Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection, and the 1978 Amendments

Mack Player
Santa Clara University School of Law

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Automated Citation
DEFENSES UNDER THE AGE
DISCRIMINATION IN EMPLOYMENT ACT:
MISINTERPRETATION, MISDIRECTION,
AND THE 1978 AMENDMENTS

Mack A. Player*

I. INTRODUCTION

The Age Discrimination in Employment Act of 1967 prohibits employers, labor organizations, and employment agencies from discriminating because of age,1 but it does not protect all age groups against employment discrimination. As enacted, the 1967 Act pro-

---

(a) Employer practices.
It shall be unlawful for an employer—
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.
(b) Employment agency practices.
It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.
(c) Labor organization practices.
It shall be unlawful for a labor organization—
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of age;
(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

tected persons between the ages of forty and sixty-five; the amend-
ments in April 1978 extended that protection five years to age sev-


The 1967 Act provided:
§ 631. Age limits.
The prohibitions in this chapter shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.
29 U.S.C. § 631 (1970). Congress amended this provision in § 3(a) of the 1978 amendments by inserting the following:
Sec. 12. (a) The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.
(b) In the case of any personnel action affecting employees or applicants for em-
ployment which is subject to the provisions of section 15 of this Act, the prohibitions
established in section 15 of this Act shall be limited to individuals who are at least 40
years of age.
(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirement of
any employee who has attained 65 years of age but not 70 years of age, and who, for
the 2-year period immediately before retirement, is employed in a bona fide executive
or a high policymaking position, if such employee is entitled to an immediate nonfor-
feitable annual retirement benefit from a pension, profit-sharing, savings, or deferred
compensation plan, or any combination of such plans, of the employer of such em-
ployee, which equals, in aggregate, at least $27,000.
(2) In applying the retirement benefit test of paragraph (1) of this subsection, if
any such retirement benefit is in a form other than a straight life annuity (with no
ancillary benefits), or if employees contribute to any such plan or make rollover contribu-
tions, such benefit shall be adjusted in accordance with regulations prescribed by
the Secretary, after consultation with the Secretary of the Treasury, so that the benefit
is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to
which employees do not contribute and under which no rollover contributions are
made.
(d) Nothing in this Act shall be construed to prohibit compulsory retirement of any
employee who has attained 65 years of age but not 70 years of age, and who is serving
under a contract of unlimited tenure (or similar arrangement providing for unlimited
tenure) at an institution of higher education (as defined by section 1201(a) of the
(b)(1) Sections 12(a), 12(c), and 12(d) of the Age Discrimination in Employment
Act of 1967, as amended by subsection (a) of this section, shall take effect on January
1, 1979.
(2) Section 12(b) of such Act, as amended by subsection (a) of this section, shall
take effect on September 30, 1978.
(3) Section 12(d) of such Act, as amended by subsection (a) of this section, is
repealed on July 1, 1982.
Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92
All discrimination within the protected age group is prohibited. Thus to discriminate on
the basis of age against an employee who is 45, favoring one who is 60, is a violation of the
Act. Discrimination against those outside the age group, however, is not a violation. Thus it
is permissible to favor a 25-year-old applicant over one who is 39. It is also permissible to
favor an applicant who is 45 over one who is over 70 because the complaining party is outside
the protected age group. 29 C.F.R. § 860.91 (1977).
enty. Thus it is not illegal to discriminate against people before their fortieth or after their seventieth birthday.

The Act, in its original and amended versions, contains five exceptions or "defenses" to age discrimination in employment: (1) discipline for "good cause"; (2) differentiations based on "reasonable factors other than age"; (3) use of age where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; (4) observance of a bona fide seniority system; and (5) observance of the terms of a

---


4 Section 4(f)(1) of the 1967 Act provides in part: "It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1970).

In the exercise of his interpretative function the Secretary of Labor has set forth a relatively detailed description of reasonable factors other than age. 29 C.F.R. § 860.103, 104 (1977). The Secretary has indicated:

- Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age. 29 C.F.R. § 860.103(f)(2)(1)(iii) (1977).
- Physical fitness requirements are permissible provided that such minimums are reasonably necessary for the specific work to be performed and are uniformly applied regardless of age. 29 C.F.R. § 860.103(f)(1)(i) (1977). Hiring based on test performance is not necessarily invalid but the court will scrutinize them closely for both adverse impact on older applicants and, if such impact exists, a reasonable relationship to the job to be performed. 29 C.F.R. § 860.104(b) (1977).

5 Section 4(f)(1) provides in part: "It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (1970). The Secretary of Labor has interpreted this section in 29 C.F.R. § 860.102 (1977).

6 Section 4(f)(2) provides in part: "It shall not be unlawful for an employer, employment agency or labor organization—(2) to observe the terms of a bona fide seniority system." 29
bona fide benefit plan, such as retirement or insurance.\footnote{Section 4(f)(2), in addition to protecting seniority systems, provides in part: “It shall not be unlawful for an employer, employment agency, or labor organization—(2) 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 chapter.” 29 U.S.C. § 623(f)(2) (1970). Section 4(f)(2) contains a caveat “except that no such employee benefit plan shall excuse the failure to hire any individual.”}

Since defenses essentially admit the presence of discrimination on the basis of age, the first two exceptions are not true “defenses.” If an employer disciplines or reassigns a worker for “good cause,” then age is not the motivating factor in the employment decisions. And if the employer distinguishes among workers because of “reasonable factors other than age,” there is obviously no age discrimination. Presentation of “good cause” or “factors other than age” is part of an employer’s rebuttal of the plaintiff’s prima facie showing of age discrimination\footnote{Under Title VII, litigation of race, sex, religious, and national origin discrimination can be divided into two categories. The first category includes “motive” cases usually involving a single, one-on-one employment decision. The issue presented is whether improper causes motivated the employer. The second category includes cases challenging class-based rules having a broad adverse impact on a protected class. The issue in these cases is not so much the employer’s motive but whether employer “business necessity” justifies the adverse impact of the rule.}

750 GEORGIA LAW REVIEW


The first category of cases, involving single acts where motive is the issue, is governed by the rule in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court has set up a system of shifting burdens. The plaintiff first must prove membership in a protected class, basic ability to perform the job, application, rejection, and the employer’s filling the job with someone other than a minority or woman. Then the burden shifts to the employer to establish that the employment was motivated by legitimate nondiscriminatory reasons. In cases dealing with class-based rules that adversely affect a protected class, the plaintiff must prove the adverse impact, and then the employer has the burden of proving the business necessity for the rule. Thus in each situation, the economic, nonprescribed factors that the employer must present are not true defenses but are part of his burden once the plaintiff makes a prima facie showing of improper discrimination. The ultimate risk of nonpersuasion on the issue of discrimination remains with the plaintiff. See Causey v. Ford Motor Co., 516 F.2d 416 (6th Cir. 1975).

The courts have indicated that they will take a similar approach under the Age Act. In Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977), the employer fired the plaintiff, a 57-year-old employee, and replaced him with a 19-year-old. The defendant asserted that the plaintiff was terminated because of inadequate performance. The court held that to establish a prima facie case of illegal age discrimination the plaintiff must prove that he was within the protected age group (at that time 40-65), that he was discharged, and that he was replaced with a person outside the protected age group. To rebut the prima facie case, the burden was on the employer to demonstrate that the older employee was unable to perform. See also Bonham v. Dresser Indus., Inc., 569 F.2d 187 (3d Cir. 1977). In Hodgson v. Earnest Mach. Prods., Inc., 479 F.2d 1133 (6th Cir. 1973), however, the court required specific proof that the employer knew that the employee was within the protected age group and would not accept the employee’s appearance as proof.
Thus only the “bona fide occupational qualification” (BFOQ), “bona fide seniority system,” and “bona fide benefit plan” are true defenses. These three defenses assume that an employer, union, or agency is basing employment decisions in part upon the age of the employee or applicant and would violate the Act but for the statutory provision permitting the age discrimination.

