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COMMENTS

THE PROBLEM OF INVOLUNTARY RETIREMENT BEFORE AGE 65

*"I am afraid that, in trying to assist those affected by the very real problem of age discrimination, we have pried open a can of legal worms."**

Today a large number of older Americans, denied employment opportunities or involuntarily removed from their jobs, are entering the courts to challenge the legality of the employment decisions which placed them among the unemployed. The challenges are based on claims of age bias in employment practices.

There are many forms of age discrimination in employment. Some of these discriminatory practices are prohibited under state or federal law.¹ Others are excepted from these laws, an apparent concession to the employers' claims of commercial necessity.² Another form of age discrimination—the involuntary retirement of older employees before they reach age sixty-five—is to some legal minds a permissible employment practice, and to others, an invidious denial of protected rights. The problem of discrimination against older workers³ and the ap-

* S. REP. NO. 723, 90th Cong., 1st Sess. 15 (1967) (Individual Views of Senator Dominick).

1. There are at least 32 states as well as the federal government which currently have operative age discrimination laws or regulations. Kovarsky & Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 915-25 (1974) [hereinafter cited as Kovarsky & Kovarsky]. Puerto Rico and the District of Columbia also prohibit age discrimination in employment.

The various fair employment practice laws of the states are compiled at [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451.

2. For a general cataloging of reasons why employers do not hire or promote older workers, see Kovarsky & Kovarsky, *supra* note 1, at 845; Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1315 (1974); Fine, *Older Workers in Pursuit of New Careers*, in TOWARD AN INDUSTRIAL GERONTOLOGY 39, 41-43 (H. Sheppard ed. 1970); Slavick & Wolfbein, *The Evolving Work-Life Pattern*, in HANDBOOK OF SOCIAL GERONTOLOGY 298, 308 (C. Tibbits ed. 1960).

3. For purposes of this article, an older worker is defined as an individual at least forty years of age but less than 65 years of age. This is the age group which is included within the protection of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1970).

plicability of federal age discrimination laws is the subject of this article.

I. THE NATURE OF THE PROBLEM

Age discrimination in employment affects thousands of American workers.⁴ It is a problem of ever-increasing magnitude in a country where the average age of the population moves continually upward,⁵ a trend which is expected to continue for the next several decades.⁶ At present, thirty-seven million people in the United States are between forty and sixty-five years of age, approximately forty-four percent of the eighty-four million over sixteen years of age.⁷ By 1990, it is estimated that forty-seven million Americans will be between forty and sixty-five years old.⁸

Currently more than eleven million employees are members of retirement plans which require retirement before age sixty-five, and several million are members of plans which permit involuntary retirement before that age.⁹ The question of

4. See H. R. REP. NO. 805, 90th Cong., 1st Sess. 2 (1967) (message of President Johnson) [hereinafter cited as HOUSE REPORT]; *Legal Problems Affecting Older Americans: Hearings Before the Special Senate Comm. on Aging*, 91st Cong., 2d Sess. 19 (1970); U.S. DEPT. OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964; RESEARCH MATERIALS 67-69 (1965) [hereinafter cited as RESEARCH MATERIALS]; Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U. L. REV. 383, 384-88 (1966) [hereinafter cited as *Older Worker*]; Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976) [hereinafter cited as *Age Discrimination*].

5. The trend toward an older America is best illustrated by an examination of the median age of the population. In 1800, the median age of the white population was 16. By 1970, the median age of the United States population had risen above 28 years. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 33 (94th ed. 1973).

6. M. BARRON, *THE AGING AMERICAN* 32 (1961); SPENGLER, *AGING POPULATIONS: MECHANICS, HISTORICAL EMERGENCE, IMPACT, IN EMPLOYMENT, INCOME, AND RETIREMENT PROBLEMS OF THE AGED* 35 (J. Kreps ed. 1963); Schulz, *The Economic Impact of an Aging Population*, 13 *THE GERONTOLOGIST* 111-12 (1973).

7. EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPT. OF LABOR, *AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967* 1 (1972).

