PROVING A VIOLATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967*

*Charles A. Sullivan***
and
*Michael J. Zimmer****

TABLE OF CONTENTS

I. Introduction 804
II. Theories of Age Discrimination 806
III. Individual Disparate Treatment 808
A. Proof of Discrimination through Admissions by the Employer 809
1. Facial Discrimination 809
2. Admissions 810
B. Inferential Proof of Intent to Discriminate Without Admission Evidence: The General Approach 811
C. Inferential Proof: Establishing an ADEA Prima Facie Case 815
1. Membership in the Protected Class 816
2. Application/Qualification/Vacancy 817
3. Rejection 822
4. Continuing Open Position 823
D. Inferential Proof: Defendant's Rebuttal and Pretext 823
E. Causation 827
IV. Systemic Disparate Treatment 829
V. Systemic Disparate Impact 831

---

* This article is adapted from the age discrimination chapters in a comprehensive three-volume work, EMPLOYMENT DISCRIMINATION, which Professors Sullivan and Zimmer co-authored with Professor Richard F. Richards of the University of Arkansas School of Law. EMPLOYMENT DISCRIMINATION was published by Little, Brown & Company in 1988, and this adaptation is published with the permission of the copyright holders, Meghan D. Sullivan, Michael J. Zimmer, and Joyce A. Richards, Trustee.

** B.A. 1965, Siena College, LL.B. 1968 Harvard University, LL.M. 1972, New York University. Professor of Law, Seton Hall School of Law.

*** B.A. and J.D. 1967, Marquette University, LL.M. 1976 Columbia University. Professor of Law, Seton Hall School of Law.

VI. Statutory Defenses and Exceptions 839
A. Bona Fide Occupational Qualification 839
B. Bona Fide Employee Benefit Plans 840
1. Benefit Plan 842
2. To observe 844
3. Bona Fide 844
4. Subterfuge 849
C. Bona Fide Seniority Systems 849
D. Good Cause and Reasonable Factors Other than Age 851
VII. Conclusion 856

I. INTRODUCTION

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA or the Act)[1] to prohibit discrimination on account of age. Although the Act was originally limited to private employment, it was subsequently extended to the state and federal sectors.[2] Unlike other employment discrimination legislation, however, the ADEA does not flatly prohibit discrimination on the basis of the specified characteristic. Rather, the original act defined "age" as 40-65,[3] thus only barring age discrimination against older workers and, even then, permitting the traditional mandatory retirement at age 65.[4]

Two subsequent amendments extended the upper age limit. In the 1978 amendments to the statute, the 65 age limit was expanded to 70 for nonfederal employees and removed entirely in covered federal employment.[5] In 1986, the Act was again amended, this time to remove the upper age limit for almost all covered employees.[6] Although certain transitional provisions

---

[1] 29 U.S.C. §§ 621-634 (1985). Subsequent references will be both by U.S.C. section and by section of the act.

[2] *Id.* at § 630(b). *See also* Pub. L. No. 93-259, effective May 1, 1974.

[3] 29 U.S.C. § 631, § 12 (1985).

[4] The Age Discrimination Act of 1975, Pub. L. No. 94-135 (as amended by Pub. L. No. 95-65) (effective January 1, 1979) was broader in this respect, barring "unreasonable discrimination on the basis of age in programs or activities receiving federal financial assistance. . . ." § 302. The statute, however, apparently does not provide for a private civil action by aggrieved parties. *See generally Symposium, Age Discrimination*, 57 CHI.-KENT L. REV. 805 (1981); U.S. Comm'n. on Civil Rights, The Age Discrimination Statute (1977).

[5] Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256. These basic changes were effective January 1, 1979, for nonfederal employees and September 30, 1978, for federal employees.

[6] Act of Oct. 31, 1986, Pub. L. No. 99-592.

limit the impact of these changes for a time,[7] the amendments invalidate thousands of mandatory retirement policies. As a result, despite a few exceptions,[8] the ADEA constitutes a sweeping bar on discrimination against older workers[9] on account of their age.

A full appreciation of the significance of the Age Discrimination in Employment Act requires an understanding not only of the core substantive provisions of that law but also its ancillary prohibitions, including the antiretaliation and no-wage reduction provisions. Further, the full meaning of the statute depends upon defining the extent of several important exceptions from its general proscriptions. Finally, any attorney involved in an ADEA matter must understand the unique procedural and remedial frameworks within which any federal age discrimination claim must be placed. While the authors have undertaken such a comprehensive treatment of the ADEA in the context of their treatise, EMPLOYMENT DISCRIMINATION,[10] which analyzes all of the antidiscrimination statute, this article has a considerably nar-

---

[7] The transitional provisions for the 1978 amendments have expired. They are dealt with in more detail in C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 11.3 (1980). The transitional provisions of the 1986 amendments, Act of Oct. 31, 1986, Pub. L. No. 99-592, are as follows:

> 1. The general effective date of the Amendments is January 1, 1987. § 7(a).
>
> 2. There is a temporary exception for tenured professors that expires on December 31, 1993; until that time such persons may be mandatorily retired at 70. § 6(b).
>
> 3. There is an exception for certain collective bargaining agreements. If such agreements were in effect on June 30, 1986, and terminate after January 1, 1987, the amendments do not apply until the termination of the agreement or January 1, 1990, whichever occurs first. § 7(a).
>
> 4. The amendments create a temporary exception permitting age discrimination against law enforcement officers and firefighters, which is to expire on December 31, 1993, but guard against retroactive effect of this exception for cases in which the cause of action arose before January 1, 1987. § 7(b).

[8] The broadest exception is the "bona fide occupational qualification" (bfoq) defense; *see infra* § VIA. In addition to other specific exceptions treated in that section, the ADEA apparently also leaves intact certain federal statutes establishing age limitations for federal employment, mainly for law enforcement officers and firefighters. *See* Johnson v. Mayor & City Council of Baltimore, 427 U.S. 353 (1985); Stewart v. Smith (Civiletti), 673 F.2d 485 (D.C. Cir. 1982).

[9] It still remains permissible under the ADEA to discriminate against younger workers (those below 40) on the basis of age. Thomas v. United States Postal Inspection Serv., 647 F.2d 1035 (10th Cir. 1981).

[10] C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION (2d ed. 1988).

rower focus, surveying the theories of liability under the Age Discrimination in Employment Act and discussing some of the more important exceptions from its basic prohibition of age discrimination in employment.

II. THEORIES OF AGE DISCRIMINATION

The substantive provisions of the ADEA parallel the provisions of Title VII with respect to the basic prohibition of age discrimination.[11] Subject to certain important exceptions,[12] it is unlawful for employers,[13] employment agencies,[14] and labor organizations[15] to discriminate against any individual "because of such individual's age."[16] The major limitation on the substantive reach of the ADEA was originally its restricted definition of age. As passed in 1967, the statute defined age to include "individuals who are at least forty years of age but less than sixty-five years of age."[17] The statute thus effectively excluded, wholly without regard to any retirement system exception, the most prevalent form of age discrimination—mandatory retirement at 65.

In two stages Congress effectively removed the upper age limit.[18] The statute does, however, continue to restrict its protections to those 40 and older, thus permitting discrimination on account of age as long as the victims are less than 40. This effectively places protected older workers in a preferred position vis-a-vis younger ones who may be victimized by age discrimination[19] without any statutory redress.[20] Nevertheless, those

---

11 *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

12 *See infra* § VI.

13 29 U.S.C. § 623(a), § 4(a) (1985). Compare the Title VII counterpart, 42 U.S.C. § 2000e-2(a), § 703(a) (1981). *See generally* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 1.3.

14 29 U.S.C. § 623(b), § 4(b). Compare the Title VII counterpart, 42 U.S.C. § 2000e-2(b), § 703(b). *See generally* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 1.5.

15 29 U.S.C. § 623(c), § 4(c). Compare the Title VII counterpart, 42 U.S.C. § 2000e-2(c), § 703(c) (1981). *See generally* EMPLOYMENT DISCRIMINATION *supra* note 10, at § 1.6.

16 29 U.S.C. § 623, § 4. The Act specifies the varieties of prohibited employment-related discrimination in the same broad terms as Title VII.

17 Pub. L. No. 90-202, 81 Stat. 602 (1967).

18 *See supra* notes 5-9 and accompanying text. This expansion pretermits most questions of whether the Constitution would bar mandatory retirement where the requisite state action is involved in the employment relation. The Supreme Court had generally upheld mandatory retirement under equal protection analysis. Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

19 While such discriminations are not commonplace, they occasionally exist, as

younger than 40 may sometimes be incidental beneficiaries of the Act. For example, an employer that wishes a "youth image" would scarcely be well-advised to adopt a policy limiting employment to those "under 25" and "40 and over." While such a policy would be legal despite the discrimination against those between 25 and 40, it would tend to increase the average age of its workers. Further, because of the "no wage reduction" clause,[21] a younger worker may be able to bring an ADEA action alleging a violation of this provision.

One other implication of the creation of a protected group 40 and older should be noted; since the Act bars age discrimination against all those above age 40, it follows that discrimination on age grounds *between covered individuals* is also barred. Thus, an employer cannot, because of age, favor an applicant age 40 to one age 69, or vice versa.[22] This view is taken by the EEOC's Interpretive Rules,[23] although those rules recognize an exception suggesting that greater *benefits* to older workers within the protected group may be permissible.[24] As a consequence, the EEOC

---

indicated by the debate during the passage of the ADEA about the protection of airline stewardesses who were frequently compelled to "retire" at 32. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967).

20 Whether youth restrictions in the public employment sector could be attacked on constitutional grounds is not addressed in this work. *See supra* note 18.

21 29 U.S.C. § 623(a), § 4(a). *See also* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 19.7.2.

22 *See generally* Note, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. CAL. L. REV. 825 (1983).

23 29 C.F.R. § 1625.1 (1986). These Rules supersede those of the Department of Labor, which was originally assigned enforcement duties for the ADEA. For the most part, the department's rules, which are codified at 29 C.F.R. § 806.1 (1986) were revoked on issuance of the EEOC's interpretations. 46 Fed. Reg. 47726 (Sept. 29, 1981). Remaining effective Labor Department regulations are noted. While the Department of Labor's views were not substantially different from the EEOC's present rules, particular variances are noted.

24 29 C.F.R. § 1625.2 (1986). While § 2(a) states the general rule that discrimination within the protected age category is prohibited, § 2(b) states an exception:

> The extension of additional benefits, such as unearned severance pay, to older workers within the protected age bracket may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.

Taken literally, this formulation recognizes only a very narrow exception: while severance pay may "counteract problems related to age discrimination" in searching for a new job, other benefits, for example, an exemption from compulsory overtime for older workers, would not seem to be permissible under the interpretations. The legislative history of the 1978 amendments suggests, however, that "special jobs, part-time employment, retraining and transfer to less physically demanding

presumably believes that basic hiring and firing decisions cannot discriminate between older and younger members of the class, but that some ancillary benefits can be adjusted to favor older workers.[25]

The appropriateness of this exception to the general prohibition of age discrimination within the protected group is questionable. On one level, it might be argued that the obvious purpose of the ADEA was to combat age discrimination, which presumably becomes more frequent and harmful as workers get older. Accordingly, preference for older workers, perhaps even including hiring and discharge preferences, are consistent with that view. Such an argument would draw on *United Steelworkers of America v. Weber*,[26] which held that Title VII permitted certain racial preferences favoring blacks despite its apparently plain language barring all discrimination on account of race. The contrary view is simply that the ADEA prohibits age discrimination against a class of persons, and it would be anomalous to allow some members of that class to be preferred over others. Under this view, *Weber* is inapposite because that case did not involve the subordination of the rights of some victims of discrimination to those of other victims of that same kind of discrimination.[27]

However important the question of whether older workers can be favored vis-a-vis younger workers within the protected group, the primary aim of the ADEA was to deal with the converse situation: discrimination against older persons in favor of younger ones. Whether the ADEA will successfully do so depends on the extent to which the three concepts of discrimination developed under Title VII—individual disparate treatment, systemic disparate treatment, and systemic disparate impact—will be applied in cases brought under the ADEA.

III. INDIVIDUAL DISPARATE TREATMENT

As developed under Title VII, disparate treatment is the most obvious theory of discrimination: the employer simply treats some persons differently than others because of their age.

---

jobs" are permissible for older workers though not required of the employer. H. Rep. No. 95-527 (July 25, 1977) at 12, 95th Cong., 2d Sess.

25 *See* Note, *supra* note 22, at 832-36.

26 443 U.S. 193 (1979). *See generally* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 3.7.

27 *See generally* Note, *supra* note 22.

Intent to discriminate, in the sense that the employer intended to take age into account in its decision-making, is critical to finding a violation. However, such intent need not be proven directly if it can be inferred from the circumstances of the employer's decision. Disparate treatment comes in two varieties, individual and systemic.

Similarly to Title VII, the courts have recognized several elements to an individual disparate treatment claim. The plaintiff, who has the burden of persuasion, must establish that he was treated differently than others because of age. This can be done by either direct or indirect evidence.

A. Proof of Discrimination Through Admissions by the Employer

The most obvious way of establishing disparate treatment is by direct proof that adverse employment decisions are reached for reasons based on age. This evidence could include facially discriminatory company policies, facially discriminatory job orders with employment agencies,[28] admissions by the defendant,[29] or plaintiff's testimony as to reasons given by the defendant.[30] Proof of such intent to discriminate on age grounds must also be linked causally to the employment decision challenged.

1. Facial Discrimination

An example of facial disparate treatment is found in the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*,[31] in which the defendant prohibited downbidding to the position of flight engineer by captains who were disqualified by a Federal Aviation Administration rule from continued service as pilots when they reached age 60. Captains who were unable to continue as pilots for other reasons could downbid. The Court held that this was, by definition, age discrimination:

> In this case there is direct evidence that the method of transfer available to a disqualified captain depends upon his age. Since it allows captains who become disqualified for any reason other than age to "bump" less senior flight engineers, TWA's transfer policy is discriminatory on its face.[32]

---

[28] Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

[29] *See* Marshall v. Board of Educ. of Salt Lake City, 15 Empl. Prac. Dec. (CCH) 8056 (D. Utah 1977).

[30] Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978); Schultz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973).

[31] 469 U.S. 111 (1985).