Prior to the 1978 amendments, some lower federal courts bizarrely construed the BFOQ defense. In addition, the Supreme Court itself gave a strained construction to the benefit plan defense in United Air Lines, Inc. v. McMann. Congress designed the 1978 amendments to alter the result in McMann by prohibiting mandatory retirement even when required by an otherwise bona fide plan. Congress did not, however, alter the prior, bizarre interpretations of the BFOQ defense, nor did it resolve whether benefit plans and seniority systems must have independent economic or business justification when applied to current employees if they discriminate on the basis of age.

II. THE BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

A. Introduction

Title VII of the Civil Rights Act of 1964 provides that it shall not be an unlawful employment practice to discriminate on the basis of religion, sex, or national origin if the ground for discrimination is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business.” The Age Discrimination Act adopts virtually identical language except that it replaces “religion, sex, or national origin” with “age.” The parallel language indicates that Congress intended for the courts to interpret...
both statutes similarly. The Secretary of Labor, whom the Age Act charges with interpretation and enforcement, construes the BFOQ defense similarly to prevailing Title VII interpretations. The courts have also indicated that they will interpret the BFOQ defense similarly under the Age Act and Title VII. Thus one would expect the analysis of the BFOQ defense under the Age Act to be consistent with Title VII analysis. This has not been the case, however. Although the courts have given lip service to Title VII standards, they have not carefully followed them.

B. *Title VII Interpretations of the BFOQ Defense*

The Guidelines of the Equal Employment Opportunity Commission provide that the courts should narrowly construe the BFOQ defense. The defendant cannot rely on class-based assumptions about comparative abilities, and stereotyped characterizations of qualifications, interests, or abilities do not suffice.

In order to rely on the bona fide occupational qualification exception the employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons in a protected class] would be unable to perform safely and efficiently the duties of the job involved.

One court limited the BFOQ defense even more stringently, holding that the defense is available only when all members of the class are intrinsically unable to qualify. For example, a male is intrinsically unable to serve as a wet nurse. Absent an intrinsic inability to qualify, "employees otherwise entitled to the position [may be] excluded only upon a showing of individual incapacity."

---

13 See Arritt v. Grisell, 567 F.2d 1267, 1270 n.11 (4th Cir. 1977). For general intent to follow parallel analysis, see Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733 (5th Cir. 1977).
18 Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).
19 Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971).
Furthermore, inability of the class to perform the job means more than just inability to perform collateral, secondary, or peripheral duties. To disqualify an entire class under the BFOQ defense, the employer must establish that the duties they cannot perform go to the “essence” of the business operation. By preventing the employer from utilizing the forbidden classification unless it is “reasonably necessary to the normal operation,” the statute, in effect, imposes a business necessity test. The employer cannot prove necessity if it is merely inconvenient or slightly more expensive for him to hire without regard to proscribed classifications. The “business necessity” test obligates the employer to make accommodations in his work force and assignments. Rather than completely disqualify an entire protected class of applicants because of their inability to perform a collateral element of the job, the employer must assign the collateral duties to those capable of performing them. Necessity presupposes accommodation, and accommodation is the alternative to overinclusive, class-based disqualifications.

Title VII analysis has recognized that jobs with little or no human risks and minor economic consequences from unqualified performance require a high degree of correlation between a disqualifying rule and predicted job performance. On the other hand, as human risks and economic consequences of misperformance increase, an employer can justify selection criteria with less of a proven relationship to job performance. At some point the courts require job qualifications for high risk jobs to be only rational. Thus the greater the risk factor—the likelihood of harm multiplied by its severity—the less scrutiny the court will give to a job qualification and thus the greater the likelihood that the court will determine that the qualification is necessary to the essence of the job. The greater the risk factor, the easier it is to pass the BFOQ or business necessity test.

In construing Title VII, the courts have also recognized the reality of situations where precise selection criteria are impossible to formulate. Some jobs, particularly highly skilled or professional occupations, are by their nature subjective in performance. Evaluation of performance thus becomes subjective. The courts permit imprecise selection criteria when qualifications are hard to identify and

---

evaluate and job performance is difficult to measure objectively.\textsuperscript{23} The courts are even more lenient when the job involves high human or economic risks.

C. The BFOQ Defense Under the Age Discrimination Act

Thus far four courts of appeals have construed the BFOQ defense under the Age Act. The first two cases, \textit{Hodgson v. Greyhound Lines, Inc.},\textsuperscript{24} and \textit{Usery v. Tamiami Trail Tours, Inc.},\textsuperscript{25} involved virtually identical facts and issues. The cases gave the defense a broad, strained, and clearly erroneous interpretation.

In both cases the employer was an interstate commercial bus company that refused to hire new drivers over age thirty-five. The bus companies had two work classifications: the “regular runs” and the “extra board.” The extra board classification was more strenuous and was generally agreed to be less desirable. Extra board drivers were subject to call twenty-four hours a day, and the company could, with little notice, require them to make irregular and frequently very long runs. Placement on regular runs was determined by a collectively negotiated seniority system. All new employees entered and remained at the extra board from ten to forty years until their seniority allowed them to claim a desired regular run.

The bus companies justified their refusal to employ persons in the protected age group of forty to sixty-five by presenting general and conclusory evidence that driving skills deteriorate with age. The companies further justified their actions on the basis of the difficulty in identifying with tests or medical examinations the deteriorating skills or potential health hazards. The defendants argued that since the applicants would begin work at an older age, in the most strenuous classification, they could not hope to progress to the less strenuous regular run before their driving skills began to deteriorate and their health became less predictable. On this combination of grounds the companies argued that age was a bona fide occupational qualification.

In each case plaintiffs countered defendants’ justifications by making two arguments. First, plaintiffs pointed out that defendants


\textsuperscript{24} 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975).

\textsuperscript{25} 531 F.2d 224 (5th Cir. 1976).
were improperly attempting to establish a BFOQ by generalized statistics and class-based assumptions when the defense required proof that "all or substantially all" persons within the protected age group could not perform safely and efficiently. Second, the plaintiffs attacked the statistics directly by pointing to the accident records which showed that the highest incidence of accidents occurred during younger years. In fact, the safest age group was fifty to fifty-five.

The defendants responded by pointing out that when the job involved substantial human and economic risks the employer could establish the BFOQ by apparently reasonable qualifications supported by generalized statistics, particularly when, as here, individualized evaluations would be difficult or inconclusive. Furthermore, the defendants said that the plaintiffs' conclusions as to accident records were tainted because drivers in the fifty to fifty-five age group had gained years of driving experience and were often in the less strenuous regular runs. Defendants attributed the high accident rate of the younger drivers largely to the strenuous extra board.

In Greyhound, the first case, the Seventh Circuit accepted defendant's arguments and ruled that the defendant had established the BFOQ defense as a matter of law. The court stated:

Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely. Rather, to the extent that the elimination of Greyhound's hiring policy may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring will increase the likelihood of risk of harm to its passengers.

This part of the court's statement of the legal principles involved is not to be severely criticized. The court, however, did not stop there; it concluded: "Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice." Here the Court appeared to overstate the legal standard and

---

2 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975).

2 2d at 863.

2 Id.
gild the lily by permitting pure speculation to justify the refusal to hire apparently qualified applicants. Although the primary error of *Greyhound* is the court’s application of legal principles to the facts presented, even the court’s statement of the BFOQ defense is not entirely accurate.

In the later *Tamiami* case, the Fifth Circuit appeared to disagree with some of the Seventh Circuit’s analysis but nevertheless affirmed the trial court’s acceptance of the defense. The court held that the trial court’s findings were not clearly erroneous because the individualized health and safety determinations were inconclusive. Thus the court permitted generalized but reasonable conclusions that safety risks increased with age.