8. Kovarsky & Kovarsky, *supra* note 1, at 840.

9. 69 MONTHLY LABOR REV. 41 (April 1973); See also *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 22 (1967) [hereinafter cited as 1967 *Hearings*]. One study found that of 21 million workers covered by private pension plans in 1971, 7 million (34%) were subject to compulsory retirement, 3.5 million (17%) were subject to automatic retirement, and 1.5 million (7%) to a combination of the two. EMPLOYMENT STANDARDS DIVISION, U.S. DEPT. OF LABOR, *AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 — A REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1973* 28-29 (1974).

whether a retirement or pension plan may lawfully require retirement before age sixty-five is of basic importance to the administration and enforcement of the federal and state age bias laws.

The problem of involuntary retirement plans is one of comparatively recent origin. Prior to the enactment of the Railway Labor Act¹⁰ and the growth of labor unions, the terms and conditions of employment were usually fixed for each employee on an individual basis.¹¹ As union membership increased, collective bargaining supplanted the individual negotiation of employment terms. The passage of the Wagner Act¹² in 1935 further stimulated union growth, and collective bargaining prevailed in most industries in interstate commerce. The Wagner Act required both employers and labor representatives to bargain in good faith over wages, hours, and other conditions of employment.¹³ The good faith bargaining requirement brought employees a number of concessions from their employers. For example, employers relinquished considerable authority in the areas of hiring, promotion, and retention of employees and also agreed to provide a number of benefits to qualified employees.¹⁴

As a result of this realignment in the respective bargaining positions of the parties, many union contracts with employers provided for retirement benefits. Prior to the enactment of the various state and federal age discrimination laws, employers' retirement practices were often challenged under the Taft-Hartley Act.¹⁵ Pension and retirement benefits were recognized as an issue directly related to wages and hours of employment¹⁶ and a mandatory subject for collective bargaining.¹⁷ However, when the contract was silent, employers were said to have unilateral control over the retirement decision as long as they acted in a reasonable and nondiscriminatory fashion.¹⁸ Absent

10. Ch. 347, 44 Stat. 577 (codified in scattered sections of 15, 18, 28 and 45 U.S.C.).

11. Kovarsky & Kovarsky, *supra* note 1, at 868.

12. 29 U.S.C. §§ 151-66 (1970).

13. 29 U.S.C. §§ 158(a)(5), 159 (a) (1970).

14. Kovarsky & Kovarsky, *supra* note 1, at 868.

15. 29 U.S.C. §§ 141, *et seq.* (1970).

16. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1949); *Hughes v. Chicago, R.I. & Pac. R.R.*, 26 L.R.R.M. 2317 (W.D. Okla. 1950); *Flowers v. Bhd. of Locomotive Firemen*, 212 Ga. 142, 91 S.E.2d 41 (1956); *Lamon v. Ga. S. & Fla. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

17. *See NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

18. *Cashner v. United States Steel Corp.*, 327 F.2d 533 (6th Cir. 1964); *United*

a showing of an illegal motive violating the Railway Labor Act or Taft-Hartley Act, unions and management were free to set virtually any retirement age and impose any condition on retirement benefits by contractual agreement.¹⁹ The age discrimination laws curtailed this negotiation freedom.

II. THE LEGISLATIVE APPROACH

A. State Age Laws

In 1903, Colorado became the first state to enact a prohibition of age discrimination.²⁰ The law simply banned the discharge of an individual between the ages of eighteen and sixty years where the discharge was based "solely and only upon the ground of age."²¹ Similar laws were enacted by Louisiana in 1934 and Massachusetts in 1937.²²

These early laws were essentially criminal statutes and were sporadically enforced.²³ Today, following the lead of Massachusetts in 1950, most jurisdictions that prohibit age discrimination²⁴ have delegated enforcement responsibility to administrative agencies.²⁵ This is the approach taken by Wisconsin, where the responsibility for administering the state's Fair Employment Act,²⁶ which includes a prohibition against age discrimination, is statutorily delegated to the Department of Industry, Labor and Human Relations.²⁷

States Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir. 1956) *cert. denied*, 351 U.S. 950 (1956).