[32] *Id.* at 121. The Court cited Los Angeles Dept. of Water & Power v. Manhart,

The Court explicitly rejected the defense's argument that the plaintiff was required to make out its case by the use of inferential methods to prove intent to discriminate. It also noted that, where a facial age discrimination was concerned, it was irrelevant that the vast majority of captains were able to downbid successfully.[33] Absent a facial discrimination, the impact of an employer's rules on the protected group is relevant and perhaps determinative in drawing the inference of intent to discriminate.[34] However, when there is a facial discrimination, reduced impact simply narrows the number of victims and does not affect the fact of discrimination.

Thurston clearly rejected the approach of several appellate decisions that refused to strike down facial age distinctions in employer benefit plans.[35] After *Thurston*, these decisions are plainly incorrect insofar as they do not deem such distinctions to be age discrimination.[36]

2. Admissions

Without being facially discriminatory, an employment decision may be shown by direct evidence to be motivated by age discrimination through the defendant's admissions. For example, the Fifth Circuit regarded a personnel officer's notes expressing an age preference for employment as one ground for

---

435 U.S. 702 (1978), as an example of a policy facially discriminatory on the basis of sex.

[33] *Thurston*, 469 U.S. at 120 n.15. Most captains downbid before being disqualified by age to avoid the very rule challenged in *Thurston*.

[34] *See* Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983). The majority in that case found that a policy of not laying off employees who were students in a company educational program, all of whom were under 40, did not constitute disparate treatment. Judge Sloviter dissented.

[35] *See, e.g.*, Britt v. E.I. du Pont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985) (requiring pension-eligibles to defer pension benefits to obtain benefits of company severance plan is not age discrimination); Electrical Workers (IBEW) v. Union Elec. Co., 761 F.2d 1257 (8th Cir. 1985) (insurance plan disqualifying workers over 40 from initial participation not "arbitrary age discrimination"). *Contra* EEOC v. Borden's, Inc., 724 F.2d 1309 (9th Cir. 1984); EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984).

[36] The cases viewed such age-based distinctions as rational in terms of the employer's goals. In other discrimination contexts, however, rationality has been held to be no defense unless the distinction could be brought within a statutory exception. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978). However, the distinctions may be justified under one of the statutory exceptions to the ADEA. *See, e.g.*, Patterson v. Independent School Dist. No. 709, 742 F.2d 465 (8th Cir. 1984) (voluntary early retirement program paying decreasing benefits the later the retirement was legal within the "bona fide employee benefit plan" exception).

proving disparate treatment.[37] Other cases have relied at least in part on statements by supervisors that the employee was "too old" or that the company was looking for younger people.[38]

If these statements are believed by the trier of fact, they establish the necessary intent to discriminate on account of age that is essential to an individual disparate impact case. In such cases, burden-shifting on the intent element is irrelevant.[39] Nevertheless, all references to age do not constitute sufficient evidence of intent to discriminate to require a finding on that issue, even if the making of the statement is not denied. Some statements have been dismissed as merely descriptive, not normative;[40] others may be too remote in time or not sufficiently directed at the plaintiff. Even statements directly indicative of preferences for younger workers are not necessarily conclusive as to employer liability for the violation charged. Most obviously, an established employer preference for *hiring* younger people may not be sufficient to prove that a particular older worker was *discharged* because of her age, although it is some evidence on that point.[41] Such a preference would be much stronger evidence that a particular older applicant for employment was not hired for age reasons, although even here there may be a question whether such a plaintiff would not have been hired in any event.[42]

B. *Inferential Proof of Intent to Discriminate Without Admission Evidence: The General Approach*

As will typically be the case, where direct proof of discrimi-

---

37 Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972). There was also statistical evidence of age discrimination in hiring. *But see* Surrisi v. Conwed Corp., 510 F.2d 1088 (8th Cir. 1975).

38 Williams v. Blue Bell, Inc., 773 F.2d 1429 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973). *See also* Jackson v. Shell Oil Co., 702 F.2d 197 (9th Cir. 1983).

39 Hazelthorn v. Kennecott Corp., 710 F.2d 76 (2d Cir. 1983).

40 Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975 (7th Cir. 1984).

41 La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405 (7th Cir. 1984); Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 371 (5th Cir. 1980).

42 *See* Mistretta v. Sandia Corp., 15 Empl. Prac. Dec. (CCH) § 7902 (D.N.M. 1977), *aff'd*, 639 F.2d 588 (10th Cir. 1980), in which, despite age-based recruitment practices, the court refused to find a violation because of the absence of proof of a single protected individual who was not hired. *Contra*, United States v. Sheet Metal Workers, Local No. 36, 416 F.2d 123 (8th Cir. 1969) (Title VII). While the absence of effects of a discriminatory policy is relevant to the remedy, and perhaps to the standing of a particular plaintiff, it can scarcely save the policy itself if attacked by a plaintiff with proper standing.

nation is lacking, the plaintiff must turn to inferential methods.[43] This may be especially appropriate when the intent at issue is subtle or even unconscious.[44] In individual disparate treatment, the most analogous Title VII authority is *McDonnell Douglas Corp. v. Green*,[45] in which the Supreme Court, addressing the "order and allocation of proof in a private non-class action challenging employment discrimination," held:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[46]

In *International Brotherhood of Teamsters v. United States*,[47] a later decision explicating *McDonnell Douglas*, the Supreme Court set out the theoretic foundation for the elements it had listed. The importance of *McDonnell Douglas* lay in "its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."[48] The Court elaborated:

> An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based. Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.[49]

---

[43] There is no requirement that plaintiff produce any direct evidence of discriminatory intent. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.) (en banc), *cert. dismissed*, 108 S. Ct. 26 (1987).

[44] *See* Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154-55 (7th Cir. 1981), *cert. denied*, 467 U.S. 1215 (1984).

[45] 411 U.S. 792 (1973).

[46] *Id.* at 802.

[47] 431 U.S. 324 (1977).

[48] *Id.* at 358.

[49] *Id.* at 358 n.44.

Once a prima facie case has been made out, *McDonnell Douglas* indicates that the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[50] Subsequent Title VII cases, chiefly *Texas Dep't of Community Affairs v. Burdine*,[51] establish that the defendant's burden is not one of persuasion but merely one of production. That is, the employer must put into evidence a reason that, if believed, would rebut the inference of discrimination drawn from the plaintiff's prima facie case. However, the employer need not persuade the trier of fact that that reason is the true explanation for the challenged decision. The plaintiff retains the burden of persuasion to show that the action was discriminatory, so plaintiff may still prevail by establishing that the reason was in fact a pretext for discrimination.[52] Frequently, the plaintiff's case will stand or fall on this determination. It is clear under Title VII that the plaintiff always bears the burden of persuasion, but he need only establish his case by a preponderance of the evidence.

The general application of the *McDonnell Douglas* approach in ADEA cases is now clear,[53] including the allocation of burdens of proof.[54] Nevertheless, the courts occasionally misconceive the nature of the inquiry. A good example is *Stanajev v. Ebasco Serv., Inc.*,[55] in which the Second Circuit recognized that there were at least four methods of proving age discrimination. First, direct proof; second, statistical evidence; third, the *McDonnell Douglas* approach, which the court characterized as "establishing a set of circumstances which to-

---

50 *McDonnell Douglas*, 411 U.S. at 802. *See also* Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980).

51 450 U.S. 248 (1981).

52 *McDonnell Doulgas*, 411 U.S. at 804. *See also* Haydon v. Rand Corp., 605 F.2d 453 (9th Cir. 1979); Hughes v. Black Hills Power & Light Co., 585 F.2d 918 (8th Cir. 1978).

53 *See* La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405 (7th Cir. 1984); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Kentroti v. Frontier Airlines, Inc., 585 F.2d 967 (10th Cir. 1978); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977). *See also* Cova v. Coca-Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978). Although the *McDonnell Douglas* mode of analysis is applicable to ADEA cases, it does not follow that the jury must be instructed in accordance with the language of that case. *See, e.g.*, Blackwell v. Sun Elec. Co., 696 F.2d 1176 (6th Cir. 1983); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

54 *See, e.g.*, Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982); Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) (applying *Burdine* approach to trial judge's function in an ADEA jury case); Haring v. CPC Int'l, Inc., 664 F.2d 1234 (5th Cir. 1981); Smith v. Farah Mfg. Co., 650 F.2d 64, 67 (5th Cir. 1981); Bittar v. Air Canada, 512 F.2d 582 (5th Cir. 1975); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

55 643 F.2d 914 (2d Cir. 1981).

gether raise an inference of discrimination;"[56] and, finally, other circumstantial evidence. While correct in segregating out direct and statistical proof of discrimination, this approach reads *McDonnell Douglas* too narrowly. Ultimately, the third and fourth categories described by the *Stanajev* court merge into one: absent direct or statistical evidence, what facts will give rise to an inference of discrimination? Narrowly viewed, *McDonnell Douglas* provides a laundry list of circumstances from which an inference of discrimination will be drawn. But viewed broadly, *McDonnell Douglas* simply states that plaintiff's proof eliminating the typical nondiscriminatory explanations for a decision leaves the obvious inference to be drawn that the decision was motivated by a discriminatory intent.[57] Indeed, the Supreme Court has been explicit on this point, recognizing under Title VII that the *McDonnell Douglas* scheme is not exhaustive and that other proof may suffice to establish a prima facie case.[58]

While the *McDonnell Douglas* approach seems clearly to be applicable to ADEA cases, it does not follow that an inference of age discrimination will be drawn as readily as might an inference of race discrimination. In *Stanajev*, for example, the court rejected certain circumstances as sufficient predicates for an inference of age discrimination. For instance, the court held that the defendant's study of the pending extension of ADEA protection to age 70 was not probative of an intent to fire the 63-year old plaintiff. Second, company projections of the plaintiff's pension benefits at different hypothetical retirement dates did not give rise to an inference of discrimination, at least where the company derived little benefit from early discharge. Third, a possible violation of defendant's normal termination procedure, as established by company policy, was not probative of age discrimination in the absence of any proof that comparable younger employees were treated any better.

The reluctance to find even prima facie age discrimination on equivocal evidence long predates *Stanajev*. In one of the first appellate ADEA cases, *Laugesen v. Anaconda Co.*,[59] the Sixth Circuit indicated that in a "proper case," *McDonnell Douglas* elements could be applied in ADEA litigation, but stated that "we believe it would be inappropriate simply to borrow and apply them automatically."[60]

---

56 *Id.* at 920.

57 *See* Parker v. Federal Nat'l Mortgage Ass'n., 741 F.2d 975 (7th Cir. 1984).

58 *McDonnell Douglas*, 411 U.S. at 802 n.13. This holding was reaffirmed in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

59 510 F.2d 307 (6th Cir. 1975).

60 *Id.* at 312.

The normal replacement with younger workers of older workers who retire is not necessarily discriminatory, so it would be wrong to draw an inference of discrimination based on a replacement employee being younger than the plaintiff:

> The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national origin.[61]

This argument, although superficially appealing, is ultimately unpersuasive. Since *McDonnell Douglas* requires, *inter alia*, that the plaintiff demonstrate her qualifications, any adverse personnel action taken with respect to such a person is suspicious enough to require justification. The *Laugesen* opinion to the contrary notwithstanding, the plaintiff was not leaving the labor market for apparently legitimate reasons, that is, because she was disqualified by age or any other factor. Since a nondiscriminatory basis for the employer's decision is not obvious, the prima facie case should be established, certainly if replacement by a younger person is also shown.

C. *Inferential Proof: Establishing an ADEA Prima Facie Case*

Tracking *McDonnell Douglas*, ADEA cases generally use that opinion's four-pronged specification, but the courts adapt it to the more common situation under the ADEA—a discharge rather than a refusal to hire.[62] The best reasoned cases recognize that various formulations are useful to achieve the purpose of *McDonnell Douglas*, which is to decide whether it is appropriate to infer discriminatory intent. As one court stated the principle:

> [A] determination [of a prima facie case of disparate treatment] turns on whether the plaintiff has presented sufficient

---

61 *Id.* at 313 n.4. The court also stressed that ADEA cases may be tried to a jury, while Title VII cases are not. However, the basis of this distinction is mystifying, because under either statute a judge will initially pass on the sufficiency of the evidence as to each element of a cause of action.

62 *See, e.g.*, Pace v. Southern Rwy. Sys., 701 F.2d 1383 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983); Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982); Cova v. Coca Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

> evidence to provide a basis for an inference that age was a factor in the employment decision. Any particular test is only a tool to facilitate evaluation of the proof and to aid the court in evaluating whether a basis for an inference of discrimination has been created.[63]

This formulation not only opens the way to recognition that particular "prongs" of *McDonnell Douglas* may not have to be met to establish a prima facie case,[64] but also that formally meeting some prongs may not suffice. For example, replacement by a younger worker, within or without the protected group,[65] may be a basis for an inference of discrimination when the worker is substantially younger,[66] but may not suffice when the replacement is only marginally younger. Despite this, it is useful to examine some of the decisions focusing on what establishes a prima facie case in various situations.[67]

1. Membership in the Protected Class

The first element of the plaintiff's prima facie case under *McDonnell Douglas* is a showing "that he belongs to a racial minority."[68] In the ADEA context this means that the plaintiff is a member of the protected age group, that is, that he is 40 or above. Although not frequently addressed in the decisions, proof that the employee or applicant is within this group is essential to the prima facie case. Further, in disparate treatment cases, which necessarily involve an intent to discriminate, the plaintiff must show the employer's knowledge of the employee's age.[69] But in most cases knowledge could be imputed from the employee's appearance or personnel records.[70]

---

63 *Pace*, 701 F.2d at 1386-87.

64 *See, e.g.*, Williams v. General Motors Corp., 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U. S. 943 (1982).

65 Maxfield v. Sinclair Int'l., 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); Goldstein v. Manhattan Indus., 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633 (5th Cir. 1985); Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 562 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980).

66 Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981).

67 *See Maxfield*, 766 F.2d at 793 (dictum); *Pace*, 701 F.2d at 1390 (two year age differential not enough, at least without additional statistical or other showing of discrimination).

68 *McDonnell Douglas*, 411 U.S. at 802.

69 *See* Currier v. Bell Helicopter Textron, 567 F.2d 1307 (5th Cir. 1978); Kincaid v. United Steelworkers of Am., 5 Empl. Prac. Dec. 8462 (N.D. Inc. 1972).