In reaching their similar conclusions, both courts purported to utilize Title VII standards to analyze the issue. Some aspects of their analysis are acceptable. For example, few would challenge the premise of *Greyhound* that when dealing with high risk, subjective jobs, the employer may relax the precision of selection criteria. The court believed that the test was a two-pronged approach based on two Title VII cases, *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (6th Cir. 1969), and *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971). The court correctly reasoned that *Diaz* required an analysis of the job to determine what duties an employer could require that each employee be able to perform. The court criticized the Seventh Circuit’s reading of *Diaz* as imposing a relaxed standard of analysis when safety is at issue. After determining what is the “essence” of the job under *Diaz*, the Fifth Circuit indicated that the next step is to determine under what circumstances an employer may eliminate an entire protected class of applicants. For guidelines the court looked to *Weeks*. *Weeks* set forth alternative approaches: (1) If there is a factual basis for believing that all or substantially all persons over age 40 would be unable to perform the “essence” of the job (to drive a bus safely), then an employer may eliminate all persons over 40; or (2) if it is impossible or highly impractical to deal with persons over 40 on an individual basis, an employer may accept reasonable statistical conclusions. 531 F.2d at 235. It appears that the court was unhappy with the very broad language in *Greyhound*, see text accompanying note 28 supra, and was perhaps more strictly limiting the application of the BFOQ defense by requiring this two-pronged analysis rather than the *Greyhound* single-pronged analysis.

See *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216 (10th Cir. 1972), where in a race discrimination case the court allowed an employer to demand of applicants for positions as airline flight engineers a college degree and a high number of flight hours. Although this had an adverse impact on black applicants, the court sustained its use as reasonable given the “high degree of economic and human risks involved in hiring an unqualified applicant.” The Fifth Circuit in *Tamiami* indicated that this case had no application to issues involving BFOQs. Technically, the court is correct: *Spurlock* involved “business necessity” for a neutral rule having an adverse racial impact. The basic principles, however, are the same. In analyzing job qualifications, even the EEOC indicates that [the smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low

---

28 The court believed that the test was a two-pronged approach based on two Title VII cases, *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (6th Cir. 1969), and *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971). The court correctly reasoned that *Diaz* required an analysis of the job to determine what duties an employer could require that each employee be able to perform. The court criticized the Seventh Circuit’s reading of *Diaz* as imposing a relaxed standard of analysis when safety is at issue. After determining what is the “essence” of the job under *Diaz*, the Fifth Circuit indicated that the next step is to determine under what circumstances an employer may eliminate an entire protected class of applicants. For guidelines the court looked to *Weeks*. *Weeks* set forth alternative approaches: (1) If there is a factual basis for believing that all or substantially all persons over age 40 would be unable to perform the “essence” of the job (to drive a bus safely), then an employer may eliminate all persons over 40; or (2) if it is impossible or highly impractical to deal with persons over 40 on an individual basis, an employer may accept reasonable statistical conclusions. 531 F.2d at 235. It appears that the court was unhappy with the very broad language in *Greyhound*, see text accompanying note 28 supra, and was perhaps more strictly limiting the application of the BFOQ defense by requiring this two-pronged analysis rather than the *Greyhound* single-pronged analysis.

29 See *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216 (10th Cir. 1972), where in a race discrimination case the court allowed an employer to demand of applicants for positions as airline flight engineers a college degree and a high number of flight hours. Although this had an adverse impact on black applicants, the court sustained its use as reasonable given the “high degree of economic and human risks involved in hiring an unqualified applicant.” The Fifth Circuit in *Tamiami* indicated that this case had no application to issues involving BFOQs. Technically, the court is correct: *Spurlock* involved “business necessity” for a neutral rule having an adverse racial impact. The basic principles, however, are the same. In analyzing job qualifications, even the EEOC indicates that [the smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low
Similarly, one would accept the conclusion of Tamiami that when individualized evaluation is difficult, employers may resort to the best evidence available to establish ability. Thus if the evidence had established that inexperienced bus drivers of the applicant's age presented a current statistical risk and that individualized evaluations of that risk were unreliable, there would be little reason to challenge the courts' acceptance of the BFOQ defense. That issue, however, was not presented. Defendants conceded that statistically the forty-year-old driver presented no present threat to the safety of the public. The basis of the courts' holdings was that at some future time, given the usual operation of the seniority system, these applicants, if hired, would present a statistically greater risk than would a younger applicant. Thus it was not age alone but the appli-
cation of the seniority system to the age of the applicant that prompted recognition of the BFOQ. Absent the seniority system it is doubtful that either court would have recognized the defense. The seniority system was the key to the analysis.33

The courts' recognition of the general importance of bona fide seniority systems is also superficially correct. Its application to the facts presented, however, is equally misplaced. Under Title VII analysis, when reasonable alternatives to class-based exclusions are available, the courts generally require the employer to avoid the harshness of the exclusion by following less discriminatory alternatives.34 Thus, arguably, the bus companies should have placed the older employees in the regular run classification when their age no longer safely permitted their use on the extra board. Reassignment of the aging employee would have been an alternative less discriminatory than denying employment to the entire class of applicants over age forty. But the employers in both cases had contractual seniority systems that precluded resort to this alternative. The courts gave controlling weight to those seniority systems, never suggesting that the employer should disregard them in order to avoid the adverse impact on older applicants.

At the time these two cases were decided there was substantial authority that ordinarily Title VII not only mandated accommodation but also forbade any use of seniority systems that frustrated accommodation and resulted in the exclusion of an entire class unless the employer could prove that the seniority system itself had independent "business necessity."35 Applying the statutory terms,
the courts held that a seniority system that resulted in discrimination against a protected class and that was not supported by "business necessity" was not the "bona fide seniority system" the statute required.

In 1977, however, the Supreme Court in *Teamsters v. United States* dramatically altered this analysis of seniority systems. Relying upon the legislative history of the Title VII seniority defense and the importance of seniority in American collective relationships, the Supreme Court concluded that, even absent independent business necessity, if the seniority system was not designed or intended to exclude the protected class, the employer could continue to apply that system even when it adversely affected a protected class.

Thus, the two cases interpreting the Age Act, perhaps anticipating *Teamsters*, were correct in determining that the court need not set aside a seniority system to accommodate the needs of older applicants. Furthermore, these cases were correct to the extent that they held that an employer need not ignore an established seniority system and pass over a younger but senior employee to place an older applicant or employee in a job that he could perform. Nor should the employer disregard the seniority system simply because the older, junior employee, because of age, can no longer safely or efficiently perform. The cases, however, did not present that issue. No applicant sought a regular run. No employee sought to transfer from the extra board or asked that the employer disregard the seniority system in order to accommodate his aging condition as an alternative to discharge. Again, it was the applicant's age and the undefinable future deterioration of skill coupled with the anticipated effect of the seniority system that prompted these employers' refusal to hire on the basis of age. It was not the application of the seniority system.

Taken in isolation, therefore, two aspects of the courts' analyses

---

Secretary of Labor's Interpretative Guidelines also provided that when examining seniority systems under the Age Act, "a seniority system which has the effect of perpetuating discrimination which may have existed on the basis of age prior to the effective date of the Act will not be recognized as 'bona fide.'" 29 C.F.R. § 860.105(b) (1977). Leading decisions indicated, however, that in determining layoffs an employer could justifiably utilize plant seniority even if the impact was to discriminate against recently hired women and minorities. Jersey Cent. Power & Light Co. v. Local Unions 327, 749, 1289, 1298, 1303, 1309, and 1314, IBEW, 542 F.2d 8 (3d Cir. 1976); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976) *cert. denied*, 431 U.S. 965 (1977); Watkins v. Steel Workers Local No. 2369, 616 F.2d 41 (5th Cir. 1979). *See also* United Air Lines, Inc. v. Evans, 431 U.S. 324 (1977).
were superficially correct. First, in high risk situations statistical data might support a refusal to hire on the basis of age if the employer could establish that a person of the applicant's age presents a statistically greater risk than a younger employee or that individualized evaluation of skill or health is an unreliable predictor. Second, the employer may honor established seniority systems. If the only way to retain an older employee is to make an assignment that would violate the system, the employer may legally refuse to accommodate the employee rather than disregard established seniority rights. Thus, no serious error exists in the general statements of legal principles in *Greyhound* or *Tamiami*. The error of these courts was to place these two principles together and apply them to a situation applicable to neither. For two reasons, it was error to permit the anticipated operation of the seniority system to justify the current refusal to hire an otherwise currently qualified employee. First, it misconstrues Title VII premises. Second, it ignores the special wording of the Age Discrimination Act in which the BFOQ defense appears.