19. Kovarsky & Kovarsky, *supra* note 1, at 868-69.

20. [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451 at 182.

21. COLO. REV. STAT. § 80-11-16 (1963).

22. [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451 at 491, 569.

23. Kovarsky & Kovarsky, *supra* note 1, at 876.

24. The jurisdictions which have operative bans on age discrimination are, in order of year of enactment: Colorado (1903); Louisiana (1934); Massachusetts (1937 & 1950); Rhode Island (1956); Pennsylvania (1956); New York (1958); Connecticut (1959); Wisconsin (1959); Oregon (1959); Puerto Rico (1959); Alaska (1960); Delaware (1960); California (1961); Ohio (1961); Washington (1961); Montana (1961); New Jersey (1962); Nebraska (1963); Hawaii (1964); Maryland (1964); Idaho (1965); Indiana (1965); Maine (1965); Michigan (1965); Nevada (1965); New Hampshire (1965); New Mexico (1965); North Dakota (1965); Kentucky (1966); Illinois (1967); West Virginia (1967); Georgia (1971); District of Columbia (1973); Iowa (1974).

Source: [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451; Note, *Older Worker*, *supra* note 4, at 388.

25. [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451; *see generally* MATSUMOTO, STATE LEGISLATION ON AGE DISCRIMINATION IN EMPLOYMENT (1961).

26. WIS. STAT. §§ 111.31-111.37 (1975).

27. WIS. STAT. § 111.33 (1975). The Wisconsin Act also provides for judicial review of the findings and orders of the Department. WIS. STAT. § 111.37 (1975).

B. Federal Legislation

Sixty-four years after the first state regulation of age discrimination, Congress enacted the Age Discrimination in Employment Act of 1967.²⁸ This Act represents the first comprehensive federal legislation aimed at protecting older workers from arbitrary employment decisions based solely upon age.²⁹

The present ADEA is an outgrowth of a study undertaken by the Secretary of Labor in 1965 pursuant to a congressional mandate contained in section 715 of the Civil Rights Act of 1964.³⁰ In fashioning the federal bill, Congress drew heavily upon the laws and the years of experience of the states.³¹ In deference to this experience and in consideration of the limited resources of the Department of Labor,³² the federal legislation contains a saving clause that provides that "any State performing like functions" may continue to handle age discrimination complaints unless an action has been commenced under the ADEA.³³ However, no action is permitted under the federal act "before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated"³⁴ These provisions effectively promote federal-state comity and eliminate many complex

28. 29 U.S.C. §§ 621-634 (1970) [hereinafter cited as ADEA].

29. See 29 U.S.C. § 621(b) (1970). Prior to enactment of the ADEA, congressional activity in this area was primarily directed at helping the older worker cope with technological innovation and environmental changes. *E.g.*, Manpower Development and Training Act of 1962, Pub. L. No. 87-415, 76 Stat. 23; Older Americans Act of 1965, 42 U.S.C. §§ 3001 *et seq.* (1970 & Supp. IV 1974). See 113 Cong. Rec. 34745 (1967) (remarks of Rep. Gilberg); *id.* at 34752 (remarks of Rep. Dwyer); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 355, 461 (1967) [hereinafter cited as 1967 House Hearings].

30. 42 U.S.C. § 2000e-14 (1970); see U.S. DEPT. OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter cited as SECRETARY'S REPORT]; RESEARCH MATERIALS, *supra* note 4; Note, *Age Discrimination*, *supra* note 4, at 383.

31. See S. REP. No. 723, 90th Cong., 1st Sess. 2-3 (1967) [hereinafter cited as SENATE REPORT]; Kovarsky & Kovarsky, *supra* note 1, at 876.

32. The Secretary of Labor has been charged with the responsibility of administering the ADEA. 29 U.S.C. §§ 624-626 (1970).