70 Hodgson v. Earnest Machine Prod. Inc., 479 F.2d 1133 (6th Cir. 1973). *See*

2. Application/Qualification/Vacancy

The second element in the *McDonnell Douglas* specification is that the plaintiff must show "that he applied and was qualified for a job for which the employer was seeking applicants."[71] Obviously, this requires some adjustment when applied to the more common ADEA case challenging discharge.

The purpose of the application requirement is simply to demonstrate the employer's knowledge of the plaintiff's availability at the time of the challenged action. Even in a hiring case, an actual application is not a necessary precondition for recovery.[72] Rather, the first prong of the second element of *McDonnell Douglas* merely requires a plaintiff in a hiring case to prove that he either was an applicant or, but for the discrimination, would have been an applicant.[73] In a discharge case, the application requirement means only that the plaintiff had been interested in retaining employment. So phrased, this element eliminates only plaintiffs who voluntarily retired or otherwise voluntarily left their employment.[74]

Another part of this element requires proof of a vacancy, that is, that defendant was seeking to fill a job that was available. The existence of a vacancy is, of course, critical to backpay recovery because absent a vacancy, the discrimination cannot "cause" plaintiff's harm. Thus, while it is possible to violate the statute even when a vacancy does not exist (a sign reading "No persons over 60 need apply"), the relief available in such a situation would only be injunctive. In any event, the existence or nonexistence of a vacancy will not normally pose serious legal problems in hiring cases: the issues are likely to be solely ones of fact.

---

also Billingsley v. Service Technology Corp., 6 Empl. Prac. Dec. 8874 (S.D. Tex. 1973).

71 *McDonnell Douglas*, 411 U.S. at 802.

72 In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court held that individual relief in a pattern-or-practice Title VII suit was available even to those who had not applied for jobs: "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Id.* at 365-66.

73 *See* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972) (EPA) (a fact question about whether a prospective employee was "persuaded" not to apply for a particular position).

74 There will of course frequently be questions about whether an employee's retirement was truly voluntary or whether it was coerced by threat of discharge of demotion. *Compare* Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987), *with* Paolillo v. Dresser Indus., 813 F.2d 583 (2d Cir. 1987).

This is not true, however, with respect to discharge cases. While an employer may discharge an older worker and then replace her (in which case it is fair to describe the situation as involving a vacancy) a more common scenario is an employer's "reduction in force." The ADEA would be violated if an employer's reduction in force discriminated on account of age in deciding *which* employees to terminate.[75] In such cases, the courts have reformulated this part of the test in various ways, usually eliminating it as a separate element and requiring only that the plaintiff prove that she was "qualified" for the job from which she was dismissed.

The last prong of the second element of *McDonnell Douglas* requires that plaintiff show his qualifications for the job. This is perhaps the most difficult question in employment discrimination law, and *McDonnell Douglas* casts little light on it. In that case, the plaintiff was a former employee of the defendant who had been doing apparently satisfactory work when he was laid off for economic reasons. When the defendant commenced new hiring, there could be no question as to the plaintiff's basic qualifications. Obviously, in cases of new hiring when the plaintiff has never worked for the employer before, there is a serious initial question as to how a plaintiff proves he is qualified. For purposes of a prima facie hiring case, the general principle that has emerged is that the plaintiff need only prove that he met the minimal objective qualifications for the job[76]—the ones stated in the advertisement, for example, or those objective qualifications actually possessed by the successful candidate. Proof that the plaintiff was better-qualified than the successful candidate is not

---

[75] The error of the contrary view is illustrated by Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977), in which the court held that plaintiff did not establish a prima facie case because he failed to prove the existence of a job vacancy when the defendant hired no one to replace plaintiff when it eliminated his position entirely. This mechanical application of *McDonnell Douglas* is untrue both to the letter and the spirit of that decision, and the Fifth Circuit later explicitly recognized that prima facie cases can be made out even in reduction-in-force situations. Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); McCuen v. Home Ins. Co., 633 F.2d 1150 (5th Cir. 1981); McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980). *Accord*, Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 237 n.5 (4th Cir. 1982); Loeb v. Textron, Inc., 600 F.2d 1003, 1012-1013 (1st Cir. 1979).

[76] The existence of such objective qualifications may raise disparate impact questions. For example, suppose an employer requires that its employees pass a particular test. Obviously, plaintiff could establish his minimal qualifications by showing that he satisfied this standard, but if the plaintiff failed the test, he might also be able to claim that the requirement was illegal under disparate impact analysis. *See infra* § V; *see also* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 4.5.4.

necessary in the prima facie case,[77] although it may be critical to prove pretext when the successful competitor is also at least minimally qualified in objective terms.

In discharge cases, however, the qualification question is of considerably less significance because employees have presumably met at least minimal qualification standards in order to be hired originally. In such cases, an employee may be able to establish the qualification element merely by showing that she was doing apparently satisfactory work.[78] At least one court upheld a motion for summary judgment against the plaintiff in which, in the absence of other evidence of age motivation in a termination, it was undisputed that the plaintiff's job performance had fallen off before termination; in these circumstances the plaintiff had failed to make out a prima facie case.[79]

In short, the necessity of proof of plaintiff's qualifications has varied. The results can be reconciled by understanding that, where the plaintiff was employed and has been discharged or demoted, it may normally be proper to infer qualification on a minimal showing because there is no obvious reason why the employee's qualifications have deteriorated. However, on a failure to hire or promote, a stronger showing of qualifications by the plaintiff may be necessary to negate the absence of those qualifications as a nondiscriminatory basis for the employer's decision.[80]

For example, the more typical cases in the hiring context arise where there are more minimally qualified applicants than there are jobs. Further, in the discharge setting, usually in reductions in force, there is a question of comparative qualification of the persons returning with the persons laid off, complicated by the fact that in some cases the job in question has been completely eliminated.

In hiring cases, does the fourth element require an applicant

---

77 *See, e.g.*, Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981).

78 The formulation generally accepted is that plaintiff "is required to show that he was 'qualified' in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or 'relative.' " Loeb v. Textron, Inc., 600 F.2d 1003, 1013-1014 (1st Cir. 1979). *Accord*, Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983). *See also* Coburn v. Pan Am. Airways, 711 F.2d 339 (D.C. Cir.); *cert. denied*, 464 U.S. 994 (1983); Cuddy v. Carmen, 694 F.2d 853 (D.C. Cir. 1982).

79 Huhn v. Koehring Co., 718 F.2d 239 (7th Cir. 1983).

80 *See* Pace v. Southern Rwy. Sys., 701 F.2d 1383 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1984); Ford v. General Motors Corp., 656 F.2d 117, 118-119 n.2 (5th Cir. 1981).

to prove she is as qualified, or more qualified, than the person who was awarded the job? The Supreme Court intimated that the answer is in the affirmative when, in *International Brotherhood of Teamsters v. United States*,[81] the Court described *McDonnell Douglas* as requiring the plaintiff to prove, inter alia, that the employer's action was not due to plaintiff's "absolute or relative lack of qualifications."[82] Arguably, a prima facie case is not established by a plaintiff who proves merely that he was treated less favorably than a younger person; the plaintiff must also show that the younger person was less qualified in order to raise the inference of age discrimination. On the other hand, if the rejected applicant can demonstrate superiority in every legitimate respect, the prima facie case would clearly be established, and the opportunities for the employer's explanation would, by definition, be very narrow.

But this approach imposes severe difficulties for plaintiffs in the usual case in which the qualifications will not objectively rank candidates relative to one another. Since job competitors will typically vary in diverse respects, rarely will the plaintiff be able to show superiority, or even equality, in every possible respect. Accordingly, perhaps a prima facie case is made out if the plaintiff, having established the other elements, also shows merely that the successful competitor is not in the protected class.[83] After all, the defendant has rejected a protected person and chosen another when both are minimally qualified. While the successful competitor may well be more qualified, the bases for that judgment are solely within the defendant's knowledge, and the defendant can come forward with an explanation in accordance with the *McDonnell Douglas* scheme for allocating burdens. While superficially such a rule seems to conflict with the language in *Teamsters*, that language is not only dictum but also does not clearly address a situation in which comparative qualifications above minimal requirements are indeterminant. Absent such a rule, age discrimination may go largely unchallenged except in

---

81 431 U.S. 324 (1977).

82 *Id.* at 358 n.44.

83 If the competitor is within the protected group, the inference of age discrimination is less likely. It must be remembered, however, that discrimination within the protected group is also barred. Thus, replacement of a 63 year-old by a 41 year-old may suggest discrimination even if replacement of a person aged 56 by someone aged 54 would not. *See* Pace v. Southern Ry. Sys., 701 F.2d 1383 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242 n.13 (4th Cir. 1982); Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

those instances where the prima facie case can be buttressed by a statistical showing.

Turning to discharge cases, there will be some instances in which a former employee will be replaced by a younger person. In such settings, the courts can be expected to find the prima facie case established without requiring the plaintiff to show that he was as qualified or more qualified than his younger replacement.[84] Further, the courts have rejected the argument that the replacement be from outside the protected age group. In part, this may be because the ADEA also bars age discrimination within the protected group, but it also reflects a perception that age discrimination may be more subtle:

> [a] requirement that the replacement be from a nonprotected group fails to take the reality of the working place into account. Because of the value of experience, rarely are sixty-year-olds replaced by those under forty. The replacement process is more subtle but just as injurious to the person who has been discharged. That the person is replaced by a person who is ten years younger rather than twenty years does not diminish the discrimination: the subtlety only tends to disguise it.[85]

The more typical age discrimination suit, however, is one involving an individual discharge or a general reduction in force where there is no replacement; rather, the position in question is eliminated. The question arises whether the plaintiff's prima facie case must include a showing that he is as qualified or more qualified than persons who were not terminated.

In some instances involving individual discharges, the courts have been willing to find a prima facie case when an older worker can prove merely that he was doing his job well enough to meet his employer's legitimate expectations.[86] In other cases, which the courts have characterized as reductions in force,[87] there are large-scale retrenchments; because a number of jobs are being eliminated by the employer, the inference of discrimination that may flow from the discharge of an older worker doing apparently satisfactory work

---

84 *See* Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981).

85 McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980). *Accord*, McCuen v. Home Ins. Co., 633 F.2d 1150 (5th Cir. 1981).

86 *See, e.g.*, La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405 (7th Cir. 1984). *But see* Huhn v. Koehring, 718 F.2d 239 (7th Cir. 1983).

87 *See* Williams v. General Motors Corp., 656 F.2d 120, 128 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

in inoperative.[88] Put another way, the nondiscrimination reason for the discharge—the reduction in force—is apparent on its face, and the employee must produce further evidence to raise an inference of discriminatory intent.[89] Usually, this evidence will be the retention of younger workers,[90] but some courts have required something more than a showing of retention of a younger person in order to establish a prima facie case.[91]

3. Rejection

Perhaps the most easily satisfied of the *McDonnell Douglas* elements is the third, which requires that "despite his qualifications, [plaintiff] was rejected."[92] Formal rejection will, of course, suffice, but failure to act on an application for an unreasonable length of time should be deemed the equivalent of rejection, at least for purposes of the plaintiff's prima facie case.

In cases of employment termination, the analogous issue is whether the employee voluntarily quit or was discharged.[93] Many ADEA cases involve reductions in force, in which an employee can choose early retirement; when that choice is truly voluntary, there can be no age discrimination against the retiree.[94] But in some situations, the option of early retirement is merely the lesser of two evils, because the employer threatens—expressly or implicitly—discharge, demotion, or transfer as the alternative. When the employee has formally sought early retirement, establishing this prong of the prima facie case re-

---

88 LaGrant v. Gulf & Western Mfg. Co., 748 F.2d 1087 (6th Cir. 1984); Parcinski v. Outlet Co., 673 F.2d 34 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983).

89 Stumph v. Thomas & Skinner, Inc., 770 F.2d 93 (7th Cir. 1985); Matthews v. Allis-Chalmers, 769 F.2d 1215 (7th Cir. 1985); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985); Williams v. General Motors Corp., 656 F.2d 120, 128-129, (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

90 *See* Duffy v. Wheeling Pittsburgh Steel Co., 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); EEOC v. Western Elec. Co., 713 F.2d 1011 (4th Cir. 1983); Coburn v. Pan American World Airways, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); Stanojev v. Ebasco Serv., Inc., 643 F.2d 914, 920-921 (2d Cir. 1981).

91 Holley v. Sanyo Mfg., 771 F.2d 1161 (8th Cir. 1985); Sahadi v. Reynolds Chem. Co., 636 F.2d 1116, 1117 (6th Cir. 1980). *See also* LaGrant v. Gulf & Western Mfg. Co., 748 F.2d 1087 (6th Cir. 1984).

92 *McDonnell Douglas*, 411 U.S. at 802.

93 Tribble v. Western Elec. Corp., 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983).

94 Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982). It is, of course, a separate question whether other workers who are not offered an early retirement option may have an ADEA claim on that basis.

quires proof that she in fact did so under pressure.[95] Further, under the ADEA, as under Title VII, the notion of constructive discharge should be applicable.[96]

4. Continuing Open Position

The fourth element of *McDonnell Douglas* is that "after [plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[97] This element poses no problems under facts such as those in *McDonnell Douglas* itself where the job in question remained open after plaintiff's application was rejected. Nor is it much of an extension of *McDonnell Douglas* to reach situations where the position is no longer open because it was filled by a person of another race or, in the ADEA cases, a younger applicant. But a problem arises in the more typical age discrimination cases where there are large-scale reductions in force. In such instances it will sometimes be possible to show that, under one name or another, the plaintiff's job was in fact assigned to a younger worker. But in the greater number of cases, the job will have been entirely eliminated. In those situations, the courts will require some proof that the employer's selection of which jobs to cut was influenced by the age of the person holding those jobs.[98]

D. Inferential Proof: Defendant's Rebuttal and Pretext

The elements of the prima facie case are only the first part of the three-step *McDonnell Douglas* mode of analysis. If plaintiff makes out such a case, the defendant then has the burden of production under Title VII to come forth with a nondiscriminatory reason. Should the defendant carry that burden, the Title VII plaintiff may still carry her ultimate burden of persuasion on the issue of disparate treatment by showing that the defendant's reason is in fact pretext.