37 The 1978 amendments to the Age Act provide that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978) (amending § 29 U.S.C. § 623(f)(2) (1970)). This amendment arguably could dictate a contrary result. It could prohibit all use of seniority to force retirement of an individual. Thus if retirement is the alternative to disregarding the seniority system, this amendment may require an employer to disregard the seniority system. It is doubtful, however, that the courts will interpret the amendment in this way. A seniority system could not by its own operation and its own terms impose an involuntary retirement based on age. Retirement pursuant to the seniority system, however, is based on the "system," not "age." See text accompanying notes 89-95 infra. It is doubtful that Congress intended the amendment to prohibit the recognition of seniority systems in such a situation. Indeed, the legislative history of the amendment indicates that Congress intended to retain the BFOQ concept and apply it in its former force to employees no longer able to perform. H.R. Rep. No. 527, 95th Cong., 1st Sess. 12 (1977); S. Rep. No. 493, 95th Cong., 1st Sess. 5 (1977); 123 Cong. Rec. S17298 (daily ed. Oct. 19, 1977) (remarks of Senators Javits and Williams). The purpose of the amendments was to alter the Supreme Court's decision in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), which permitted mandatory retirement pursuant to retirement plans that included within the plans obligations to retire before age 70. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8 (1978). It is doubtful, too, that without debate and discussion Congress was attempting to overturn the results of the Supreme Court's decision in *Teamsters*. Thus if the application of the system prohibits a junior employee from transferring to a job he can perform, the amended Act does not prohibit the employer from continuing to recognize the seniority system and discharge the employee who is no longer capable of performing his assigned duties.

38 The seniority system, however, would not necessarily prohibit the transfer of a driver to a regular run while he was within the age group presenting the lowest risk of accident. The facts indicated that in some cases transfer was possible with 10 years seniority. Thus a driver hired at age 40 could possibly secure a regular run by age 50. The safest age group was 50-55.
A key element of Title VII analysis is that selection criteria “must measure the person for the job, and not the person in the abstract.” Clearly, the courts, in upholding the denial of bus drivers' jobs to these applicants, did not measure them for the job for which they applied. They measured them “in the abstract,” rejecting them because at some future time they might not be qualified to perform. The employees might have quit, died, been promoted into management, transferred to a nondriving job, or even secured the seniority necessary for regular runs before age presented a statistical risk to the company. If and when a risk arose, the company could act. But until the risk exists, the employer should not, because of an abstract possibility of future events, have the right to deny the applicant a job he admittedly can perform.

The EEOC employee selection guidelines provide:

If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level . . . . [P]erformance at a higher job level is a relevant criterion . . . only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time. Although not directly controlling on the issue of future performance, the teachings of this guideline are relevant. Unless an employer expects that within a reasonable period of time the employee will be unqualified to perform the duties the employer will assign to him, he must make his selection on the basis of the duties that he initially expects the employee to perform. Anticipated future performance must rest upon future evaluations. Moreover, as noted above, if the employer can avoid the adverse impact of class-based exclusions by using a less discriminatory alternative, he has a statutory duty to make these reasonable accommodations.

---

41 See note 34 supra.
The employer has two options: (1) deny these qualified applicants employment because at some future time the seniority system might not permit them to transfer to a less demanding job, or (2) hire them, and if the employer cannot find other work when they can no longer safely perform as extra board drivers, discharge them at that point. The bus companies elected the first option. There is little employer justification for premature, sweeping refusals to hire when future termination, if necessary, would serve the employer's valid goals just as well. For the applicant over forty, work for a few years with a chance for a transfer is a less discriminatory alternative than no work at all. The second option, which the employer rejected and the courts ignored, clearly has a lesser discriminatory impact.

The unique and specific wording of the Age Act also supports the conclusion that the employer cannot use future disqualification and the operation of a seniority system to justify a refusal to hire. Under section 4(f)(2) of the Act, an employer may “observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . except that no such employee benefit plan shall excuse the failure to hire any individual.” A fair construction of this section is that it specifically prohibits the use of seniority systems as an excuse for the refusal to hire. The benefit plan and seniority system defenses both appear in the same subsection. Despite the wording in the “failure to hire” proviso at the end of section 4(f)(2), the proviso arguably qualifies both “benefit plans” and “seniority systems.” Thus it could read, “[n]o such benefit plan (including seniority systems) shall excuse the failure to hire any individual.”

Moreover, even if the term “benefit plan” in the proviso does not literally include “seniority systems,” the intent of the drafters seems clear. The employer can use these common types of systems (benefit and seniority) to make age distinctions among employees but can use neither “system” to deny employment. It would indeed be anomalous specifically to prohibit the employer from using benefit plans to deny employment but permit a seniority system, protected by the same statutory subsection, to justify the refusal to hire.

Current support for this interpretation is found in the 1978 amendment which expressly provides that employers may not use seniority systems to justify discharges based on age. The same

---


Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978): “[N]o such seniority system . . . shall require or permit the involuntary retirement of any individual [protected by this Act] because of the age of such individual.”
concept should apply to refusals to hire. The employer can use seniority only to distinguish among employees, not as a basis for denying employment.

The legislative history of the 1967 Act also supports the Act's direction toward securing hiring opportunities. Although recognizing that some systems might justify age distinctions among employees, the legislators indicated that the employer could not use those systems to deny employment initially.4

The Secretary of Labor has concluded that the BFOQ defense is to "have limited scope and application." It is an exception "to be construed narrowly," with the burden of establishing the defense upon the employer, union, or employment agency asserting it.4 The Secretary expressly recognizes the defense only when federal statutory law or regulations impose mandatory age limits, e.g., Federal Aviation Agency pilot age limitations,4 and where age is an intrinsic characteristic necessary for the job, e.g., models and actors.4 The courts have held that these interpretative guidelines are to be given substantial deference.4 The bus driver cases, however, instead of following a narrow interpretation, broadly construed the defense. The courts allowed the employers to carry their burden rather easily, not by proof of any present inability, but based upon speculative future problems. The courts permitted the employers to run rampant with statistics with no attempt to give each individual the great-

---


In the debate, Senator Yarborough stated that the Act "will not deny an individual employment or prospective employment, but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." 113 Cong. Rec. 31255 (1967). In addressing the impact of the seniority and benefit plan amendments, Senator Javits stated that "bona fide retirement and seniority systems will facilitate hiring rather than deter it and make it possible for workers to be employed without the necessity of disrupting those systems." Hearings Before Subcomm. on Labor of Senate Comm. on Labor & Public Welfare, 90th Cong., 1st Sess. 28 (1967). This history is quoted and discussed in United Air Lines, Inc v. McMann, 434 U.S. 192 (1977).

The thrust was to allow the systems to operate freely without deterring employment. The Greyhound and Tamiami courts' interpretations had nothing to do with the operation of the systems but in fact allow their existence to deter hiring of older workers.

4 29 C.F.R. § 860.102(b) (1977).
4 Id. at § 860.102(d).
4 Id. at § 860.102(e).
The recent case of Arritt v. Grisell\textsuperscript{49} justifiably questioned the vitality of the analysis in the bus cases. The employer in Arritt was a police department which refused to hire police officers over age thirty-five. Relying on Greyhound, the trial court summarily dismissed a complaint challenging the rule. The Fourth Circuit reversed and remanded for consideration of the issue according to the following test:

\begin{quote}
[T]he burden is on the employer to show (1) that the bfoq which it invokes is reasonably necessary to the essence of its business (here the operation of an efficient police department for the protection of the public), and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class (in our case, persons over 35 years of age) would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.\textsuperscript{50}
\end{quote}

The court specifically rejected the “minimal increase of risk” test which the court in Greyhound had used.\textsuperscript{51}

This recent pronouncement pointedly omitted consideration of risk factors. In a footnote, however, the court indicated that risk might be a valid factor to consider on remand in determining the job’s “essence.”\textsuperscript{52} Although citing Tamiami\textsuperscript{53} with approval, the court did not even suggest that the future operation of the seniority system was a factor for denying employment. That is a significant omission.