33. 29 U.S.C. § 633(a) (1970) provides that state action is superseded where an action is brought under the ADEA. See Note, *State Deferral of Complaints Under the Age Discrimination in Employment Act*, 51 NOTRE DAME LAW. 492 (1976); Note, *Age Discrimination in Employment: Available Federal Relief*, 2 COLUM. J. L. & SOC. PROB. 281 (1975); Note, *Procedural Aspects of the Age Discrimination in Employment Act of 1967*, 36 U. PRR. L. REV. 914, 916-21, 923-27 (1975).

34. 29 U.S.C. § 633(b) (1970).

ment of the ADEA.^{34.1}

The substantive provisions of the ADEA are similar to those of many of the state age laws. The Act protects workers between the ages of forty and sixty-five³⁵ from a variety of discriminatory practices in most employment-related situations.³⁶ The stated purpose of the Act is "to promote employment of older persons based on their ability rather than age" and to "prohibit arbitrary age discrimination in employment."³⁷ In pursuit of these goals, the ADEA contains broad prohibitions against refusals to hire, discharges and discriminatory treatment of workers because of age,³⁸ as well as retaliatory action against those asserting their rights under the Act.³⁹ The ADEA also bans age discrimination in employment advertisement,⁴⁰ employment agency referral practices⁴¹ and labor union activities.⁴²

The language of these prohibitions is deceptive unless read in conjunction with the four broad exceptions to the Act. The first two exceptions permit an employer to make employment decisions "based on reasonable factors other than age"⁴³ or "for good cause."⁴⁴ These sections, which are standard provisions in most antidiscrimination legislation,⁴⁵ logically preserve the

34.1. See, e.g., *Walker Mfg. Co. v. Indus. Comm'n*, 27 Wis. 2d 669, 135 N.W.2d 307 (1965).

35. 29 U.S.C. § 631 (1970). This is the age group which is most frequently protected under the age laws. Wisconsin and thirteen other states specifically limit the applicability of their laws to those in the 40 to 65 age category. Wis. STAT. § 111.32 (1975); [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451.

The age 65 ceiling has been criticized on constitutional grounds. Note, *Age Discrimination in Employment*, 50 N.Y.U. L. REV. 924, 945 (1975), [hereinafter cited as *Age Discrimination in Employment*]; Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311 (1974). Alaska, Iowa, Maine, Nevada and New Hampshire do not specify any protected age group.

36. The ADEA applies to the following: all employers "engaged in an industry affecting commerce," who have twenty or more employees; to states and local governments; to the federal government; to employment agencies; and to labor organizations. See 29 U.S.C. §§ 630(b), (c), (d), and 633(a) (1970).

37. 29 U.S.C. § 621(b) (1970).

38. *Id.* at § 623(a)(1).

39. *Id.* at § 623(d).

40. *Id.* at § 623(e).

41. *Id.* at § 623(b).

42. *Id.* at § 623(c).

43. *Id.* at § 623(f)(1).

44. *Id.* at § 623(f)(3).

45. It is interesting to note that the Wisconsin Fair Employment Act contains no

employer's right to make management decisions affecting older workers on the basis of merit instead of age⁴⁶ and are consistent with the stated purposes of the Act.⁴⁷

The last two exceptions are of an entirely different character and, in effect, serve to excuse discriminatory actions based on the age of the individual.⁴⁸ An employer is allowed to make decisions based on age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."⁴⁹ Although most state age discrimination acts include similar exceptions,⁵⁰ as does Title VII of the Civil Rights Act with respect to all traits but race,⁵¹ there are yet no clear standards for determining what constitutes a "bona fide occupational qualification" sufficient to excuse a discriminatory act or practice.⁵²

The second exception which serves to excuse discriminatory action permits an employer, employment agency, or labor organization "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 . . . [the] Act, except that no such employee benefit plan shall excuse the failure to hire any such individual."^{52.1} This inartful accumulation of words has generated a wave of protracted litigation and has eviscerated the substan-

specific exception for decisions based on "good cause" in its prohibition of age bias. See WIS. STAT. § 111.32 (1975).

