief in two separate locations, one with qualifications, the other without.[203]

1978 Amendments to ADEA

In *Lorillard,* the Supreme Court granted the right to jury trial on the issue of lost wages, but did not address the matter of jury trials on the issue of liquidated damages. In the 1978 amendments to the ADEA[204] Congress extended the right to jury trial to this issue. Explaining Congress' reasons for taking this action, the joint committee reported that liquidated damages are in the nature of legal relief, and that in such a case a party should be entitled to a jury trial of the factual issues underlying the claim. According to the committee, the ADEA as amended does not provide remedies of a punitive nature.[205] The right to jury trial on this issue was granted because it was clear that liquidated damages do not penalize under the FLSA but rather compensate for losses too difficult to measure by other means.[206]

Several courts have taken the language of the report as a clarification of congressional intent on the compensatory and punitive damages issue.[207] The committee's statement was felt to be unequivocal on the issue of punitive damages, and strongly reinforced the notion that liquidated damages were the sole source of recovery for non-pecuniary loss.[208]

Other courts have found the report not dispositive on the issue of damages,[209] deeming the best evidence of legislative intent to be the language of the statute.[210] Given what they consider the unambiguous language and the ADEA's statement of purpose, plus the fact that the report focused on the ADEA's jury trial provisions rather than on its remedies, these courts discounted the conference report.[211] Furthermore, the intent of the Congress that passed a piece of legislation should influence the courts, not the opinion of a subsequent

201. 29 U.S.C. §626(c)(1) (Supp. II 1978).

202. *See* Patagonia Corp. v. Board of Governors, 517 F.2d 803, 813 (9th Cir. 1975).

203. *See* Hassan v. Delta Orthopedic Medical Group, Inc., No. 79-206 slip op. (E.D. Cal. Oct. 1, 1979).

204. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978).

205. H.R. CONF. REP. No. 950, 95th Cong., 1st Sess. 14 *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 535.

206. *Id.*

207. *See, e.g.,* Jaffe v. Plough Broadcasting Co., No. 78-1254 slip op. (D. Md. Mar. 2, 1979); Brin v. Bigsby & Kruthers, No. 78-2892 slip op. (N.D. Ill. Jan. 9, 1979); Riddle v. Getty Ref. & Mktg. Co., 460 F. Supp. 678, 680 (N.D. Okla. 1978).

208. *See* Brin v. Bigsby & Kruthers, No. 78-2892 slip op. (N.D. Ill. Jan. 9, 1979).

209. See cases cited in note 211 *infra.*

210. *See* Patagonia Corp. v. Board of Governors, 517 F.2d 803, 813 (9th Cir. 1975).

211. *See* Wise v. Olan Mills, Inc. of Texas, 485 F. Supp. 542 (D. Col. 1980); Hassan v. Delta Orthopedic Medical Group, Inc., No. 79-206 slip op. (E.D. Cal. Oct. 1, 1979).

Congress. The language of the remedies sections of the ADEA was not changed by the 1978 Congress. Therefore, 1978 congressional statements of opinion with respect to the intentions of Congress in 1967 should be given little weight.[212]

THE CONTROVERSY AND CONGRESSIONAL INTENT

The arguments on both sides of the issue of compensatory and punitive damages under the ADEA are strong. Compensatory and punitive damages are not contemplated by the FLSA.[213] Therefore, those opposed to granting compensatory and punitive damages point to the language of section 626(b) which states that the ADEA shall be enforced in accordance with the remedies of the FLSA. Furthermore, Congress placed primary emphasis on administrative remedies, rather than lawsuits, for enforcement of the ADEA.[214] The Act is silent on whether compensatory and punitive damages may be granted at the administrative level. It is unlikely that Congress would delegate to an agency the authority to assess and collect such penalties without setting forth standards to guide the agency in its determination.[215] Therefore such damages should not be available in the administrative phase. With this limitation on the concilia-

212. The Supreme Court has made it clear that the unchanged language of a statute will not be given a new interpretation solely because of a clarifying statement by a subsequent Congress. "Legislative observations . . . are in no sense part of the legislative history. . . . It is the intent of the Congress that enacted [the section] that controls." Oscar Meyer & Co. v. Evans, 99 S. Ct. 2066, 2072 (1979). In *Evans*, the Court addressed the question of whether §633(b) of the ADEA, which deals with deferral to state agencies when the state has a statute similar to the ADEA, was mandatory or elective. The Court held that resort to state agencies was mandatory, basing its holding on the similarity of the language in the ADEA and Title VII, and a well-established holding that such deferral is mandatory under Title VII. *Id.* at 2071. In so holding the Court specifically rejected a statement from the Committee Report accompanying the 1978 amendments. The committee stated: "It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law." S. REP. No. 493, 95th Cong., 2d Sess., 7, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 510, *adopted by Joint Explanatory Statement of the Committee of Conference*, H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 7, 12, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 528, 534. The opinion of a later Congress was insufficient to overcome the clear language of the statute. 99 S. Ct. at 2072-73.

213. See note 196 and accompanying text, *supra*.

214. *See* Slatin v. Stanford Research Inst., 590 F.2d 1292, 1296 (1979). The entire thrust of the ADEA's enforcement provision is that suits by either the Secretary or the private individual are secondary to the administrative process. Private lawsuits may not be commenced if the Secretary is suing. 29 U.S.C. §626(c)(1) (Supp. II 1978). The Secretary may not sue until conciliatory efforts are made. 29 U.S.C. §626(b) (1976).

215. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). Congress is constitutionally permitted to delegate broad powers to agencies to fix and collect taxes, fines, penalties, etc., but only if the delegation accompanies an act laying down an "intelligible principle: to which the agency fixing the amount is to conform. *Id.* at 409. If Congress has permitted the Department of Labor to assess compensatory and punitive damages it has acted unconstitutionally, since no "intelligible principle" for setting the amount of the damages has been articulated. *See also* National Cable Ass'n. v. United States, 415 U.S. 336, 342 (1974) (Congress does delegate powers to agencies, setting standards to guide their determinations). For analysis of the trend to delegate penalty-setting power to agencies, see Charney, *The Need For Constitutional Protections For Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974). *See generally* K. DAVIS, ADMINISTRATIVE LAW IN THE SEVENTIES 29-39 (1976).

tion process, it seems unlikely that Congress intended to give complainants the incentive of additional damages to ignore conciliation and take their case to court.

On the other hand, Congress did go beyond the FLSA in wording sections 626(b) and (c) of the ADEA to permit such legal relief as would effectuate the purposes of the chapter. This language encompasses both compensatory and punitive damages, which fit into the category of legal relief. There is some evidence that Congress may have anticipated a need for compensatory and punitive damages, and that it intended by this language to permit such damages.[216]

No unassailable conclusion can be drawn from the language of the ADEA or from its legislative history. The hybrid enforcement provisions, drawn partly from old language from the FLSA, with new phrasing added, are too ambiguous to support a definite conclusion on congressional intent. The legislative history of the ADEA is devoid of material which deals directly with the question. There is not a clear statement on the issue of compensatory and punitive damages, although indirect evidence is sometimes offered.[217] It is not surprising, however, that clear congressional intent cannot be found, for there was probably no conscious intent within Congress regarding compensatory and punitive damages. Foremost in the mind of Congress was the elimination of age discrimination through educating employers and the public. With this primary goal accomplished, there would be few cases of discrimination.[218] The remaining cases would be dealt with by an existing bureaucracy which was experienced in settling similar disputes. Therefore, the number of cases going to court would be small. Accordingly, the less important question of the scope of recovery was probably not considered by Congress.

If Congress had actually gone through the reasoning process above, the ambiguity on this question would not be important. The goals of the ADEA would be largely attainable, and whether compensatory and punitive damages were permitted or not would not change this fact. Unfortunately, events have not transpired as Congress envisioned them. Despite the Department of Labor's education and promotional programs, age discrimination has not diminished. In fact, the number of complaints of discrimination has increased dramatically

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216. *See* Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 330-31 n.3 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). The court found that the remarks of Senators Javits and Young during the Senate debate on the ADEA, and of Representatives Kelly, Pucinski, Eilberg, Pepper, and Dwyer during discussion in the House, confirmed the view that Congress intended an award of pain and suffering damages. Representative Dwyer's remarks, emphasizing the frustration, fear, mental anguish, pain, human suffering and despair experienced by one who loses his job because of his age, were emphasized by the court. For remarks of senators and representatives see 113 CONG. REC. 31254-56, 34744-52 (1967). *But see* Platt v. Burroughs Corp., 424 F. Supp. 1329, 1338 (E.D. Pa. 1976) (discounting significance of Rep. Dwyer's remarks).

217. Even the statements offered as evidence that Congress intended to permit compensatory and punitive damages do not mention the subject of damages. Instead they focus on the suffering which results from age discrimination to urge passage of the bill; there is no mention of any particular remedies. See note 216 *supra*.

218. See note 8 *supra*.

since the early years of the ADEA.[219] In addition, the Department of Labor has been unsuccessful in resolving most of the complaints by conciliation.[220] Thus, it appears the congressional plan of eliminating age discrimination through education, information and conciliation is not working. In such a situation, it is not surprising to find the courts floundering in their attempts to determine whether Congress meant to allow compensatory and punitive damages. Congress probably never expected the problem to arise and had no intent with respect to this question. The courts' difficulties arose because they were forced to fabricate legislative intent.

CONCLUSION

The solution to the problem, therefore, lies not with the courts, but with Congress. The ADEA should be amended to clearly express Congress' intent in light of present circumstances. Given the failure of Congress' earlier conciliatory strategy, the logical action is to permit age discrimination plaintiffs to recover compensatory and punitive damages in ADEA actions. The threat of a large recovery would give greater incentive to employers to resolve the discrimination cases in the administrative proceeding. Even more important, granting these remedies would discourage discrimination at the outset, thereby furthering a basic purpose of the Act, the prohibition of arbitrary discrimination in employment based on age.[221]

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219. U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 8 (1979). The number of individuals due damages because of violations of the ADEA in the ten-year period (1969-78) was:

Fiscal Year	Individuals Due Damages
1969	48
1970	131
1971	655
1972	964
1973	1,031
1974	1,648
1975	2,350
1976	1,908
1977	1,943
1978	4,111

Id.

220. In 1976, the success rate for conciliation was only 32%. Of 7877 establishments contacted regarding complaints of violations of the ADEA, only 2490 were successfully resolved by conciliation. Vasquez v. Eastern Airlines, Inc., 579 F.2d 107, 111 (1978).

221. See note 7 *supra*.