The final noteworthy court of appeals treatment of the BFOQ defense is Houghton v. McDonnell Douglas Corp.,\textsuperscript{54} in which the issue was whether the employer could reassign a fifty-two-year-old test pilot to nonflight duties because of his age. As in the bus driver cases, the defendant presented generalized, statistical data to demonstrate that reflexes and health decline with age. Here, however,
the plaintiff countered with specific evidence that he was in excellent health and had little chance of heart attack or stroke while flying and that the greatest cause of accidents is pilot error based on lack of experience, not illness or impaired reflexes. Plaintiff pointed to military and government practices and regulations permitting military and civilian pilots to continue flying until at least age sixty.

As in the other cases, the court adopted Title VII standards. The court stated that the burden is on the company to demonstrate that it has a "factual basis for believing that substantially all of the older pilots are unable to perform the duties of test pilot safely and efficiently or that some older pilots possess traits precluding safe and efficient job performance unascertainable other than through knowledge of the pilot's age." Applying that standard the court held that defendant had failed to establish a BFOQ.

Thus, a superficial anomaly is presented. Under current law, age is a BFOQ for bus drivers but not for test pilots. This, however, is an oversimplification. In the test pilot case, the issue was whether the employer could justify the transfer of the particular pilot on the basis of age. The plaintiff marshalled strong and specific evidence indicating the lack of significant danger if he continued for a few more years. The situation presented to the court differed from the bus cases in which the employer refused to hire on the basis of age, relying upon the anticipated impact of seniority systems upon the aging bus driver. The Houghton test pilot case, however, indicates that the court was strictly construing employer claims that age and accidents are necessarily correlated. It did not blindly accept, as did the bus driver cases, generalized assumptions about ability decreasing with age, partly because the plaintiff used rebuttal evidence more persuasively and partly because the court was aware that it must strictly construe and closely analyze the defense even when the defendant raises arguments of safety.

D. The 1978 Amendments

The 1978 amendments to the Age Act did not address the BFOQ defense. A Senate amendment specifically allowed mandatory re-

---

54 Accord, Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976). The court refused to impose mandatory retirement on an assistant fire chief. Although the court recognized health and safety arguments, it imposed on the defendant a heavy burden to show specifically how the potential health of this employee would jeopardize the defendant's interests.
tirement of an employee if the employer demonstrated that age was a BFOQ. The House bill had no BFOQ provisions. In conference, the Senate receded; the conference agreed that the Senate amendment worked no change in the law and was unnecessary. The final bill thus did not alter the 1967 language.

The House Committee Report, discussing the prohibitions of mandatory retirement under benefit plans, did indicate that the bill was not designed to "prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification." The Report continues:

It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered as a factor in hiring and retaining workers. For example, jobs such as some of those in air traffic control and law enforcement and firefighting have very strict physical requirements on which public safety depends. The committee, however, expects that age will be a relevant criteria for only a limited number of jobs.

As discussed above, the specific prohibition of age-based discharges because of a seniority system adds credibility to an already strong argument that the mere existence of seniority systems cannot justify refusals to hire.

E. The Bona Fide Occupational Qualification Defense in Perspective

The remedial purpose of the Age Discrimination Act was to counter the assumption that older workers are not as efficient as younger workers. In the early cases involving bus drivers, the courts seemed much too willing to accept generalized correlations between aging and ability. Using the justifiable concern of public safety as a rationale, they did not critically analyze the evidence. This relaxed attitude simply perpetuated the very evil the statute was attempting to remedy. In later cases, the courts appear to be resisting the temptation to accept generalized assumptions about the risks inherent in employing older workers. They are demanding proof of actual inability and are critically analyzing that proof. These decisions more faithfully serve the purposes of the Act.

---

59 Id.
The courts in the early bus driver cases stretched the BFOQ defense to justify the refusal to hire presently qualified employees on the assumption that their future susceptibility to ill health might increase risks of unsafe performance. The employer bootstrapped the BFOQ defense by claiming that the existence of the seniority system prohibited the hiring of the older worker because he probably would not be transferred to a less strenuous position prior to the age at which the risks would increase. The argument is spurious; it completely misconstrues the concept of BFOQ developed under Title VII and the Age Act. Allowing speculation about future ability or inability to justify refusal to hire presently qualified applicants could destroy the effective application of the statute. It is still a bit too early to tell, but the later cases, particularly the Fourth Circuit case of Arritt v. Grisell, appear to ignore or avoid the misconstruction of the earlier bus driver cases. The courts should not only ignore them; they should bury them before they corrupt or trap unwitting litigants and courts.

III. BONA FIDE BENEFIT PLANS

A. Introduction

Many, if not most, large employers have employee benefit programs dependent upon the employee's salary, age, and length of employment. An employer might use a benefit plan to justify age discrimination in three situations. First, the employer might refuse to hire an older applicant because the employer believes older employees will disrupt the actuarial calculations on which the plan is based. This is particularly true of health care programs. Second, the plan would have an adverse impact on older employees if persons hired at an older age were not to qualify for a pension because of length-of-service vesting requirements or if the older employee's health or retirement benefits were less or cost the employee more. Thus the effect of the plan would be to discriminate against the worker hired at a later age. Third, the benefit plan might call for retirement of employees on the basis of age.

---

64 567 F.2d 1267 (4th Cir. 1977). It is also worthy of observation that no court has specifically approved of the reasoning in Greyhound. In the subsequent bus driver case, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), the court specifically disapproved of the broad test announced in Greyhound and rather reluctantly affirmed a trial court ruling that the defendant had established the BFOQ defense. Other cases, although not directly related to the issue resolved in Greyhound and Tamiami, have given the defense a rather strict interpretation. See Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), cert. denied, 434 U.S. 966 (1978); Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976).
Recognizing the use of benefit plans as a potential problem, the 1967 Act, in section 4(f)(2), sets forth the "seniority-benefit plan" defense:

It shall not be unlawful for an employer, employment agency, or labor organization—

. . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual. 41

The Act clearly resolves two of the possible situations in which the employer might utilize a benefit plan to affect older persons adversely. First, the proviso clearly stipulates that the employer cannot use the benefit plan as an excuse for failing to hire an applicant. Regardless of the good faith, the bona fides, or objective reasons why the plan could not actuarially accommodate the older applicant, that plan cannot justify age discrimination in the initial employment decision.

As to the second situation, adverse impact on older employees, the Act and its accompanying history clearly permit the employer to apply a benefit plan to distinguish among employees 42 with the


I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan.

The Secretary of Labor's Interpretative Guidelines also emphasize this point:

For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers . . . . Further,
caveats that the plan must be "bona fide" and not "a subterfuge to evade the purposes of the [Act]." Consequently, assuming that the plan is objectively bona fide and subjectively not used as a "subterfuge," an employer could simply apply his plan to his work force. The employer may follow his plan even if it requires a certain vesting period that effectively prohibits workers employed at a later age from claiming benefits. A plan may provide for differing health or retirement benefits even though the employer contributes equal amounts for each employee; such a plan would be lawful. Some plans having equal employer payments may require the older employees to pay more for coverage, and the defense would protect these plans as well.\footnote{29 C.F.R. § 860.120(a)(1977).}

As to the third situation, the 1967 Act was silent. Clearly, absent a benefit plan, forced retirement of those within the protected age group is a prima facie violation of the Act. Thus the issue is to what extent the employer may use a retirement plan as a defense to the prima facie violation.

The history of the 1967 Act is ambiguous; segments and sequences

\footnote{29 C.F.R. § 860.120(a)(1977). The Secretary of Labor provides more specifically: A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension, or retirement benefits, or insurance coverage.