46. See *Age Discrimination in Employment*, *supra* note 35, at 946.

47. 29 U.S.C. § 621(b) (1970).

48. See *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975); *Age Discrimination in Employment*, *supra* note 35, at 946.

49. 29 U.S.C. § 623(f)(1) (1970).

50. See *Kovarsky & Kovarsky*, *supra* note 1, at 915-925; [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451.

51. 42 U.S.C. § 2000e-2(e) (1970). See *Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 883-90 (1967); *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1176 (1971).

52. See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied* 404 U.S. 950 (1971); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Houghton v. McDonnell Douglas Corp.*, 413 F. Supp. 1230 (E.D. Mo. 1976). Although several standards have been enunciated in the above-cited decisions, none of them has met with any substantial critical approval. Note, *Age Discrimination*, *supra* note 4, at 400, 408-10; *Age Discrimination in Employment*, *supra* note 35, at 947.

52.1. 29 U.S.C. § 623(f)(2) (1970).

tial protection against arbitrary employment termination which the otherwise clear language of the statute affords the older worker.

III. JUDICIAL TREATMENT OF THE INVOLUNTARY RETIREMENT QUESTION

A. *Experience Under the State Laws*

A majority of the states which have age discrimination acts include a provision making otherwise prohibited practices lawful when related to an acceptable pension, retirement, or benefit plan.⁵³ As in the federal Act, the states generally require that in order to qualify for the retirement policy exception, the discriminatory action be taken pursuant to a "bona fide plan"⁵⁴ or a plan which is not a subterfuge to evade the purposes of the legislation.⁵⁵

The Wisconsin Fair Employment Act,⁵⁶ which was enacted prior to the ADEA, provides that its prohibition against age discrimination⁵⁷ is not to be construed "to affect any retirement policy or system of any employer where such policy or system is not a subterfuge to evade the purposes of . . . [the Act]."⁵⁸ The retirement policy exception was construed by the Wisconsin Supreme Court in *Walker Manufacturing Co. v. Industrial Commission*,⁵⁹ the leading case on the issue of an employer's

53. See [1976] 8 LAB. REL. REP. (BNA) Fair Empl. Prac. Man. § 451.

54. See, e.g., CAL. LAB. CODE § 1420.1 (West, 1971); CONN. GEN. STAT. § 31-126 (1973); HAW. REV. STAT. § 378-9 (1968); N.J. REV. STAT. § 10:5-2.1 (1976); 43 PA. CONS. STAT. § 955 (1976).

55. See, e.g., WIS. STAT. § 111.32(5) (1975); DEL. CODE tit. 19, § 711 (1975); MICH. STAT. ANN. § 17.458(3a) (1975); NEB. REV. STAT. § 48.1003 (1974); N.Y. EXEC. LAW § 296(3-a)(c) (McKinney, 1972).

56. WIS. STAT. §§ 111.31 *et seq.* (1975). Originally enacted in 1945 Wis. Laws, ch. 490, the Act was later amended to include the present prohibitions on age discrimination, 1959 Wis. Laws ch. 149.

57. Section 111.32(5)(b) of the Wisconsin Fair Employment Act provides:

(b) It is discrimination because of age:

1. For an employer . . . because an individual is between the ages of 40 and 65, to refuse to hire, employ, admit, or license, or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment . . .

The Act also prohibits age discrimination in job advertising, job application forms, and inquiries in connection with prospective employment, WIS. STAT. § 111.32(5)(b)2 (1975); as well as retaliatory action against those asserting their rights under the Act. WIS. STAT. § 111.32(5)(b)3 (1975).

58. WIS. STAT. § 111.32(5)(c) (1975).

59. 27 Wis. 2d 669, 135 N.W.2d 307 (1965).

right to involuntarily retire employees protected under state age laws.