Just as the prima facie analysis of Title VII has been carried over largely intact to the ADEA, so has Title VII law concerning the defendant's burden of production and plaintiff's opportunity

---

95 *See* Carpenter v. Continental Trailways, 446 F. Supp. 70 (E.D. Tenn. 1978), *rev'd on other grounds*, 635 F.2d 578 (6th Cir.), *cert. denied*, 451 U.S. 986 (1981). *See also* Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978).

96 *See* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 4.2.3.

97 *McDonnell Douglas*, 411 U.S. at 802.

98 Williams v. General Motors Corp., 656 F.2d 120, 129-130 (5th Cir.), *cert. denied*, 455 U.S. 943 (1982).

to prove pretext.[99] The defendant clearly has no burden of persuasion that the nondiscriminatory reason in fact motivated the adverse action, but it does have to present this reason "through the introduction of admissible evidence."[100] That is, the mere assertion of such reason in the argument of counsel or in answer to a complaint will not suffice.[101]

Under the ADEA, any reason that is not an "age" reason will suffice to carry the defendant's burden of production.[102] However, as a practical matter, the more idiosyncratic and the less business-related the employer's asserted reasons are, the less likely the trier of fact is to believe that they are the true reasons. Nevertheless, if the trier of fact believes the asserted non-age reasons are the employer's real reasons, the defendant should prevail. This is true even if the asserted reasons are otherwise illegal, although the court might then enter judgment of liability on other grounds.[103] It must be remembered, however, that not all seemingly innocent reasons are unrelated to age. For example, a discharge of the "most senior" workers in terms of job tenure may be so highly correlated with age and so contrary to normal seniority principles that it would be held to be an age reason.

Some courts have concluded that the employer's carrying of its *McDonnell Douglas* burden of production eliminates the plaintiff's prima facie case in the sense that there is no longer necessarily a jury issue. To create such an issue, the plaintiff must prove pretext.[104] For example, in *Elliot v. Group Medical & Surgical*

---

99 *E.g.*, Jackson v. Sears, Roebuck & Co., 648 F.2d 225 (5th Cir. 1981).

100 Davis v. Combustion Eng., Inc., 742 F.2d 916 (6th Cir. 1984).

101 *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).

102 *Contra*, Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 621, 654 (1983) (certain "illegitimate" reasons ought not to count.)

103 For example, if the plaintiff sued on age grounds and the defendant denied age discrimination by claiming that it was really plaintiff's race that led to his exclusion, the appropriate response would seem to find a Title VII violation. Failure of the plaintiff to follow Title VII procedures should be excused in this exceptional circumstance.

104 Palmer v. District Bd. of Trustees of St. Petersburg, 748 F.2d 595 (11th Cir. 1984) (decision not to renew plaintiff's contract as teacher in order to hire black replacement defeated claim of age discrimination); Pace v. Southern Rwy Sys., 701 F.2d 1383 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369 (5th Cir. 1980) (summary judgment for defendants). As one court wrote: "[t]hus, unlike Humpty-Dumpty, the employee's prima facie case can be put back together again, through proof that the employer's proffered reasons are pretextual." Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 640 (5th Cir. 1985).

Serv., Inc.,[105] the appellate court, in reviewing a jury verdict for plaintiff, conceded that a prima facie case had been established. The company, however, offered reasons for the discharge of the plaintiff that were not "irrational or idiosyncratic." The plaintiff then failed to challenge the accuracy of the defendant's reasons, instead merely denying that such a reason was an adequate basis for termination. The court held that the plaintiff's case was insufficient to go to the jury. Absent admissions, the court thought the plaintiff must prove the intent by showing that the stated reasons were inaccurate, or by proof that the reasons, though accurate, were not the true basis for the termination, as by showing younger persons who were not terminated for such reasons.[106]

But there can be no general rule as to whether distinct proof of pretext must be put in by the plaintiff in order to get to the jury. The ultimate question is always whether there is enough evidence to permit the trier of fact to infer intent to discriminate.[107] Certainly, there are some nondiscriminatory reasons that, once they are put into evidence by the defendant eliminate the inference of discrimination warranted by the prima facie case because a reasonable jury could not find for the plaintiff.[108] For example, an older employee who shows he was doing satisfactory work before his discharge might establish a prima facie case, but an employer's proof that the employee murdered a co-worker[109] would provide a nondiscriminatory reason for an employer action that otherwise lacked rational explanation. If no reasonable jury could doubt the employer's proof, plaintiff's case will not even go to the jury unless plaintiff advances evidence of pretext—for example, that he had not really attacked his fellow worker or that younger workers who committed similar assaults were not discharged.

While there are some instances in which the employer's satisfaction of its burden of production might justify a directed verdict against the plaintiff if she does not advance other proof of pretext, in most cases the mere articulation of a nondiscriminatory reason should not suffice to take the case from the jury: the prima facie case may be strong enough, and the articulated rea-

---

105 714 F.2d 556 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

106 *Accord*, Bohrer v. Hanes Corp., 715 F.2d 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984) (upholding judgment n.o.v. for defendant).

107 *See* Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986).

108 *But see Thornbrough*, 760 F.2d at 640.

109 *See* Carter v. Maloney Trucking & Storage Co., 631 F.2d 40 (5th Cir. 1980). *See also* Houser v. Sears, Roebuck & Co., 627 F.2d 756 (5th Cir. 1980).

son so unlikely, that a jury question is created. Nevertheless, some courts have shown a surprising tendency to grant summary judgments, directed verdicts, or judgment n.o.v. in ADEA cases.[110]

It should be noted that in addition to putting into evidence a nondiscriminatory reason for the action adverse to the plaintiff, employers have sometimes tried to defend their conduct—especially in reduction-in-force cases—by showing that there has been no overall adverse impact on older workers. Such evidence is probative on the intent issue,[111] but it is not conclusive.[112] The fact that the employer does not generally discriminate against a specific group does not prove that a particular decision was not biased.[113]

Most ADEA litigation has focused on the area of explanation and pretext. For example, in *Mistretta v. Sandia Corp.*,[114] the defendant claimed that several individual employees were chosen for layoff due to nondiscriminatory performance ratings. The court of appeals, however, held that the fact that the performance rating system had been held earlier to be inherently biased against other older persons established that the alleged nondiscriminatory reason was in fact pretext.

In responding to defendant's explanation by proving pretext, the plaintiff may seek to establish that the asserted reason is false in the sense that it is inapplicable to her.[115] Alternatively, the plaintiff might admit the reason to be true, but show that it does not explain the decision. For example, if the employer claims the employee was discharged for tardiness, the plaintiff might either deny the tardiness or admit that he was frequently late but claim that younger persons were also late and were not

---

110 Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). *See also* Sahadi v. Reynolds Chem., 636 F.2d 1116 (6th Cir. 1980) (affirming directed verdict for failure to establish prima facie case where cutback led to plaintiff's layoff and assumption of his duties by younger person); Houser v. Sears, Roebuck & Co., 627 F.2d 756 (5th Cir. 1980) (upholding grant of judgment n.o.v. to defendant that had fired plaintiff, a dedicated, hard-working employee with 18 years of service, allegedly for dishonesty engaged in for the employer's best interests; plaintiff was replaced by person half his age). *But see Thornbrough*, 760 F.2d at 640.

111 Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986).

112 *See Thornbrough*, 760 F.2d at 644-45.

113 *See* Trans World Airlines v. Thurston, 469 U.S. 111 (1985); Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

114 649 F.2d 1383 (10th Cir. 1981).

115 *E.g.*, Golumb v. Prudential Ins. Co. of Am., 688 F.2d 547 (7th Cir. 1982).

fired because of it. If the plaintiff cannot prove the falsity of the employer's reason, the next best way of proving pretext is to demonstrate that younger persons were treated more favorably in regard to the asserted reason.[116]

Pretext, however, can be shown in a number of other ways. For example, if others—even older workers—were not fired for engaging in similar conduct, there is at least a question as to whether the employer's asserted reason is the real basis. If it is discredited, the trier of fact is at least permitted, and perhaps required, to conclude that the real reason for the adverse action was the age of the employee.[117]

Another method of proving pretext is to show that the employer violated its own procedures or standards to the disadvantage of an older plaintiff. While not illegal per se under the ADEA, such violation can be probative of discrimination.

E. Causation

Speaking broadly, the courts have been concerned not only with finding an intent to discriminate (which is definitional where direct proof of intent is believed) but also in establishing causation,—that is, that the intent to discriminate actually caused the harm of which the plaintiff is complaining. This causation question arises both in the case of direct proof of discriminatory intent and in cases where the intent is inferred.

Under the ADEA the causation inquiry is usually phrased in terms of whether age is a "determinative" or "determining" factor. This question involves two interrelated aspects: first, the substantive law and, second, the procedural allocation of burdens of proof.

On the former point, it is generally held that the age factor must be determinative: if the adverse employment decision would not have occurred but for age, there is a violation.[118] This

---

116 *See, e.g.*, Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982).

117 Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984) ("a showing that a proffered justification is pretextual is itself *equivalent* to a finding that the employer intentionally discriminated").

118 Perrell v. Financeamerica Corp., 726 F.2d 654 (10th Cir. 1984) ("The jury must understand that it is not enough that age discrimination figure in the decision to demote or discharge; age must 'make a difference' between termination and retention of the employee in the sense that 'but for' the factor of age, the employee would not have been adversely affected."); La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405 (7th Cir. 1984); Blackwell v. Sun Elec. Co., 696 F.2d 1176 (6th Cir. 1983); Cuddy v. Carmen, 694 F.2d 853 (D.C. Cir. 1982); Cancellier

means that even the existence of an age-based policy, while certainly in the abstract a violation of the statute, will not necessarily require judgment for a particular plaintiff because he may have been terminated for reasons other than age.[119]

The second point, the burden of proof as to whether age was a determinative factor, has generated considerably more controversy. From a theoretical perspective, the appropriate approach is that utilized by the Supreme Court in comparable situations: if the plaintiff can carry her burden of persuasion that the defendant utilized an impermissible consideration in an employment decision, the plaintiff should prevail unless the employer can shoulder the burden of persuasion in demonstrating that the adverse decision would have been the same even without the impermissible factor.[120] This approach is appealing on several levels, not the least of which is the fact that once the plaintiff has proved that age played any role in an adverse decision, she has proved a violation of the statute, and she has a right under the ADEA to be considered for employment opportunities without regard to her age. The question whether the role was determinative in, say, a discharge is more a question of the appropriate remedy, and it is established in a number of contexts that once a violation is proven, the defendant has the burden of demonstrating that particular harms did not follow.[121]

Although some cases accept this reasoning,[122] there are a number of ADEA decisions that, in addition to requiring a showing that age be a determinative factor in a particular decision, also place the burden of persuasion on that point on the plaintiff. Although many of these decisions can be dismissed as unconsidered dicta,[123] the very repetition of descriptions of the plaintiff's

---

v. Federated Dep't Stores, 672 F.2d 1312, 1316 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); Haring v. CPC Intl., Inc., 664 F.2d 1234 (5th Cir. 1981); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); Smithers v. Bailer, 629 F.2d 892 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

119 *E.g.*, EEOC v. Wyoming Retirement Sys., 771 F.2d 1425 (10th Cir. 1985).

120 Mt. Healthy City School Dist., v. Doyle, 429 U.S. 274 (1977). *See also* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983); Village of Arlington Hts. v. Metro Housing Dev., 429 U.S. 252, 271 n.21 (1977).

121 *See Mt. Healthy*, 429 U.S. at 285-86.

122 *E.g.*, EEOC v. Wyoming Retirement Sys., 771 F.2d 1425 (10th Cir. 1985); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

123 *E.g.*, La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405 (7th Cir. 1984); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982); Smithers v. Bailer, 629 F.2d 892 (3d Cir. 1980).

burden as including proof that intent to discriminate is a determinative factor will be an obstacle to incorporating into the ADEA the analysis used by the Supreme Court in analogous areas.

IV. Systemic Disparate Treatment

The theory of systemic disparate treatment discrimination is applicable to the ADEA, as well as under Title VII. Systemic disparate treatment has in common with individual disparate treatment the requirement of intent to discriminate. The basic differences between the theories lie in, first, the breadth of discrimination proven and, second, the method of proof. Under systemic disparate treatment the plaintiff seeks to demonstrate that discrimination, rather than being an isolated phenomenon, is pervasive with a particular employer.[124] In some cases, the systemic case is easily established because the employer has engaged in an explicitly discriminatory policy.[125]

In most cases, however, the method of showing this is primarily statistical, although a statistical systemic case can be buttressed by evidence of discrimination in the form of admissions of discriminatory intent and by the kind of inferential proof of discriminatory intent use in individual cases. If a case of systemic treatment is proven, the employer will be liable unless it can establish one of the statutory defenses, such as proving age as a bona fide occupational qualification (bfoq), or that the discrimination is permissible under a bona fide benefit plan.

An example of the systemic disparate treatment case in the ADEA context is found in *Mistretta*[126] in which the defendant was a government contractor whose business, and therefore employment, varied substantially depending on federal appropriations. At issue in the case was a large-scale reduction in force in 1973 designed to cut the employee rolls by some eleven percent. Although the method of determining who was to be terminated was complicated, the plaintiff established through statistical evidence that the effects of the cuts were disproportionately suffered by certain categories of older workers. Further, statisticians testified that the pattern of adverse effect was statistically signifi-

---

124 *See* Employment Discrimination, *supra* note 10, at ch. 3 (Title VII).

125 *See Thurston*, 469 U.S. at 121.

126 649 F.2d 1383 (10th Cir. 1981); *see also supra* note 114 (discussion of *Mistretta*).

cant.[127] The court found that this pattern established a prima facie case of disparate treatment, which the defendant failed to rebut. Although the layoffs were made according to a system for evaluating individual employees, the court found that the evaluation system was extremely subjective and had never been validated. At least in the context of direct evidence of discriminatory attitudes towards older workers, the court found that such a system was too susceptible to discriminatory use to defeat plaintiff's case.

Although there are aspects of disparate impact analysis in *Mistretta*, the case clearly illustrates how a large-scale reduction in force can become a textbook exercise in the application of statistical analysis to prove a correlation between age and layoff in order to make out a prima facie case of systemic disparate treatment.