Id.\footnote{Id. The courts have not followed this result under the pay discrimination provisions of Title VII. In City of Los Angeles v. Manhart, \textit{---} U.S. \textit{---}, 98 S. Ct. 1370 (1978), the Supreme Court held that an employer who made equal retirement contributions for each employee but required each female employee to contribute more to the retirement program engaged in illegal sex discrimination. The Court rejected the argument that a woman's longer life expectancy and the employer's equal contributions for all employees justified the disparate treatment. Cf. EEOC v. Colby College, 439 F. Supp. 631 (D. Me. 1977), in which the court distinguished Manhart because the employer made similar monthly annuity payments for male and female employees but because of actuarial longevity, upon retirement the females received a lower monthly retirement payment and the males received lower death benefits. Manhart would not compel a similar result under the Age Act. The Age Act has a specific defense permitting the application of bona fide benefit plans; Title VII does not. Furthermore, the legislative history of the Age Act's § 4(f)(2) benefit plan defense indicates that differing benefits or employee costs based on age were contemplated and sanctioned. See text accompanying note 59 supra & note 78 and accompanying text infra. Thus at least if the employer payments or costs are the same regardless of age, differing end benefits or differing costs to employees would not constitute illegal age discrimination.}
support conclusions on both sides of the issue. The Department of Labor, however, in exercising its interpretive and enforcement function, concluded that "the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2)." Thus if a benefit plan is "bona fide" and not used as a "subterfuge," the Labor Department would have sanctioned its application to force retirement.

By 1975 the Department had modified its position somewhat, but rather than revoke its interpretative guideline, it directed its enforcement policy on an end run around that guideline. The Department pointed out that although involuntary retirement was not per se improper, it was permitted only if the benefit plan was bona fide and not a subterfuge. By interpreting the statute's two qualifying terms, the Department concluded that a qualified plan could legally permit mandatory retirement only if early retirement was "essential to the plan's economic survival or to some other legitimate purpose—i.e., [that it was] not in the plan for the sole purpose of moving out older workers." Thus, although conceding that, at least theoretically, plans could demand retirement, the Department added an interpretative gloss on the concepts of "bona fide" and "subterfuge" that indirectly prohibited mandatory retirements under many, if not most, plans. Most employers simply could not demonstrate economic reasons flowing from the plan itself that would justify early retirement. In the lower federal courts, this interpretative sleight of hand had a mixed reception.

The first case arose in the Fifth Circuit. The court rejected the Secretary's argument and held that a plan enacted prior to 1967, the effective date of the statute, could not, as a matter of law, be considered a "subterfuge." The second case arose in the Fourth Circuit. There the court adopted the Secretary's position. The court rejected the notion that the date of the retirement plan's initiation was relevant in determining whether or not it was a subterfuge. In addition,

---

7 Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).
the court accepted the argument that the concept of subterfuge required the early retirement provisions to have an economic or business purpose apart from desire to remove older workers. In the final case, the Third Circuit agreed with the Fourth Circuit's evaluation that the concept of subterfuge did not depend upon the date of the retirement plan's initiation. The issue as this court saw it was whether the forced retirement under the plan violated a purpose of the Act. The Third Circuit, however, disagreed with the Fourth Circuit on whether subterfuge contained an element of independent economic justification. According to the Third Circuit, Congress intended to distinguish between "retired" employees and "discharged" employees by permitting mandatory retirement pursuant to a plan paying meaningful benefits to the retired employee even though the employer did not establish an independent economic or business justification for early retirement.

This division among circuits prompted the Supreme Court to grant certiorari in the Fourth Circuit case to review the holding that "subterfuge" contained a requirement of independent economic justification which the employer must prove in order to permit early retirement pursuant to an otherwise bona fide plan.


In United Air Lines, Inc. v. McMann, a sixty-year-old employee was forced to retire pursuant to a retirement plan which the employer had established in 1941. Plaintiff was hired in 1944 and joined the retirement plan in 1964. It was established that the plan paid substantial benefits to retiring employees and that it had been regularly applied to all persons when they reached sixty. The plaintiff conceded that the plan was "bona fide" in that it existed and provided benefits but argued that it was a subterfuge to evade the purposes of the Act because it lacked any independent economic justification for the forced retirement. On the other hand, the defendant conceded that if it had adopted the plan after 1967, it would

---

70 Id. at 194.
not satisfy the elements of the defense. The defendant argued, however, very subtly, that because it had adopted the plan prior to the effective date of the Act, as a matter of law it could not be a subterfuge. The parties thus presented to the Supreme Court a very narrow issue for resolution.

The plaintiff did not rely upon a per se rule that all mandatory retirement pursuant to any plan was outside the defense and thus illegal; the Secretary of Labor's regulations preclude this argument. The plaintiff admitted that if a plan was “bona fide” and not a “subterfuge,” the employer could use it to force involuntary retirement. Furthermore, the plaintiff elected not to utilize the concept of bona fide as the vehicle to impose a requirement of independent economic justification. The plaintiff proposed a very narrow and restrictive interpretation of “bona fide,” conceding that a plan would meet that requirement if it existed, was regularly applied, and provided meaningful benefits to retired employees. The defendant, on the other hand, conceded that if he had adopted the plan after the effective date of the Act, it would be a “subterfuge.” The defendant thus effectively conceded that independent economic justification was required of all post-Act retirement plans.

In all of this misdirection which the litigation stance of the parties created, it is understandable how the Supreme Court’s approach to the problem left much to be desired. The Supreme Court directed the bulk of its opinion to the issue of whether Congress intended to prohibit, as a matter of law, involuntary retirement pursuant to admittedly bona fide plans. Since the parties had not made and the court of appeals had not relied on this argument, this aspect of the Court’s opinion appears directed more to the per se argument of the dissent than to the issue presented. Nonetheless, the Court concluded what the parties virtually conceded: Congress intended to permit involuntary retirement pursuant to bona fide, nonsubterfuge benefit plans.

Less than a half a page of the opinion, however, addressed the issue actually framed by the parties, that is, whether a plan adopted prior to the Act is a subterfuge to avoid the purposes of the Act unless the employer can establish the independent economic justification for the early retirement. The Supreme Court disagreed with the Fourth and Third Circuits that the date of the plan is immater-
It adopted the position of the Fifth Circuit, concluding that Congress did not intend "invalidation of retirement plans instituted in good faith before [the Act's] passage," nor did Congress intend "to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans . . . . [A] plan established in 1941, if bona fide, as conceded here, cannot be a subterfuge to evade an Act passed 26 years later."

Certainly, the Court's analysis can be criticized. But when the parties kept directing the Court to a particular shell, one can hardly blame the Court for lifting the shell and finding no pea. For example, no one, including the Secretary of Labor, argued that Congress had created a per se rule outlawing all mandatory retirement regardless of the nature of the plan. The Court's somewhat gratuitous agreement with them can hardly be blamed on the Court. Second, the appropriate place to analyze the objective element of business or economic necessity is under the rubric of "bona fide." The term "bona fide" carries with it all the objective elements that would make a proffered justification legally acceptable. To be bona fide one could assume that the plan must be at least concrete, if not written. It must be regular in form, predictable, and similarly applied to persons similarly situated. Presumably the concept requires some communication to employees of the existence of the plan. Bona fide requires that the employee receive meaningful benefits from the plan and that the plan not violate other statutes or public policy by having, for example, improper race or sex distinctions. All these are objective elements. Independent economic or business justification is also an objective element.

The statutory element of "subterfuge," however, is entirely different; it is subjective. It carries connotations of intent, motive, and
purpose. A plan is a "subterfuge" and will not support discrimina-
tion because of age even though it is objectively reasonable if the
employer uses it for improper reasons or to secure an improper
goal. Thus when plaintiff conceded that the benefit plan was objec-
tively "bona fide" and then attempted to impose on the subjective
term "subterfuge" the objective element of business necessity, he
imposed a burden the term could not easily bear. It is not surprising
that a court could conclude that "subterfuge" does not require proof
of business necessity.

On the other hand, there is little justification for the Court's
conclusion that as a matter of law a plan adopted prior to the Act
could not be a subterfuge. Under the Court's reasoning, two employ-
ers with identical retirement plans, adopted for identical purposes,
would be treated differently. Even if the purpose of the pre-Act plan
was to rid the employer of older workers whom he believed to be
inefficient and expensive, the obviously improper purpose, if framed
in a plan adopted prior to the Act, was immaterial. The Court
overlooked the import of the statutory language, which prohibits
subterfuge to avoid, not the command of the Act itself, as the Court
supposes, but the "purposes of the Act." Clearly one of the purposes
of the Act is to prohibit invidious distinctions among employees
because of age. Remedyng this form of discrimination is a purpose
that the court should honor, not avoid under some arbitrary time
sequencing.