In *Walker* the employer implemented a policy of systematically retiring all employees over sixty years of age with ten or more years of service at the company. Thirty-eight employees were retired pursuant to a "pension agreement" which provided that any employee who attained age sixty and had ten years of service was subject to retirement by any one of three methods: at his own option, at the employer's option, or under mutually satisfactory conditions. If the employee was retired either at the employer's option or under mutually satisfactory conditions, the plan afforded the employee increased benefits until either age sixty-five or eligibility for primary social security benefits, whichever occurred first. Thereafter benefits continued at the same rate as that of the voluntary retiree.⁶⁰

In considering whether the challenged retirement policy was a subterfuge to evade the purpose of the Act,⁶¹ the court looked to the legislatively-declared policy of the State — "to make unlawful conduct which ' . . . tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them.' "⁶² The court then concluded that there could be no finding of subterfuge unless it was established "that the retirement benefits payable to the retired employee were unsubstantial, or, if substantial, that continued payment thereof was likely to be jeopardized."⁶³ Because the plaintiff did not contend that the funding requirements of the plan were inadequate to provide the retirement benefits specified, the court looked to the average amount received by the thirty-eight employees until age sixty-five and decided that the Walker Company plan was not a subterfuge to evade the purposes of the Act.⁶⁴

The court's holding in *Walker* was contrary to that of the Wisconsin Industrial Commission,⁶⁵ which found the Walker

60. *Id.* at 673, 135 N.W.2d at 310.

61. Initially the court stated:

[T]here is no essential difference between an age-discrimination statute proviso phrased in terms of retirement policies or systems that are not a subterfuge . . . and the corresponding provisions of age-discrimination statutes which speak in terms of "*bona fide*" retirement or pension plans.

Id. at 683, 135 N.W.2d at 315. (Emphasis in original).

62. *Id.* at 685, 135 N.W.2d at 316 citing WIS. STAT. § 111.363.

63. 27 Wis. 2d at 685, 135 N.W.2d at 316.

64. *Id.* at 686, 135 N.W.2d at 316-17.

65. The Industrial Commission was renamed the Department of Industry, Labor

Company policy to be a subterfuge. The Commission based its conclusion on the fact that the plan did not mandate retirement of workers before age sixty-five, but permitted the company to do so at its option. The court considered the inclusion of the option feature to be immaterial, as long as it was not itself a subterfuge: "the test is not whether the exercise of the option is a subterfuge but rather whether the option provision of the pension agreement is such that to permit its exercise would constitute a subterfuge."⁶⁶ Thus, the court directed its attention to an evaluation of the plan as a whole. This approach is consistent with the language of the statutory exception, which allows employers to act pursuant to a retirement plan that is not in conflict with the purposes of the Act.⁶⁷ Thus, an employer need only insure that its retirement plan complies with the requirements of the statute. Thereafter, the employer may freely operate the plan without laboring under the apprehension that each employee retired thereunder might successfully challenge the exercise of the option provision in that particular instance.

In *Walker* the Industrial Commission also based its finding of a subterfuge on the fact that the Walker Company did not attempt to ascertain the physical health or occupational qualifications of the employees before retiring them. But the court held that a failure to ascertain the qualifications of the employees is immaterial to the issue of subterfuge when the retirements are made pursuant to the option provisions of a pension agreement. The court relied on the existence of a statutory exception for the discharge of a worker "physically or otherwise unable to perform his duties."⁶⁸ Reasoning that the retirement policy exception would be surplusage if its application were limited to terminations solely for health reasons, the court concluded that the legislature did not intend to restrict the retirement policy exception to situations in which the employee is physically unable to perform the job duties.⁶⁹

In determining the question of the substantiality of the ben-

and Human Relations in the Executive Branch Reorganization Act, 1967 Wis. Laws ch. 75.

66. 27 Wis. 2d at 684, 135 N.W.2d at 316.

67. WIS. STAT. § 111.32(5)(c) (1975).

68. *Id.*

69. 27 Wis. 2d at 685, 135 N.W.2d at 316.

efits and hence the subterfuge issue itself, the supreme court considered the total amounts to be received by the retirees until age sixty-five. The court's approach is consistent with state policy. Since it is the individual's ability to maintain a "just and decent standard of living" which the Fair Employment Act seeks to protect,⁷⁰ the court properly considered not only the actual pension benefits, but also vacation pay, social security benefits and unemployment compensation received, as well as insurance premiums paid by the employer. However, state policy should also require that the entire amount of benefits received by the retirees be considered in determining the substantiality question, not just those benefits payable until age sixty-five.