As with analogous Title VII cases, the theory of systemic disparate treatment under the ADEA has both its strengths and its weaknesses. Its major limitation is the requirement that there be sufficient numbers of employees involved before the theory is available. Several courts have cautioned that the numbers used for statistical analysis must be large enough to yield significant results.[128]

Another potential limitation on the use of systemic disparate treatment emerges from the hesitation of some courts to use statistical analysis in ADEA cases because of perceived unique aspects of age discrimination. This argument, as noted earlier,[129] although superficially appealing, is ultimately unpersuasive as a bar to the use of statistical analysis under the ADEA. It may have value, however, with respect to the *kind* of statistical analysis made. For example, perhaps statistics showing that an employer's workforce is getting "younger" should be accorded less significance, in light of the natural exit of older workers and entry of younger ones, than would statistics showing a workforce to be getting "whiter." More accurately, the correct use of statistics would take this factor into account by determining if there are fewer older workers present (or more older workers discharged) than legitimate employment factors would indicate. In *Mistretta*,

---

127 The use of statistics in general and the meaning of statistical significance is discussed in EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 3.4.

128 *See, e.g.*, Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984); Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975 (7th Cir. 1984).

129 See EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 3.6.

for example, the court had to factor out of its analysis those employees who were taking truly voluntary retirement: such persons should not be used to decide whether the employer was discriminating against older workers in deciding who to terminate.

Of course, as with Title VII, a statistical showing of discrimination is not the end of the matter. The defendant can try to rebut the showing either by challenging the raw data or the statistical methodology, or by showing nondiscriminatory reasons that explain the statistical picture and rebut the inference of intent to discriminate on age grounds. For example, suppose the employer in *Mistretta* could establish that the suspect pattern of terminations resulted solely because older workers happened to be concentrated in an older department, which was entirely eliminated because it was technologically obsolete. If the trier of fact believed this claim, the inference of discriminatory intent drawn from the statistics would be rebutted.

Alternatively, the employer might admit the discrimination reflected in the statistics but try to justify it, as by proving that age-related policies are legitimate under the bfoq exception. This defense, however, is an affirmative one in the sense that the defendant bears the burden of persuasion.

Still a third possibility should be considered: the employer could admit the adverse effect on older workers but claim that it simply reflected an age-related decline in job performance of older workers. After all, the fact that a test disproportionately excludes blacks does not establish that its adoption was motivated by racial discrimination. So long as layoffs were the result of nondiscriminatory individual evaluations, the fact that older workers performed less well than younger ones should not bar the defense. Of course, any such argument must admit that such evaluations have at least a disparate impact on older workers; the employer may have to be prepared not merely to prove the good faith of the evaluations but also to establish business necessity for them if the disparate impact theory is available under the ADEA.

V. Systemic Disparate Impact

The purposes of the ADEA are "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment. . . ."[130] Maxi-

[130] 29 U.S.C. § 621(b), § 2(b) (1985). *See generally* Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. Calif. L. Rev. 1311 (1974).

mum effectuation of these purposes, within the limits of the Act's coverage, requires acceptance of both the "disparate treatment" and "disparate impact" definitions of discrimination developed under Title VII. As has been seen, disparate treatment, both individual and systemic, requires proof of intent to discriminate. The disparate impact theory, on the other hand, finds discrimination in the even-handed application of facially-neutral employment policies that, regardless of intent, adversely impact on older workers. The employer can, however, justify such policies by establishing that they are a business necessity.

Disparate impact emerged as a theory of discrimination under Title VII in the landmark case of *Griggs v. Duke Power Co.*,[131] and the close relationship of the ADEA to Title VII led many to conclude that the disparate impact model also applies to age discrimination.[132] The most obvious basis for such a view was simply that the language of Title VII, which *Griggs* had held to prohibit disparate impact discrimination, is virtually identical to that in the ADEA. This is scarcely surprising because the ADEA was largely modeled on Title VII. This modeling was in fact the second basic argument for recognition of an ADEA disparate impact theory paralleling Title VII's. Finally, the administrative agencies charged with enforcing the statute have adopted a disparate impact definition. Thus, the Interpretive Bulletin, issued by the Department of Labor, which was originally charged with ADEA enforcement, took this approach.[133] When the EEOC assumed ADEA enforcement responsibilities, it explicitly adopted the disparate impact test.[134]

Nevertheless, there remains some dispute about the appropriateness of a disparate impact test under the ADEA, with several contrary arguments being advanced. First, it has been suggested that the "reasonable factors other than age" defense

---

131 401 U.S. 424 (1971).

132 *See* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979); Note, *Proving Discrimination Under the Age Discrimination in Employment Act*, 17 ARIZ. ST. L. REV. 495 (1975).

133 For example, uniformly-applied physical fitness requirements are permissible if they "are reasonably necessary for the specific work to be performed." 29 C.F.R. § 860.103(f)(1) (1986). Since uniform application of such requirements to old and young alike would normally satisfy the disparate treatment test, the additional requirement of job relation evidenced a disparate impact analysis. A more detailed analysis of the original Interpretive Bulletin is found in C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 11.5 (1980).

134 29 C.F.R. § 1625.7(d) (1986).

in the ADEA, which has no precise parallel in Title VII, explicitly permits practices that are not motivated by discriminatory intent.[135] But this argument seems flawed. To being with, it assumes the answer: are "other than age" factors ones that are other than age in the disparate treatment sense, or may they be factors other than age in both the disparate treatment and disparate impact meanings?[136] Even more fundamentally, the phrasing of this exception contrasts sharply with its Equal Pay Act (EPA) counterpart. The EPA permits wage discriminations when based on "any other factor other than sex."[137] But the ADEA does not permit just *any* other-than-age factor, but rather only *reasonable* other-than-age factors. Indeed, it could be argued that by this language the ADEA explicitly adopts a disparate impact concept of business necessity by applying a test of reasonableness to factors that are not age-based in the intent sense.[138]

A second argument against the disparate impact concept under the ADEA is more result-oriented. Impact is a necessary theory of discrimination under Title VII because of the pervasiveness of discrimination against minorities; to merely require policies and practices to be neutral, in the sense of lacking any discriminatory intent, would still leave minorities frozen into subordinate positions in the workforce. From this perception two implications emerge. First, it is claimed that discrimination against older workers is less invidious, less systematic, and less pervasive than race or gender discrimination and therefore does not warrant the radical step of adopting a disparate impact test.[139] Second, the adoption of such a test under the ADEA

---

135 *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STANFORD L. REV. 837, 844-845 (1982).

136 A comparable question is addressed in connection with the Equal Pay Act. *See generally* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 17.12.

137 29 U.S.C. § 206(d) (1978).

138 A contrary argument can be drawn from the structure of the defense: "it shall not be unlawful . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." If disparate impact discrimination is not "otherwise prohibited" by the ADEA, the defense cannot make it so. The rebuttal to this argument, of course, is that disparate impact age discrimination is illegal and that the reasonable factors defense is simply a statutory expression of the business necessity defense.

139 The argument admits that there is considerable discrimination against older workers, particularly with respect to new hiring; it stresses, however, that there is also considerable discrimination in favor of older workers, especially in job security and pay as a result of seniority. Further, unlike minority groups who were never the beneficiaries of any kind of discrimination, older workers were once younger and may have benefitted from age discriminations. These kinds of considerations led the Supreme Court to refuse to treat discriminations on account of age as sus-

would in fact work at cross-purposes with the more fundamental concerns of Title VII. That is, by protecting an older workforce (which is statistically "whiter" and more "male") the ADEA will act to retard the advancement of minorities and women, which is the goal of Title VII.[140]

A third argument against disparate impact under the ADEA is simply that the theory is fundamentally misconceived in this context. Under this view *Griggs* is correctly founded on the premise that

> [t]here is nothing inherent in race that supports a correlation between race and ability to perform a particular skill. Instead, the source of the correlation must be found in factors such as past discrimination and cultural deprivation. But, unlike race, there is an inherent correlation between age and ability.[141]

The point apparently is that certain policies and practices may disparately affect older workers because, as a group, older workers are less qualified than younger workers for many positions because of the physical, and perhaps mental, deteriorations caused by age. Under this view, disparate treatment should be proscribed because individuals ought to be judged on their own merits, even if the group to which they belong is characterized by certain declines in ability. But disparate impact analysis would be self-defeating because normal merit-based policies will have such an impact on older workers or at least some subsets of them.

Even if the basic premise of a decline in ability is accepted, it is not clear why the disparate impact theory is inappropriate. In those cases where age leads to lesser performance on a certain criterion for older workers than younger ones (or at least for certain age groups of older workers), there will be a disparate impact on age grounds but the employer should be able to justify its practice by business necessity. It is only where there is a disparate impact on older workers that is not justifiable that the impact theory will result in liability.

Perhaps because of this welter of arguments, the case law under the ADEA is less than definitive about the applicability of the disparate impact theory. In part this is because relatively few cases have

---

pect or quasi-suspect under equal protection analysis. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

140 *See* Blumrosen, Book Review, 12 SETON HALL L. REV. 186, 192-193 (1981).

141 *See* Note, *supra* note 135. To demonstrate that Congress recognized such a correlation, this piece cites the bfoq defense and the fact that the ADEA permitted mandatory retirement at 70. The 1986 amendments eliminating the upper age limit obviously undercut this argument.

considered disparate impact questions, plaintiffs having usually relied on the disparate treatment approach.[142] Also, in a number of instances plaintiffs have inexplicably failed to raise the disparate impact theory even though it appeared potentially applicable. For example, in *Holley v. Sanyo Mfg. Inc.*,[143] the appeals court rejected a claim of age discrimination without analyzing a possible disparate impact theory. The plaintiff offered proof that his heart condition adversely affected his employer's evaluation of him. The court quoted *Loeb v. Textron, Inc.*,[144] as holding that "the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor or competence."[145] While that statement is accurate so far as it goes, neither *Holley* nor *Loeb* considered whether the disparate impact theory would at the least require the employer to justify a particular health policy as business necessity if it in fact had a disparate impact. But in neither case did the plaintiff make a showing of the kind of disparity of impact that would require such a showing.

When plaintiffs have directly invoked the disparate impact theory under the ADEA, however, the appellate courts have unanimously applied it.[146] Perhaps the leading case is *Geller v. Markham*,[147] decided by the Second Circuit. Certiorari was denied by the Supreme Court over a strong dissent by Justice Rehnquist who objected to the use of disparate impact under the ADEA.[148] *Geller* held that a school board policy restricting new employment to teachers with less than five years' experience was illegal. The court of appeals held that disparate impact was established by plaintiff's evidence that more than ninety percent of teachers over 40 were disqualified by such a rule, compared with only sixty-two percent of those under 40. The court further rejected as a justification the financial business necessity urged by the school board—that state-mandated salary scales required paying more experienced teachers higher salaries.

A second ADEA case adopting disparate impact analysis is

---

142 A number of decisions involve facially unequal treatment, and the only real issue is whether any of the statutory exceptions applies. *See, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

143 771 F.2d 1161 (8th Cir. 1985).

144 600 F.2d 1003 (1st Cir. 1979).

145 *Id.* at 1016.

146 *See generally* Player, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984).

147 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

148 *See Markham*, 451 U.S. at 945-49.

Leftwich v. Harris-Stowe State College,[149] which involved the transfer of a former city college to the Missouri state college system. The board of regents set a low quota of tenured positions at the "new" college, and allowed persons who had held tenured positions at the "old" college to compete only for the tenured slots at the new college. The Eighth Circuit held that this policy, because of its impact on an older, tenured group, had a disparate impact that was unjustified by the attempted business necessity defenses of cost-cutting and maintaining quality. The former was, as a matter of law, insufficient, and the latter not proven.

Geller and *Leftwich* and other circuit court cases employing disparate impact analysis under the ADEA[150] have generally assumed the applicability of that analysis without discussing it in any detail.[151] Nevertheless, while the question cannot be viewed as definitively resolved, the acceptance of the theory by the circuits considering it suggests that the more important questions lie in the application of that theory to ADEA situations. As in other Age Act contexts, the more developed Title VII law should be examined, but several points peculiar to the ADEA must be addressed.

First, *Geller* found the central fact of disparity of impact by comparing the effects of the policy on the group of older workers (then 40 to 70) and younger workers (below 40). Perhaps in accordance with this logic, another decision indicated that it would not be sufficient to establish a general adverse impact on older workers as compared to younger ones—the plaintiff would have to show the impact on the protected group.[152]

Age—unlike sex and race—is, however, a continuum. This means that there can be a question as to age discrimination among subgroups of the over-40 cohort. For example, suppose a plaintiff proved a disparity of impact on an over-55 group as compared with either younger workers below 40 or younger workers below 55. Would this constitute a prima facie case? Would it matter, if true, that there was no disparity of impact on the entire 40-and-over cohort (as compared to the entire below-40 group)? The purposes of

---

149 702 F.2d 686 (8th Cir. 1983).

150 *See* Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); EEOC v. Bordens, Inc., 724 F.2d 1390 (9th Cir. 1984); Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982). *See also* Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983) (assuming arguendo that the disparate impact theory applied, the court found no such impact.)

151 *But see Massarsky*, 706 F.2d at 122 (raising but not deciding whether disparate impact theory applied).

152 *But see id.* at 129-131 (dissent of Judge Sloviter).

the statute would seem to support disparate impact analysis to the extent that any appreciable group of older workers is affected relative to younger workers, but the practicalities of the situation should prevent a narrow focus on, say, an age group as small as one year.

Second, the *Leftwich* decision found a disparate impact by proof that the mean age of the tenured faculty at the old college was nearly 46, while that of the nontenured faculty was 34. This, of course, would not establish the disparate impact of a policy reserving certain slots as tenured and nontenured. Such an impact would result only if the ratio of tenured to nontenured slots favored the nontenured faculty who were presumably younger. While the court's opinion is not specific, this appeared to be the case, although some doubt is cast on this conclusion because of the defendant's proof that the average age of the new college's faculty was virtually the same as that of the old college.[153]

Third, assuming a disparity of impact is shown, the question arises of what defenses are available. As with Title VII, a seniority system is a statutory defense. Similarly, there is an ADEA defense for "reasonable factors other than age." While these are treated in more detail subsequently, it seems clear that an employer may be able to escape liability if either defense is established despite any disparity of impact. More broadly, if Title VII principles are applied, an employer will be able to justify a policy with a disparate impact by showing business necessity. Both *Geller* and *Leftwich* rejected the argument that cost-cutting is a valid business necessity. It is true that such a defense will not suffice to save a disparate treatment case,[154] but it is not so clear that that should be true of disparate impact. For example, suppose an employer, in a period of retrenchment, discharges several workers, all of whom are highly paid and all of whom are older. The situation is ambiguous. The employer might be discriminating intentionally on account of age. In that case, as with Title VII, the fact that the employer has some

---

153 The *Leftwich* court itself rejected this proof in part because it viewed it as a "bottom line" defense, which had been rejected by the Supreme Court in Connecticut v. Teal, 457 U.S. 440 (1982). *See* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 4.2.1.2. But it is not so clear that the defense argument, as in *Teal*, was that other factors compensated for the discriminatory impact of a selection device; rather, the defense might have been pointing to these statistics to demonstrate that the policy in question had no disparate impact.