The Court, however, is not entirely to blame for its strained con-
struction. There were two ways the Court could uphold forced retire-
ment under apparently bona fide retirement plans. It could take the
approach of the Fifth Circuit and conclude that the employer need
not establish economic necessity for retirement under pre-Act
plans. Alternatively, it could have concluded, as did the Third
Circuit, that proof of economic necessity was never required; all
plans, pre- or post-Act, were to be judged on the basis of a limited
noneconomic concept of bona fide. The defendant's concession
that post-Act plans without economic justification would violate the
Act prevented the Court from following the second option. To be

17 Hence the subterfuge element of § 4(f)(2) serves as a check on the objective test of the
"bona fide" element. Even though a plan may be technically bona fide applying objective
standards, if the motive for adopting or maintaining the plan contravenes the purposes of the
Act, the plan will not pass muster under § 4(f)(2).

18 Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).

consistent with its view of congressional intent in the face of defendant's concession, the Court was virtually forced to conclude that the pre-Act adoption insulated from attack an otherwise bona fide plan.\textsuperscript{82}

To present the issue as it should have been presented, the plaintiff should not have conceded that the plan was bona fide. Rather, it should have argued that to be bona fide, the plan must satisfy many objective elements, including some independent economic reason apart from the desire of the employer to rid itself of older workers. It is far more manageable to analyze the objective element of economic reasons under the rubric of the objective term "bona fide" than under the subjective element of "subterfuge." On the other side of the counsel table, the defendant perhaps should not have conceded that post-Act benefit plans must justify forced early retirement in terms of business necessity. Defendant could have argued that regardless of when enacted, "bona fide" refers only to existence, regularity, and benefits. Had the parties proceeded in this manner, they would have presented the Court with the precise issue that it needed to resolve. As it was, the Court resolved both too little and too much: too little because the role of bona fide and subterfuge in analyzing post-Act plans is still undecided; too much because the Court could have resolved the key underlying issues without its sweeping confirmation of virtually all pre-Act retirement plans.

C. The 1978 Amendments

With promptitude rare for Congress, it revised \textit{McMann} by statute. Congress amended section 4(f)(2) in 1978 by providing that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [protected by the Act] because of the age of such individual."\textsuperscript{83} The legislative history

\textsuperscript{82} Although \textit{McMann} reached the Supreme Court before \textit{Zinger}, the Court could have continued the \textit{McMann} case and granted certiorari in \textit{Zinger} which presented the issue more clearly. By so doing, the Court could have addressed the issue of economic necessity directly.

\textsuperscript{83} The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978). The statute has three saving clauses. The first allows retirement pursuant to a collective agreement in effect on September 1, 1977, until the termination of that agreement, but no later than January 1, 1980. The second permits mandatory retirement of tenured college professors between the ages of 65 and 70 until July 1, 1982. The third exception allows the mandatory retirement of bona fide executives or high policymakers between the ages of 65 and 70 if the employee has held that position for at least two years prior to forced retirement and the employee is entitled to an immediate, nonforfeitable
of the amendment clearly indicates Congress's intent: "The confer-
nees specifically disagree with the Supreme Court's holding and rea-
soning in [McMann]. Plan provisions in effect prior to the date of
enactment are not exempt under section 4(f)(2) by virtue of the fact
that they antedate the act or these amendments."44

With the addition of this limitation there are now two restrictions
on the bona fide seniority and benefit plan exception. The 1967 Act
provides that the employer may not use a plan to refuse employ-
ment, and the 1978 amendments provide that the employer may not
use a plan to require or permit involuntary retirement. The em-
ployer must base an employee's mandatory retirement prior to age
seventy on "cause," "factors other than age," or a "bona fide occu-
pational qualification."

What the amendments do not address is the extent to which the
employer may use a plan to discriminate among employees. The
plans still must be "bona fide" and not used as a "subterfuge" to
avoid the purposes of the Act. Although the history clearly indicates
that the date of adoption of the plan is immaterial in resolving the
issues of bona fides and subterfuge, it adds little additional light on
the proper interpretation of those statutory terms. That is why the
misdirection of McMann is so unfortunate. Because of the plaintiff's
restrictive argument of "bona fide," the Court found that the par-
ties had conceded that the plan met the statutory definition of
"bona fide" and thus did not give any interpretative guides to that
term. Because the Court rested its opinion on the sweeping view
that no pre-Act plan could be a subterfuge, it did not scrutinize that
element either. And now, even though the history of the amend-
ments establishes that a pre-Act plan can be a "subterfuge," there
is no statutory guidance as to exactly what is and is not within the
term.

D. Suggested Analysis

The 1978 amendments unequivocally answer the major interpre-
tative problem of the 1967 Act, that is, under what circumstances
an employer can use a retirement program to retire involuntarily
employees within the protected age group. The amendments say
never! The result is that regardless of good faith and bona fides, the

---

employer can apply seniority systems and benefit plans only to current employees. Even as to them, however, these systems and plans must pass muster as both "bona fide" and not a "subterfuge to evade the purposes of the [Act]." Both the Act and the amendments leave unresolved the determination of when the systems and plans meet the qualifications of "bona fide" and non-"subterfuge." More particularly, must economic or business necessity justify benefit and retirement plans applicable to current employees? For example, can an employer, without proof that he bases his denial on sound economic necessity, deny an employee hired at a later age the right to participate in a health care program because inclusion of the older worker would work an undue hardship on the employer or threaten the solvency of the plan? Can an employer pay maximum retirement benefits at age 65, thereby inducing early retirement by denying employees incremental increases in retirement benefits by their continuing to work until age 70? Absent an economic justification for freezing benefits is it a permissible, bona fide application of the system? The issue remains open even after Supreme Court opinion and an amendatory statute which purportedly addressed the general problem.

It is submitted that the appropriate analysis should include the concept of business necessity as an element of bona fides. A rule that discriminates directly or indirectly against older workers is only bona fide if it has some objective justification. The absence of objective economic justification indicates arbitrariness, and arbitrary action can hardly be bona fide. Furthermore, the term "bona fide," when used in conjunction with "occupational qualification," imposes an objective business necessity element.9

Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971). The boundaries of this concept of "bona fides" including an economic necessity element are beyond the scope of this Article. A brief example, however, of economic considerations should illustrate the point. An employer could make equal contributions for each employee toward payment of a group life, health, or retirement plan. The plan would not be invalid just because benefits might differ on the basis of age or because some older employees might be required to make personal payments in order to continue their participation. See note 63 supra. But if the employer were to cut off all payments to any such program and drop the older employees from the program entirely, he would need some business or economic necessity to support his action. Because the employer would be denying the employee a form of compensation solely on the basis of age, he would have the difficult burden of showing that the amount saved by dropping the older employee from the plan was economically justifiable in terms other than business costs. By inference the Secretary's interpretative regulations support this thesis.

An employer should not be allowed to use the existence of a benefit plan to reduce the effective compensation of his older employees. Employers need not increase their costs
It is submitted, too, that "subterfuge" is solely an element of subjectivity. Thus if the employer imposes on his employees a benefit plan for the purpose of discouraging older workers from seeking or continuing employment the plan is a subterfuge to evade the purposes of the Act regardless of the plan's objective justifications. The courts should not allow post hoc justifications to justify purposeful age discrimination.\textsuperscript{8}

This theory, although modified somewhat, was the approach taken by the Fourth Circuit in \textit{McMann}. That court recognized the basic concept that in order to utilize a plan that discriminates against older employees an employer "must have some economic or business purpose other than arbitrary age discrimination."\textsuperscript{9}\textsuperscript{9} Although the Supreme Court reversed the decision, it did not reverse this point. More important, Congress specifically approved the reasoning of the Fourth Circuit decision. Thus, if one can draw any inference from this history, it is that Congress reads into the concept of bona fides an element of business or economic justification for the plan. Without such economic justification, the employer cannot use

---

with the age of the employees. Nor should they be allowed to discriminate in the benefits supplied by reducing forms of indirect compensation to the older employees.\textsuperscript{29} C.F.R. § 860.120(a) (1977).