It is true that the Act only protects individuals until they reach sixty-five. However, the state's concern for the welfare of its citizens does not terminate upon their reaching sixty-five. In view of the meager amount of social security benefits received by most retired workers,⁷¹ it is inconsistent with the policy of the Act to allow an employer to involuntarily retire employees under a plan which would only provide benefits until age sixty-five, and which thereafter would leave the retiree with only social security income for the remainder of his years. It should be borne in mind that the amount of the monthly social security benefits received are reduced when one elects to commence receiving benefits prior to age sixty-five.⁷²

Although many states have had age discrimination laws in effect for a number of years, there have been few reported decisions arising under the state acts. Even fewer state decisions have considered the validity of involuntary retirement of older workers before age sixty-five.

One case which did is *Delvitto v. Shope*,⁷³ a class action

70. WIS. STAT. § 111.31(1) (1975).

71. In Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, *supra* note 2, at 1319, it is pointed out that the average amount of benefits received by retired workers in recent years is below the poverty income level established by the government.

72. 42 U.S.C. § 402(a) (1970). Although the court in *Walker* based its decision on the amount the retirees received until age 65, it did note that the reduction in social security benefits was offset by pension benefits payable beyond that age which the court said were not required under the Wisconsin Act. 27 Wis. 2d at 686, 135 N.W.2d at 316.

73. 17 Pa. Commw. Ct. 436, 333 A.2d 204 (1975).

brought under the Pennsylvania Human Relations Act.⁷⁴ In *Delvitto* the plaintiffs sought to enjoin the implementation of a retirement system which provided for the payment of benefits upon involuntary retirement at age sixty-five. The Pennsylvania Supreme Court quickly disposed of the plaintiffs' claim that mandatory retirement violated civil rights protected by both the Pennsylvania⁷⁵ and United States Constitutions.⁷⁶ The court relied on its earlier decision in *McIlvanie v. Pennsylvania State Police*,⁷⁷ wherein similar claims by the plaintiff were rejected because no showing was made that the state's retirement system was arbitrary or unrelated to bona fide occupational factors.⁷⁸

The plaintiffs also contended that the operation of the retirement system violated rights protected by the ban on age discrimination contained in the Human Relations Act.⁷⁹ Because the Pennsylvania Act recognizes an exception where employment is terminated "because of the terms or conditions of any bona fide retirement or pension plan,"⁸⁰ the court denied the plaintiffs relief. The court concluded that "a plan, such as the one involved here, which establishes an involuntary retirement at age sixty-five and provides for receipt of retirement benefits at that age, falls within this statutory exception."⁸¹

The opinion did not attempt to define what constituted a bona fide retirement or pension plan within the meaning of the statute. Interestingly, no mention was made of the fact that the statutory protection against age discrimination is limited to individuals between the ages of forty and sixty-two, thus placing the plaintiffs outside the coverage of the Act.⁸²

Another state involuntary retirement case is *Thompson v.*

74. PA. STAT. ANN. tit. 43, §§ 951 *et seq.* (Purdon 1964) (Supp. 1974-75).

75. The plaintiffs relied on PENN. CONST. art. I, § 26 (1968), which provides, in pertinent part: "Neither the Commonwealth nor any political subdivisions thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

76. It was broadly claimed that the mandatory retirement system violated rights protected by the fourteenth amendment.

77. 6 Pa. Commw. Ct. 505, 296 A.2d 630 (1972), *aff'd* 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974).

78. 6 Pa. Commw. Ct. at 513, 296 A.2d at 634.

79. PA. STAT. ANN. tit. 43 § 995(a) (Purdon 1964) (Supp. 1974-75).

80. PA. STAT. ANN. tit. 43 § 955(a)(i) (Purdon 1964) (Supp. 1974-75).

81. 17 Pa. Commw. Ct. at 439, 333 A.2d at 205.