154 *See* Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987). *See also* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978). The *Leftwich* court cited EEOC and Department of Labor views on this point: 29 C.F.R. § 1625.7(f) (1986), and 29 C.F.R. § 860.103(h) (1986), but both address disparate treatment discrimination.

economic justification should be irrelevant.[155]

Suppose, however, that the finder of fact concludes that the employer did not take age into account at all, but simply discharged a large group of his highest-paid employees. To make the point clear, suppose the group discharged, while predominately composed of older workers, included several highly paid younger employees. It would seem that the disparate impact theory would apply, and that the employer would have a superficially plausible business necessity defense.

But further analysis is necessary. While reducing labor costs is a legitimate business objective, it does not follow that any method of doing so is permissible. Specifically, the elimination of higher-paid employees who tend to be older may be objectionable under the ADEA if it is not the result of an employer calculus that takes both costs and benefits into account. That is, an employer should consider the productivity of the employees to be discharged, not merely their salaries.[156]

But that will not necessarily avoid a disparate impact on older workers: if their higher salaries are largely the result of seniority rather than ability, one could still expect that a cost-benefit analysis would tend to eliminate older, more senior workers.[157] Such a result still seems objectionable because it is not the work that the employees are doing that causes their discharge, but rather their high salaries relative to younger, less senior employees. While cost-cutting remains a legitimate employer goal, from a business necessity perspective it does not follow that discharging higher-paid workers is a *necessary* means to achieve that end.[158] Put simply, there will normally be a less restrictive alternative. In *Leftwich*, for example, there seemed to be no consideration of reducing costs by generally

---

155 To the extent that cost is relevant to disparate treatment under the ADEA, it is under the bona fide benefit plan exception, discussed *infra*. Indeed, the need for a statutory exception to permit cost-based distinctions in benefit plans has been argued to demonstrate congressional intent that cost considerations are not otherwise a defense to age discrimination. *See* Note, *The Cost Defense Under the Age Discrimination in Employment Act*, 1982 DUKE L.J. 580.

156 *Id.* at 584-585. *See also Metz*, 828 F.2d at 1216-1222 (dissent of Judge Easterbrook).

157 Note, *supra* note 155, at 599-600. A plaintiff cannot prevail on this theory, however, without a showing that this impact in fact occurred. *See* Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986).

158 In *Leftwich* itself, the court rejected the defendants' claim that the selection plan was designed to "promote innovation and quality among the faculty" in part because there was no proof that the plan with the disparate impact was necessary to achieve that goal.

cutting salaries.[159] Alternatively, the older worker could be offered the choice of continuing at a reduced salary. While there are understandable reasons why an employer might hesitate to do this—the older worker may well have a continuing "gripe" that will interfere with his job performance—it is not clear that such reasons rise to the level of a business necessity.

In this regard, consider the problem suggested by *Holley v. Sanyo Mfg. Inc.*[160] The plaintiff there claimed that the employer wished to replace him with a younger person because, as an older worker with greater experience, he was making a much higher salary. The *Holley* court avoided analyzing this claim under disparate impact, but the theory seems applicable if the plaintiff can demonstrate that a policy to this effect exists.[161]

VI. Statutory Defenses and Exceptions

The significance of the theories of liability under the statute is obviously affected by the several statutory defenses available to defend against an ADEA action. These include the bona fide occupational qualifications (bfoq), employee benefit plans, bona fide seniority systems, good cause, and reasonable factors other than age. These, and others, will be discussed in the following sections.

A. Bona Fide Occupational Qualification

Like Title VII, the ADEA contains an exception "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[162] The age bfoq generated a large number of decisions prior to the 1986 amendments removing the age 70 upper limitation on statutory protection. While most of those bfoq decisions involved police officers or fire fighters, employment that is now temporarily exempt from ADEA coverage, the 1986 elimination of any upper limit on the protected age group seems certain to lead many employers to attempt to justify continuing mandatory retirement policies under the bfoq defense.

A defendant may establish age as a bfoq by meeting several

---

159 In *Geller*, the situation was somewhat different: since the state mandated certain salaries based on experience, arguably the only way the defendant school board could reduce salary costs was by restricting the experience of teachers hired.

160 771 F.2d 1161 (8th Cir. 1985).

161 *See* Dace v. ACF Indus., 722 F.2d 374 (8th Cir. 1983).

162 29 U.S.C. § 623(f)(1), § (4)(f)(1) (1985).

requirements. First, the employer must show that being younger than a certain age is essential to the employer's business. Second, the employer must demonstrate either that it had a factual basis for believing (1) that no persons over a certain age are able to perform the work in question or (2) that the group of older workers is less capable of performing the work and that it is impossible or highly impracticable for the employer to make individual determinations as to qualifications. The employer has the burden of persuasion as to the existence of an age bfoq.[163] In short, while there is reason to expect a substantial increase in age bfoq litigation in the wake of the elimination of the age-70 upper limit in ADEA protection, the employer faces a difficult task in establishing this exception.

B. Bona Fide Employee Benefit Plans

Another defense which may be raised by an employer to avoid liability is by establishing that discrimination resulted from a bona fide employee benefit plan. Section 623(f) of the ADEA provides:

> It shall not be unlawful for an employer, employment agency, or labor organization. . .to observe the terms of. . .any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this [Act], except that no such employee benefit plan shall excuse the failure to hire any individual *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [aged 40 or more] because of the age of such individual.*[164]

The burden of persuasion as to this exception is on the defendant seeking to immunize conduct that is otherwise illegal under the Act.[165]

In *United Air Lines, Inc. v. McMann*,[166] the Supreme Court construed an earlier version of this provision that did not include the italicized language. The Court held that involuntary retirement

---

163 *See, e.g.*, Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).

164 29 U.S.C. § 623(f)(2), § 4(f)(2) (1985) (emphasis added). The italicized language was added by the 1978 amendments, Pub. L. No. 95-256. Although this exception does not by its terms govern federal employment, which is treated in a separate provision of the statute, it has been held to apply to federal retirement plans. Mason v. Lister, 562 F.2d 343 (5th Cir. 1977).

165 EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208 (4th Cir. 1982).

166 434 U.S. 192 (1977).

prior to age 65 (then the upper age limit of ADEA protection) was permitted if it was part of an employee benefit plan.[167] Scarcely had the Supreme Court's decision been rendered, however, before Congress, in the 1978 amendments to the ADEA, added the italicized language providing that involuntary retirement was not permitted pursuant to this provision.[168] Since those amendments simultaneously extended the upper limits of the ADEA to 70, and Congress has subsequently removed the upper age limit entirely for almost all covered employment, the effect is to render all involuntary retirement illegal, even if pursuant to a retirement plan, unless justified as a bfoq.[169]

Despite this legislative narrowing of the bona fide retirement plan exception, there remain important questions about the scope of the provision, questions that were complicated by the inability of the Department of Labor and the EEOC to develop definitive regulations on the subject[170] and by the difficulties of determining

---

167 The Supreme Court majority rejected plaintiff's argument that the sole purpose of the retirement plan exception was to remove disincentives to hiring older workers by permitting the employer to provide them with fewer benefits than younger workers. Although recognizing that this was one purpose, the Court read the exception more broadly to reach involuntary retirement. This interpretation was found consistent with the general congressional proscription of arbitrary age discrimination because, unlike discharge without pay, retirement on an adequate pension was viewed favorably by Congress. *Id.* at 198-199. The Court's opinion concluded by stressing that the plan in question could scarcely be a subterfuge since a plan established 26 years prior to the passage of the ADEA cannot qualify as a "scheme, plan, stratagem, or artifice of evasion." *Id.* at 203.

Mr. Justice White, while concurring, disagreed that an otherwise bona fide plan was necessarily lawful merely because it was adopted long before the Act: defendant's decision to continue the plan after the effective date of the ADEA "must be separately examined to determine whether it is proscribed by the Act," *id.* at 205, because the statute applied to "new and existing employee benefit plans, and to both the establishment and maintenance of such plans."

Justices Marshall and Brennan dissented, and this dissent became the basis of the 1978 amendment expressly barring mandatory retirement before the then-established upper age limit of 70.

168 Conference Report 95-950, 95th Cong., 2d Sess., makes explicit that this amendment was intended to overrule *McMann*.

169 The extension of the ADEA's upper limit to 70 became effective on January 1, 1979, but the prohibition on involuntary retirement under a benefit plan generally became effective earlier—on April 6, 1978, Pub. L. No. 95-256, § 2(b). The removal of the upper age limit entirely became generally effective on January 1, 1987. The 1978 amendment has been held not to be retroactive. Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980); Jensen v. Gulf Oil Refining & Mkt. Co., 623 F.2d 406 (5th Cir. 1980); Sikora v. American Can Co., 622 F.2d 1116 (3d Cir. 1980). *But see* EEOC Interpretive Rules, 29 C.F.R. § 1625.9(b) (1985). It seems clear that the 1986 amendments will also be prospective.

170 The Department of Labor, which was originally in charge of ADEA enforcement, issued an Interpretive Bulletin that addressed a number of issues, including

whether previous judicial decisions, including *McMann* itself, have been wholly superseded by the 1978 amendments, or whether they continue to have some vitality.

The basic question is, of course, when benefit plans may—short of "excus[ing] the failure to hire any individual" or "requiring or permitting the involuntary retirement of any individual,"—discriminate on the basis of age. The existence of the exception obviously contemplates that some such discriminations are permissible, but gives little guidance on which ones fall outside the pale.

In order to approach the question of what discriminations are permissible under this exception, it is perhaps best to start with the words of the exception: it is not illegal "to observe the terms of . . . any bona fide benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes" of the ADEA. The following treatment is organized around the four concepts embraced in this language: what is a benefit plan, what conduct "observes" such a plan, what makes a plan "bona fide," and what constitutes "a subterfuge."

1. Benefit plan

In deciding that constitutes a benefit plan that may qualify under the statutory exception, there are a number of major concerns. First, one must distinguish between "benefits" and other aspects of employment, such as compensation. Although the term "fringe benefit" is not one of art, clearly Congress was concerned with plans "such as a retirement, pension, or insurance plan" rather than employer systems dealing with base compensation or other privileges of employment.[171]

Second, even within the universe of fringe benefits it has been held that, in order for the exception to apply, the plan must deal with benefits whose costs are related to age. This position is

benefit plans. 29 C.F.R. § 860.1 et seq. (1986). The EEOC, after it assumed enforcement responsibilities, issued its own Interpretive Rules, which were in some respects different from the Bulletin. 29 C.F.R. § 1625.1 et seq. (1986). However, while the EEOC rules generally replaced the Bulletin, which was for the most part rescinded, the Commission neither adopted nor rejected the Labor Department's views concerning benefit plans. See EEOC Interpretive Rules, 29 C.F.R. § 1625.10. Accordingly, those Interpretations presumably remained in effect. They are codified at 29 C.F.R. § 860.120. A law suit compelled the EEOC to finally rescind the Interpretive Bulletin but was unsuccessful in its attempt to require the Commission to adopt new rules for such plans. *See* American Ass'n of Retired Persons v. EEOC, 823 F.2d 600 (D.C. Cir. 1987).

171 29 C.F.R. § 860.120(a)(1) and (b).

taken by the applicable regulations,[172] and *EEOC v. Westinghouse Elec. Corp.*[173] illustrates the point. In that case, the Third Circuit considered a benefit plan defense by an employer that denied certain unemployment benefits to workers over the age of 55 when a layoff occurred; the employer sought to justify the denial of these benefits on the ground that the older workers were eligible for early retirement. After rejecting the "other than age" defense,[174] the court turned to the district court's conclusion that the plan was valid under § 4(f)(2) because it constituted insurance against unemployment. While not disagreeing with that characterization, the Third Circuit found that that was not enough to establish a statutory "benefit plan." Rather, "[t]he thread common to [exclude] retirement, insurance and pension plans . . . is the age-related cost factor."[175] In short, the court believed that Congress intended to allow employers some latitude in discriminating against older employees in the award of benefits when age was related to increased costs of such benefits.[176] Accordingly, the court found the exclusion not to be a bona fide benefit plan and therefore it did not have to be analyzed to see if it was a subterfuge.

Finally, there may be a focus on the "plan" concept: a scheme that was a one-time, ad hoc arrangement has been held not the kind of on-going plan that Congress intended.[177] Nevertheless, the courts have not imposed formal requirements for such a plan. In one case, the Fifth Circuit rejected arguments that material provisions of a qualified plan must be communicated to employees and that the plan must comply with Internal Revenue definitions.[178]

---

172 29 C.F.R. § 860.120(a)(1).

173 725 F.2d 211 (3d Cir. 1983).

174 *Id.* at 222-223.

175 *Id.* at 224.

176 *Accord*, EEOC v. Bordens, Inc., 724 F.2d 1390 (9th Cir. 1984). This view draws support from *McMann*, where at least eight justices accepted the proposition that newly hired older employees may be treated less favorably than comparable younger employees with regard to employment benefits, although no employer may refuse to hire someone because he cannot participate in a benefit plan or because participation would be too costly. While not necessarily rejecting this principle per se, other cases have taken a more permissive view of what constitutes age-related cost savings. Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986).

177 *See Bordens, Inc.*, 724 F.2d at 1396.

178 Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974). *See also* 29 C.F.R. § 860.120(b). *But see* Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980); Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQUESNE L. REV. 227, 245-246 (1974).