Some support can also be found in the 1978 legislative history. The Senate Committee Report on the 1978 amendments indicates:

Concerns were also expressed regarding potential increased costs for employee welfare benefit plans such as disability, health, life and other forms of insurance for employees. Presently some employers reduce coverage for older workers under these plans or increase the required employee contributions as workers advance in age. This bill would not alter existing law with respect to these practices.


It is significant that the report allows a reduction in benefits or an increase in employer contribution but does not permit a decrease in employer contribution. The same report later emphasizes the importance of actuarial and real costs in evaluating the plan. \textit{Id.} at 16. Representative Waxman, commenting on the proposed legislation, stated that "[i]n the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the Act." 124 Cong. Rec. H2277 (daily ed. Mar. 21, 1978).

\textsuperscript{8} \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 436 (1975). Although \textit{Albemarle} was a Title VII case; the Court indicated that even statistically validated preemployment tests might be improper if the plaintiff could establish that the employer used the test as a pretext to discriminate against applicants on the basis of race. \textit{See also NLRB v. Great Dane Trailers}, Inc., 388 U.S. 26 (1967), where the Court held that even if the employer had substantial business justification for discrimination against employees, the discrimination would violate labor relations legislation if it were actually motivated by a desire to discriminate because of union membership.

the plan to justify the challenged discrimination under section 4(f)(2). Thus, as a freeze on benefits at a particular age such as 65 has elements of subterfuge and may lack objective economic bona fides it should not be permitted.

At the very least courts and litigants should avoid confusing the two elements that are necessary to validate a benefit plan. Objective justification such as the actual existence and regularity of the plan, communication to employees, and economic reasons for the plan's provisions must be analyzed in terms of the plan's bona fides. Subjective elements such as purpose and intent for adopting or applying the plan go to the issue of "subterfuge." Most of the analytical confusion on this point results because the parties do not clearly identify the appropriate role of the two statutory elements.

IV. Bona Fide Seniority Systems

Section 4(f)(2) of the Age Discrimination Act allows employers, unions, and employment agencies "to observe the terms of a bona fide seniority system." The 1967 Act would seem to prohibit the employer from refusing to hire an employee because of the existence of that seniority system. Two courts have allowed an employer to refuse to hire bus drivers on the basis of the anticipated operation of the company's seniority system, and the first part of this Article criticizes this result. The 1978 amendments are even clearer in their prohibitions against using the seniority system to force an involuntary retirement or discharge: "[N]o such seniority system . . . shall require or permit the involuntary retirement of any individual [protected by the Act] because of the age of such individual." A fair reading of the Act would seem to lead to the conclusion that the employer cannot use seniority systems as a basis for either refusal to hire or discharge but only to differentiate among employees.

Two major issues about the use of seniority remain. The first issue is whether the Act prohibits the employer from using seniority to determine lay-off and recall. The statute does not permit seniority systems to require involuntary retirement because of age, but it does not prohibit retirement (temporary or otherwise) because of the application of the seniority system. When a lay-off is necessary for

---

* See note 85 and accompanying text supra.
* See text accompanying notes 24-56 supra.
general economic reasons, using seniority to determine layoffs will often adversely affect a particular age group. Nonetheless, in spite of the adverse impact on a particular age group the lay-off is not, in the words of the statute, "because of the age of the individual." The lay-off is because of the lack of seniority. Such use of a "bona fide seniority system" is protected by the Act.

The Supreme Court's decision in Teamsters v. United States virtually dictates this result. The Court held in Teamsters that under Title VII the neutral application of an otherwise bona fide seniority system was valid and that the employer need not disregard an established seniority system in order to avoid adverse impact. Other cases have specifically held that Title VII allows an employer to follow a seniority system which mandates that the last hired be the first fired even though he fires a disproportionate number of recently hired minorities and women. To hold to the contrary under the Age Act, i.e., to prohibit the discharge made pursuant to a seniority system, would clearly frustrate the policy the Supreme Court announced.

The second issue that remains is whether in applying the seniority system to current workers to award competitive advantages the employer must justify the seniority system on the basis of independent business necessity. Under Title VII, prior to Teamsters, the lower federal courts uniformly held that when the application of a seniority system had a discriminatory impact, the employer could honor seniority only if he justified it economically. Absent that justification the system was not "bona fide." The Supreme Court, however, rejected that interpretation in Teamsters by holding that the seniority system, if otherwise bona fide and applied in good

---

81 The impact of a seniority system will generally be to prefer older employees over younger ones, but the employer may make no intentional distinction on the basis of the age of the applicant or employee if the distinction affects individuals within the protected age group of 45 to 65 (now 70). Thus to prefer a 50-year-old employee over one who is 40 would be equally violative of the act as to prefer the younger over the older. It is not, however, a violation to prefer an older worker over an employee less than 40 years old. 29 C.F.R. § 860.91 (1977). See note 2 supra.


84 Jersey Cent. Power & Light Co. v. Local Unions 327, 749, 1289, 1298, 1303, 1309, and 1314, IBEW, 542 F.2d 8 (3d Cir. 1976); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977); Watkins v. Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975).

85 See note 35 and accompanying text supra.
faith, carries sufficient societal interests to justify its application even absent additional and independent business reasons for its application. The rationale would seem to be controlling under the Age Act. Even if under the seniority system one class of employees receives better treatment in part because of age, the employer need not show separate economic reasons to honor the seniority system.

This conclusion may seem to conflict with the suggestion above that in order to justify distinctions among employees, employee benefit plans should be supported by independent justification. The difference, however, is in the nature of the systems. Congress and the courts have noted that seniority systems have significant societal value to both workers and employers wholly apart from strict economic necessity. Benefit plans lack much of this inherent and historical importance and thus need to carry some indicia of economic reasons to justify distinctions based on age. Absent these independent indicia, benefit plans appear arbitrary and lack bona fides.

V. Conclusion

The first cases analyzing the BFOQ defense under the Age Act gave lip service to Title VII analysis, but they grossly misapplied the thrust of Title VII and the purposes of the Act by allowing anticipated future disabilities to disqualify presently qualified applicants. They bootstrapped a BFOQ by anticipating operation of a seniority system. The 1978 amendments did little to correct this misapprehension. Future courts must be alert to this erroneous approach.

The bona fide benefit plans went through a brief but stormy season of litigation over whether an employer could use a retirement plan to retire mandatorily employees within the protected age group. In a case presented in a confusing context, the Supreme Court held that, at least for retirement plans predating the 1967 Act, the employer could mandatorily retire employees pursuant to a bona fide plan. The 1978 amendments reverse the specific holding of that decision and establish a per se rule: the employer may not impose retirement before the employee is seventy years old regardless of any good faith or bona fides of the retirement program. The employer must justify forced retirement of those in the protected age group, if at all, under the "cause" or BFOQ defenses. Remaining for resolution is the proper interpretation of the qualifications a benefit plan must meet before the employer can apply the plan to current employees. In short, what is meant by the statutory terms "bona fide" and "subterfuge" is still unclear. Bona fide would seem
to include the element of economic or business necessity, an objective element that must be present before an employer can use a benefit system to discriminate among employees because of age. "Subterfuge" is more appropriately analyzed as a subjective element that would prohibit the application of even a bona fide plan if the employer uses the plan to discriminate on the basis of age. Courts must be alert to the proper interpretation of these two terms.

The courts have yet to interpret seriously seniority systems under the Age Act. The 1967 Act, as amended in 1978, prohibits the use of a seniority system to deny employment or force retirement because of age. An employer, however, can probably act in good faith even if he observes the plans in making employment decisions. Furthermore, unlike benefit plans, the Title VII case of Teamsters v. United States would seem to control application of seniority systems. Thus the employer need not establish independent business justification in order to prove the bona fides of the system and its operation.

After eleven years, we know surprisingly little about the defenses under the Age Discrimination in Employment Act.