2. To observe

The second requirement of the exception is simply that any benefits at issue be denied or reduced "pursuant to" the plan; thus, courts have rejected attempted defenses when the benefits in question were denied wholly apart from the plan,[179] or when the plan was invoked to justify discrimination against employees who were not members of the plan.[180] This follows from the fact that any denial of benefits must be "to observe the terms of" the plan.[181]

3. Bona fide

The "bona fide" concept is central to construing the extent of the exception,[182] but is not one whose meaning is readily apparent.[183] The mere fact that a plan discriminates on the basis of

---

179 Alford v. City of Lubbock, Texas, 664 F.2d 1263 (5th Cir. 1982) (denying sick leave to employees not covered by the retirement plan was not part of the plan); EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir.), *cert. denied*, 456 U.S. 975 (1982).

180 29 C.F.R. § 860.110(b). *See* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971).

181 That is, the denial must not merely be made in the context of the plan in order to qualify as an action that is "to observe the terms" of a bona fide plan. *See Sexton*, 630 F.2d at 488 (involuntary retirement of employee at 59 was not pursuant to plan that provided for involuntary retirement at 65 but only for voluntary retirement earlier). *See* 29 C.F.R. § 860.120(c). *Accord*, EEOC v. Baltimore & Ohio R.R., 632 F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); Benzel v. Valley Nat'l Bank of Arizona, 633 F.2d 1325 (9th Cir. 1980).

182 There were a number of cases decided under the pre-1978 version of the ADEA that state that a bona fide plan must pay substantial benefits. Indeed, *McMann* seemed to suggest this proposition by stressing that Congress envisioned a trade-off between involuntary retirement and pension benefits. Quoting from a prior case, the Court noted that "[w]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor." *McMann*, 434 U.S. at 198. This logic suggests that a plan that pays no benefits is not bona fide; further, perhaps nominal or even real, but plainly inadequate, benefits may not be enough. Justice White's concurring opinion in *McMann* indicated that Congress intended to except all plans "as long as the benefits they pay are not so unreasonably small as to make the 'retirements' nothing short of discharge." *Id.* at 207. While other cases have repeated this caution, *e.g.*, EEOC v. Home Ins. Co., 672 F.2d 252 (2d Cir. 1982); Benzel v. Valley National Bank of Calif., 633 F.2d 1325, 1326 (9th Cir. 1980); Smart v. Porter Paint Co., 630 F.2d 490, 494 (7th Cir. 1980), it seems doubtful that this requirement is of any consequence now that mandatory retirement by virtue of such plans is prohibited.

183 Some courts have looked for an analogy to the bona fide seniority system exception in Title VII. *See* Alford v. City of Lubbock, Texas, 664 F.2d 1263, 1271 (5th Cir. 1982). Not only is the language of the two exceptions somewhat different, but the cases under Title VII make clear that a seniority system is bona fide if it is not the result of intentional discrimination. If that analogy is used, any retirement plan that facially discriminates on account of age would be illegal under the ADEA,

age by providing fewer benefits for older workers[184] does not, of course, prevent it from being bona fide, because Congress believed that certain discriminations in benefits were justified.[185] On the other hand, the requirement of bona fideness (and the prohibition of subterfuges) obviously limits the extent of the discriminations permitted. The difficulty lies in developing a test to distinguish permitted discriminations from impermissible ones.

In fact, there seem to be two distinct, if related, rationales underlying the entire exception, both of which stem from a congressional recognition that certain costs tend to increase for older workers who, as a group, are more subject to illness, long-term disability, and even death than are younger employees.[186] The first rationale is that, due to this reality, to require equal treatment for older workers in terms of benefits would require employers to incur greater costs and therefore discourage hiring or retention of older workers, regardless of the nondiscrimination commands of the ADEA. The second rationale is simply that, from a fairness perspective, employers should not have

---

as would a seniority system under Title VII that explicitly provided that blacks had less seniority credit than whites with equal service. In fact, under the ADEA itself, the Supreme Court has recognized that a seniority system that has an explicit age classification is not bona fide. *Thurston*, 469 U.S. at 124-125. But since Congress seemed clearly to intend age-based distinctions benefits, "bona fide" in the context of the benefit plan exception must have a different meaning.

184 This seems to be the major thrust of the exception, but it would also seem to permit greater benefits being paid to older workers. This latter aspect could exonerate preferences for older workers, such as sliding-scale retirement provisions that permit retirement on specified benefits with fewer years of service as age increases.

185 *See generally* Cohen, *Section 4(f)(2) of the Age Discrimination in Employment Act: Age Discrimination in Employee Benefit Plans*, 2 WEST. NEW ENG. L. REV. 379 (1980).

186 *See McMann*, 434 U.S. at 200. In the House, at least two representatives objected to the bill insofar as they interpreted it to allow total exclusion of newly hired older workers from benefit plans. 113 Cong. Rec. 34745 (STATEMENT OF REPRESENTATIVE SMITH (D-IOWA)) AND 113 CONG. REC. 34750 (statement of Representative Randall (D-Mo.)). But in the Senate, Senator Javits (R-N.Y.) spoke of the act as allowing employers not to pay "exactly the same benefits," 113 Cong. Rec. S31255 and Senator Yarborough described it as limiting a new employee's "right to obtain *full* consideration." *Id.* (emphasis added). Indeed, the remarks of Senator Javits seem to envision an "equal cost" approach to benefits:

> [A] retirement, pension or assurance plan will be considered in compliance with the statute where the actual amount of the payment made or cost incurred on behalf of an older worker is equal to that made or incurred on behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

123 Cong. Rec. S17274 (1977).

Other remarks are supportive of this view. 123 Cong. Rec. S17274 (remarks of Senator Williams (D-N.J.)).

these additional costs imposed on them.[187]

One straightforward approach to the exception would look to these reasons and simply recognize as bona fide those plans that reduce benefits in order to eliminate such excess costs. In fact, precisely that principle has ultimately emerged, as the result of new congressional action.[188] This legislative action, however, was not effective until January 1, 1988,[189] thus requiring some brief discussion of the problems that prompted this amendment.

The administrative interpretations of the benefit plan exceptions adopted an "equal cost" approach with respect to all benefit plans *except retirement plans*. The rationale for the general rule was simply that eliminating disincentives for hiring or retaining of older workers and fairness to employers were satisfied if older workers' benefits were of equivalent cost to the employers, even if the benefits received were proportionately lower. Thus, the Department of Labor's Interpretive Bulletin, which was in this regard *not* superseded by the new EEOC Interpretive Rules, specified that all nonretirement benefit plans had to provide equal benefits to older and younger workers or reflect unequal benefits that were cost-justified.[190] This means that any lower level of benefits for older workers would reflect only the increased costs of providing benefits to such older workers.[191] Put another way, if the costs incurred are approximately equal, the fact that an older worker receives less than a younger counterpart

---

187 *E.g.* Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208 (4th Cir. 1982).

188 Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201 of which amends 29 U.S.C. § 623 by adding a new paragraph (i).

189 *Id.*, § 9204.

190 *See* 29 C.F.R. § 860.120. The original Interpretive Bulletin provided little guidance on the implementation of the equal-cost concept. In the wake of the 1978 amendment, however, the Department of Labor substantially elaborated on the requirements for reductions in employee benefits linked to age.

191 Application of the equal-cost concept in practice is not easy. The Department of Labor's regulations are elaborate. For example, they permit two separate ways of viewing such costs—benefit by benefit, or the benefit package approach—which allows all fringe benefits (except retirement plans) to be lumped together. Cost comparison had to be based on the employer's own cost experience or that of a group of similarly situated employers. Further, in order to compare the costs of benefits to older workers vis-a-vis younger ones, the employer was generally permitted to make cost comparisons in age brackets of up to five years. That is, there is cost justification if, for a given level of benefits, the average cost per bracket is equal to the average cost for the immediately younger bracket. 29 C.F.R. § 860.120(d)(3).

under a benefit plan does not matter.[192]

The Bulletin, however, essentially adopted a bifurcated scheme. While all benefits except retirement benefits are subject to an equal-cost rule, the Bulletin did not require equal costs where retirement plans are concerned. The reason for not adopting an equal-cost rule for retirement plans emerges from the legislative history of the 1978 amendments, which manifests a congressional concern with permitting employers to establish a normal retirement age (NRA) for purposes of "defined benefit" pension plans. Thus, there are aspects of the legislative history which state that it was permissible to deny the accrual of benefits between the NRA (usually 65) and the then-applicable upper age limit of 70.

The explanation for this concession to employers lay in the very concept of a defined benefit plan. In such a plan (in contrast to a defined contribution plan), the employer provides funds sufficient to provide a defined level of benefits at retirement age. Because a defined benefit plan must of necessity compute benefits on the basis of a presumed retirement date, employers using such plans were required by ERISA,[193] the federal law governing pension plans, to establish a "normal retirement age."

Before the 1978 amendments, normal retirement age was frequently also the age of mandatory retirement—then permitted to be 65. When Congress passed the amendments, it barred mandatory retirement before 70, but the legislative history showed some intent to leave intact the NRA concept: denial of accrual of plan benefits between the normal retirement age and age 70 was said not to violate either the ADEA or ERISA.[194]

Obviously, this arrangement resulted in discrimination against post-NRA workers because, unlike younger workers, their subsequent years of employment yielded them no further retirement benefits. Further, this scheme is not related to cost: the employer makes no further contributions at all after NRA and, as far as retirement plans are concerned, therefore actually incurs

---

192 The Interpretive Bulletin contains elaborate provisions for comparing costs for purposes of this analysis.

193 ERISA is the acronym for the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001 to 1381 (1985).

194 S. Rep. No. 95-493, 95th Cong., 1st Sess., at 14-16 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504. *See also* 124 Cong. Rec. 4451 (March 23, 1978) (statement of Sen. Williams). *See generally* Gitt, *The 1978 Amendments to the Age Discrimination in Employment Act—A Legal Overview*, 64 MARQUETTE L. REV. 607 (1981).

lower costs for post-NRA workers.[195] This disparate treatment could be justified only as deriving from a perceived congressional purpose not to affect such pension plans.

While the validity of the regulations and their interpretation of congressional intent generated considerable confusion, no extended treatment of this issue seems necessary in light of the congressional action taken to eliminate the anomaly of allowing employers to discriminate against older workers by wholly excluding them from further participation in retirement plans after NRA.

Basically, Congress acted by adding to the ADEA a new provision, effective January 1, 1988, which makes it unlawful "to establish or maintain an employee pension benefit plan which requires or permits" any age-based reduction in employee benefit accrual (for defined benefit plans) or any age-based reduction in allocations to the employer's account (for defined contribution plans).[196] The effect of this amendment is generally to bring the treatment of retirement plans under the benefit plans exception into conformity with the general equal-cost rule adopted by the applicable regulations. While substantial development of this amendment by administrative regulation is to be anticipated, it is at least clear that Congress has removed a major disincentive for older workers to continue employment after the traditional retirement age of 65, which was the typical normal retirement age at which continued accrual of pension benefits was cut off under prior law.[197]

But if all benefits are to be subjected to an "equal cost" test, the contours of this principle remain to be developed. In the few cases to consider this question, the courts have not required any strict tailoring of plans to cost savings—it seems to suffice for "bona fide" purposes if there is some relationship between the benefit plan and the cost savings.[198] However, the relationship between the plans' premises and the cost savings to be realized

---

195 Indeed, at least for defined benefit plans, there is reason to believe that continued participation after age 65 would generally result in no cost to employers because of the shortened life expectancy of workers retiring later. See Cong. Rec. H13045 (daily ed. Sept. 19, 1986) (statement of Rep. Grossley).

196 See *supra* note 188. The new paragraph permits benefits plans to limit the amount of benefits by number of years of service or years of plan participation, as long as the limitation operates "without regard to age." (i)(2).

197 Crosland v. Charlotte Ear, Eye & Throat Hosp., 686 F.2d 208 (4th Cir. 1982).

198 Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986).

has become the focus of the "subterfuge" prong of the benefit plan exception.

4. Subterfuge

A benefit plan that otherwise meets the requirements of § 623(f) will still fail to qualify under the statutory exception if "it is a subterfuge to evade the purposes" of the ADEA. It is not clear, however, how a plan that adopts an equal-cost approach for older workers could ever be a subterfuge. While such a plan does discriminate on account of age, it does so in apparent compliance with a congressional perception that employers ought not to be required to bear higher costs associated with providing equal benefits of older workers.

In one case, after assuming the bona fides of the plan, the Fourth Circuit considered what factors would invalidate the plan as a subterfuge.[199] Drawing on *McMann*, the court formulated the test for rebutting this possibility as follows: "[t]his may be done by [the defendant's] proving that the provision was motivated by a legitimate business or economic purposes which, objectively assessed, reasonably justified it."[200] The plaintiff, however, could presumably attempt to show that the business purpose was in fact pretext. The decision is likely to turn on whether the plaintiff can show that the plan so radically departs from reasonably anticipated cost savings that it could not have been motivated by those savings.[201]

C. Bona Fide Seniority Systems

The ADEA provides that "[i]t shall not be unlawful for an employer, employment agency, or labor organization to observe the terms of a bona fide seniority system."[202] The 1978 amendments added language to this provision specifying that seniority systems may not "require or permit" involuntary retirement.[203] Since seniority systems will normally favor older workers, there is little cause to interpret this defense. Nevertheless, seniority sys-

199 *Crosland*, 686 F.2d at 212 n.3.

200 *Id.* at 213. *Crosland* was decided prior to the addition of paragraph (i) to § 623, establishing that accrual of retirement benefits could not be cut off at normal retirement age.

201 *See Cipriano*, 785 F.2d at 58-59. *See also* Portenze. New York Shipping Ass'n, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987).

202 29 U.S.C. § 623(f)(2), § 4(f)(2) (1985).

203 *Id.*

tems can become implicated in ADEA cases involving discrimination claims among groups within the protected class.

In *Thurston*,[204] the Supreme Court made clear that the seniority exception could not be utilized to shield intentional discrimination because of age. In that case, the defendant treated captains who were disqualified by an FAA rule from piloting commercial aircraft at age 60 differently from captains disqualified for other reasons. This was held to be age discrimination on its face, and therefore, prima facie illegal. After disposing of the proffered bfoq defense, the Court proceeded to give short shrift to a claim that the seniority system exception shielded the practice:

> [A]ny seniority system that includes the challenged practice is not "bona fide" under the statute. The Act provides that a seniority system may not "require or permit" the involuntary retirement of a protected individual because of his age. Although the FAA "age 60 rule" may have caused [plaintiff's] retirement, TWA's seniority plan certainly "permitted" it within the meaning of the ADEA. Moreover, because captains disqualified for reasons other than age are allowed to "bump" less senior flight engineers, the mandatory retirement was age-based. Therefore, the "bona fide seniority system" defense is unavailable to the [employer].[205]

Despite *Thurston*, seniority systems lacking a specific age limitation will probably be broadly approved if the law developed under Title VII is applied in the ADEA context.[206] a result that seems appropriate in view of the many parallels between the two statutes.

In resolving questions under this exception, the EEOC's Interpretive Rules are a useful source of guidance in the absence of apposite ADEA precedents. Generally speaking, these rules require that seniority systems[207] must be "based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives," although merit may be a factor.[208] Such systems must also be communicated to employees and must be applied uniformly, regardless of age.[209] Further, since sen-

---

204 469 U.S. 111 (1985). *See also supra* notes 31-36 and accompanying text.

205 *Thurston*, 469 U.S. at 124 (citations omitted).

206 *See* Morelock v. National Cash Register Corp., 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

207 As under Title VII, there is an unresolved question whether the exemption covers any seniority system or only those created by collective bargaining agreements. *See* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 4.6.

208 29 C.F.R. § 1625.8 (1986).

209 *Id.* at § 1625.8(c).

iority systems normally discriminate in favor of those with longer service, a system that fails to do so may, "depending on the circumstances," be considered a subterfuge under the Act.[210] Moreover, the rules view any seniority systems that are illegal under Title VII as subject to close scrutiny to ensure they are bona fide under the ADEA.[211] While one might wonder whether another statute's prohibitions should be relevant to the ADEA, the question does not seem worth pursuing in view of the Supreme Court's general validation of seniority systems under Title VII.[212]

Finally, it should be noted that the Rules take the position that the "subterfuge" notion, which is clearly applicable to employee benefit plans, also applies to the seniority system exception. This interpretation of the statutory language appears reasonable in view of the grammatical construction of the provision. Even if the "subterfuge" limitation is applicable, however, the *McMann* decision, which exculpates from "subterfuge" status any plans long predating the Act, would seem also to exonerate many seniority systems. This leaves only post-Act systems, and, given the Rule's view of what constitutes a bona fide system, the subterfuge concept should rarely pose an independent problem.

D. Good Cause and Reasonable Factors Other Than Age

The ADEA provides that "[i]t shall not be unlawful for an employer, employment agency, or labor organization. . .(3) to discharge or otherwise discipline an individual for good cause."[213] This provision follows the bfoq exception and the exceptions for bona fide seniority systems or retirement plans. Those provisions presumably shift to the employer not only the burden of coming forth with the evidence but also the burden of persuasion once the plaintiff has established a prima facie case. But it is doubtful that this allocation of burdens is appropriate with respect to the "good cause" provision.[214] The problem is that "good cause" seems to be the ADEA statutory parallel for the "legitimate nondiscriminatory reason" utilized in Title VII disparate treatment cases using circumstantial evidence to draw an inference of intent to discriminate. It would seem likely, then, that when a plaintiff relies on only the inference-drawing tech-

---

210 *Id.* at § 1625.8(b).

211 *Id.* at § 1625.8(d).

212 *See generally* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 4.6.

213 29 U.S.C. § 623(f), § 4(f) (1986).

214 The Supreme Court expressly avoided deciding this question in Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 408 n.10 (1985).

nique to establish intent to discriminate, the employer need only come forward with evidence sufficient to raise a question of fact that it had good cause for taking the challenged action. The plaintiff must then prove as pretext any "good cause" put into evidence by the employer in order to prevail. Where, however, the plaintiff has established intent to discriminate based on admissions by the defendant, the only question remaining is causation and the burden of persuasion shifts to the employer to try to show that the action was the result of the good cause factor and not the intent to discriminate.

One factor mentioned in a number of cases is that discharge for cause under the ADEA does not mean the kind of "good cause" standard that might be appropriate before tenured or civil service employees are fired.[215] Rather, "the statute is not violated in the case of terminations or other employer decisions which are premised upon a rational business decision made in good faith and not actuated by age bias."[216] Whether this interpretation is correct is probably not important: even if "good cause" was used in the tenure sense, an employer would still be privileged to terminate employees for other reasons because the ADEA also declares that it is not unlawful "to take any action otherwise prohibited. . .where the differentiation is based on reasonable factors other than age."[217] This would seem to be merely a broader statement of the principle embodied in the "good cause" section: action against older workers is valid as long as it is based on something other than age, subject only to the requirement that the factor be "reasonable."

The phrasing of the "reasonable factors" provision is similar to the Equal Pay Act (EPA) insofar as that statute permits unequal pay for equal work between the sexes for one of three specified reasons, or for "any other factor other than sex."[218] Under the EPA, the burden of establishing the "other factor" exception rests on the employer,[219] but it is not clear that the ADEA, which has been held to generally track Title VII in the proof of discrimi-

---

215 *See generally* Note, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Annotation, 66 A.L.R. 3d 1018.

216 Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974). *Accord*, Brennan v. Reynolds & Co., 367 F. Supp. 440 (N.D. Ill. 1973); Stringfellow v. Monsanto Co., 320 F.2d 1175 (W.D. Ark. 1970). *See also* Anderson v. Viking Pump Div., 545 F.2d 1127 (8th Cir. 1976); Price v. Maryland Casualty Co., 391 F. Supp. 613 (S.D. Miss. 1975), *aff'd*, 561 F.2d 609 (5th Cir. 1977).

217 *See* 29 U.S.C. § 623(f)(1), § 4(f)(1).

218 *See generally* EMPLOYMENT DISCRIMINATION, *supra* note 10, at § 17.14.

219 *See generally id.*

nation, should depart from the allocation of burdens in this regard. Like the "good cause" defense, "reasonable factors other than age" seems to negate the element of discriminatory intent as to which the plaintiff generally has the burden of persuasion.[220] Despite this reasoning, however, the EEOC's Interpretive Rules place the burden of proving the reasonable-factors exception under the ADEA Age Act on the employer.[221]

Regardless of the allocations of burdens as to the "good cause" and the "reasonable factors" exceptions, how are these defenses made out? The phrasing and the Interpretive Rules make clear that age must play no part of reasonable factors,[222] and presumably this is also true of the "good cause" defense. The employer cannot, then, admit the age discrimination but claim some justification, such as economic necessity.[223] In short, any factor that reflects an intent to discriminate on account of age cannot establish a defense.

On this ground the courts have held that a state statute mandating a particular discrimination does not constitute a reason-

---

220 Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978).

221 *See* 29 C.F.R. § 1620.7(e) (1986).

222 29 C.F.R. § 1620.7(c). The old Interpretive Bulletin of the Department of Labor, although not addressing the "good cause" exception, considered at length "reasonable factors other than age." Although these interpretations have not been carried forward in the EEOC's rules, a brief summary may be useful. For a fuller discussion, see C. Sullivan, M. Zimmer & R. Richards, Federal Statutory Law of Employment Discrimination (1st ed. 1980), § 11.5. Generally speaking, the Bulletin began by noting that Congress did not intend "to require the employment of anyone, regardless of age, who is disqualified on ground other than age from performing a particular job." 29 C.F.R. § 860.103(c). But, "even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden." 29 C.F.R. § 860.103(g).

Likewise, the Bulletin stated that the higher average cost of employing older workers rather than younger ones does not justify disparate treatment under the "reasonable factors" exception, 29 C.F.R. § 860.103(h).

The Bulletin recognized several factors that might support a differentiation, including (1) physical fitness requirements if "reasonably necessary for the specific work to be performed and . . . uniformly and equally applied to all applicants for the particular job category, regardless of age;" (2) evaluation factors such as quantity and quality of production, or educational level when "shown to have a valid relationship to job requirements;" (3) a validated employee test when "specifically related to the requirements of the job." The Bulletin stated, however, that it "is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits" because that would discriminate against other individuals within the protected age group.

223 EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984). To the extent, if any, such a defense might be valid, it would have to be advanced as a bfoq.

able factor other than age, any more than it does a bfoq.[224] Similarly, in one of the first ADEA appellate opinions, *Hodgson v. First Federal Savings & Loan Ass'n*,[225] the Fifth Circuit held that the defendant had not established its proffered defense that an older applicant was not hired because she was overweight. The court noted not only that the defendant's explanation was weak in light of direct evidence that age was critical but also that this criterion would still show age discrimination since younger overweight people were hired. These cases at least incorporate the disparate treatment view of discrimination in approaching these defenses.

The older Department of Labor's Interpretive Bulletin, however, was broader because it required that a factor would be other than age only if it passed scrutiny under both the disparate treatment and disparate impact theories. For example, if "other than age" merely referred to the absence of disparate treatment discrimination, the necessity or validity of physical exams or other tests would be irrelevant. It would suffice that the requirements were applied uniformly, at least if they were imposed for nondiscriminatory reasons. The additional requirement of the Bulletin that such tests be justified as job-related must be derived from the belief that a policy with disproportionate impact on age grounds is not an "other than age" policy unless it is justified.[226]

An alternative method of reaching a similar result is to focus on the language of the exception. Unlike the Equal Pay Act, which validates discriminations based on "*any* other factor other than sex," the ADEA excepts only *good* cause and *reasonable* factors other than age. Accordingly, the statute may be read as requiring a determination of reasonableness when "other than age" factors are concerned, and if "reasonable" is to have any objective meaning, the most obvious yardstick for determining it is "business necessity" or "job relation."

The cases have not yet clarified the question. In *EEOC v. Westinghouse Elec. Corp.*,[227] the Third Circuit considered an "other than age" defense offered to an EEOC attack on the denial of certain unemployment benefits to workers older than age 55 in

---

224 Johnson v. Mayor and City of Baltimore, 731 F.2d 209 (4th Cir. 1984); EEOC v. City of Altoona, 723 F.2d 4 (3d Cir. 1983) (age-related discharge systems linked to pension eligibility and seniority); EEOC v. County of Allegheny, 705 F.2d 679 (3d Cir. 1983) (age hiring limit).

225 455 F.2d 818 (5th Cir. 1972).

226 *See supra* note 222 and accompanying text.

227 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). *See also supra* notes 173-176 and accompanying text (discussion of *Westinghouse Elec. Corp.*).

connection with layoffs arising from a plant closing. The employer claimed that the deprivation was triggered not by the employees' ages but rather by their eligibility for early retirement. The Third Circuit, however, concluded that "early retirement is too closely related to age to be given credence as a valid justification.[228] It seems likely that the court used the "close relation" language to indicate a disparate impact analysis, although the relation might be so close that the court was simply saying that intent to discriminate was the appropriate inference. In any event, the court felt it necessary to confine the "other than age" defense so that it did not create a large loophole in the ADEA prohibitions.[229]

In considering an identical policy in *EEOC v. Bordens, Inc.*,[230] the Ninth Circuit was more straightforward. Looking to *Norris v. Arizona Governing Comm.*,[231] which had found actuarially-based distinctions between males and females to be illegal under Title VII, the court stressed that facial discriminations on a prohibited basis constituted disparate treatment, regardless of subjective motivations or animus. This, of course, is consistent with the Supreme Court's later analysis in *Thurston*.[232] As for the argument that the basis of discrimination was retirement status, not age, the Ninth Circuit held that because age 55 was a requirement for early retirement, age was a but-for cause of the denial of severance pay. Having found a prima facie violation, the *Bordens* court held that the existence of retirement benefits was not a "reasonable factor other than age" for the deprivation of severance pay.[233]

Despite an early case to the contrary,[234] it seems clear that higher labor costs associated with the employment of older employees do not constitute "reasonable factors other than age," although at some level such costs might constitute a bfoq. When the ADEA was passed, there was evidence before Congress that the employment of older workers typically entitled marginally

---

228 *Westinghouse Elec. Corp.*, 725 F.2d at 222. *See also* EEOC v. City of Altoona, 723 F.2d 4 (3d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

229 The *Westinghouse Elec.* court also rejected a bona fide benefit plan defense. *See supra* notes 164-171 and accompanying text (discussion of bona fide employee benefit plans).

230 724 F.2d 1390 (9th Cir. 1984).

231 463 U.S. 1073 (1983).

232 *See supra* notes 31-36 and 204-206 and accompanying text (discussions of *Thurston*).

233 Similarly, the court held that the denial of severance pay did not come within the "bona fide employee benefit plan" exception. *Bordens*, 463 U.S. at 1395.

234 *See* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976).

higher out-of-pocket costs.[235] The legislative choice to proscribe age discrimination despite this fact would be undercut if courts were to allow employers to use this factor as a defense in those situations in which the statistics hold true. In short, such a theory would generally frustrate the purposes of the ADEA.

A final point to be stressed is that presumably the plaintiff will have opportunities to surrebut an employer's defense. In the ADEA context this can be done by proving that the "good cause" or "reasonable factor" is really a pretext hiding disparate treatment—and perhaps by showing that there is a disparate impact. While the ADEA cases have not focused on this, the Supreme Court's decision in *McDonnell Douglas v. Green*[236] in the analogous Title VII context indicated that when the defendant rebuts by offering a legitimate nondiscriminatory reason for its action, the plaintiff may still prevail by demonstrating that the reason is a pretext for discrimination. Since the parallel of this "reason" to the ADEA "good cause" or "reasonable factor" exception is obvious, the *McDonnell Douglas* rule should apply under the ADEA to disparate treatment cases.[237]

VII. CONCLUSION

The Age Discrimination in Employment Act offers an important tool to attack the continuing problem of discrimination on account of age. Full effectuation of its purposes, however, requires a detailed appreciation not only of its substantive prohibitions and the theories used to implement them but also of the significance of the various defenses and exceptions built into the statutory scheme.

---

235 *Id.* at 1317 n.6.

236 411 U.S. 792 (1973). *See supra* notes 45-98 and accompanying text (discussion of four-part *McDonnell Douglas* test).

237 In addition to the defenses and exceptions previously considered, the Age Discrimination in Employment Act has a number of other limitations on its prohibitions which should be noted here. They include: the "bona fide executive" exception, which permits mandatory retirement of certain executives and policy makers at age 65; the temporary exception for police and firefighters; the temporary exception for tenured professors; the temporary exception for collective bargaining agreements. For any situation which may fall under these provisions, a more detailed analysis of their provisions is necessary. *See generally* EMPLOYMENT DISCRIMINATION, *supra* note 10, at §§ 19.6.5 through .6.9.