82. PA. STAT. ANN. tit. 43 § 954(h) (Purdon 1964) (Supp. 1974-75).

Chrysler Corp.,⁸³ (*Thompson I*). In this action, brought under the Michigan State Fair Employment Practices Act⁸⁴ and subsequently removed to federal court, the plaintiff, Annie Thompson, challenged the validity of her involuntary retirement at age fifty-five. Chrysler retired her pursuant to a plan which allowed the employer to involuntarily retire employees over fifty-five years of age with ten or more years of service, when the employee suffered from a disabling health condition.⁸⁵ The forced retirement was based on the worker's alleged disability due to heart disease and arthritis. However, the plaintiff contended that in her case the early retirement provision was used as a subterfuge to discriminate against women, blacks and older persons.

In considering the defendant's motion for summary judgment on the age discrimination claim, the court considered the statutory prohibition of age discrimination against individuals between the ages of eighteen and sixty,⁸⁶ as well as the Act's retirement plan exception, which provides, in pertinent part, that nothing in the Act shall be construed "to affect the retirement policy or system of an employer where that policy or system is not merely a subterfuge to evade the purposes of this section unless that policy or system, if established on or after July 1, 1965, provides for a mandatory retirement age of less than 65."⁸⁷ Chrysler's retirement policy was established prior to the July 1, 1965 cutoff date provided in the statute.

In opposition to the defendant's motion, the plaintiff argued that, since she was neither disabled, nor was her work performance poor, the company did not comply with the terms of the plan. The court brushed aside the plaintiff's contentions, finding no triable issue of fact, and decided the case on a tortured construction of the age discrimination statute. Acknowledging that every mandatory retirement discriminates against the older worker, the court observed that the statute allows such a result when it is bargained for between an employer and

83. 382 F. Supp. 1317 (E.D. Mich. 1974).

84. MICH. COMP. LAWS ANN. §§ 423.301-423.311 (1975).

85. The plan also provided that before the company could effect an early retirement, the employee's disability must result in excessive absenteeism, decreased production, and frequent application for and receipt of sickness and accident payments. 382 F. Supp. at 1320.

86. MICH. COMP. LAWS ANN. § 423.303a(a) (1975).

87. MICH. COMP. LAWS ANN. § 423.303a(e) (1975).

the employees' representatives. The Michigan Act indeed requires that for mandatory retirement to fall within the statutory exception, it must be carried out pursuant to a plan which is not a subterfuge for discrimination. However, in a piece of legal legerdemain, the court simply announced an irrebuttable presumption that plans initiated before July 1, 1965, are not subterfuges for discrimination,⁸⁸ although no basis can be found in the statute for recognizing such a presumption.⁸⁹

To justify its *ipse dixit* the court stated that:

The Court cannot second guess the state legislature. It required only that Chrysler act pursuant to the terms of the agreement; this the defendant has done. Whether that action was properly taken is a contract issue among the plaintiff, her union and Chrysler. Otherwise, the Court would be forced to review every case in which an employer retires an individual pursuant to a pension plan since it is conceded that by its nature such an action befalls only those who are of matured age.⁹⁰

In reaching its holding, the court effectively read out of the Michigan Act the only protection afforded older workers against arbitrary discharge under any retirement plan adopted before July 1, 1965, even if the plan is clearly a subterfuge to evade the purposes of the age discrimination laws. Regrettably, *Thompson I* still stands as precedent for determining the rights of an involuntarily retired older worker under the Michigan Act. Even more regrettably, the bulk of the decisions under the ADEA more closely resemble *Thompson I* and *Delvitto*, than the thoughtful, judicious approach taken by the Wisconsin court in *Walker*.

B. The Treatment of the "Bona Fide Plan" Exception in the Federal Courts

A considerably greater number of cases wherein an involuntarily retired worker challenges his forced superannuation under a retirement plan have arisen under the ADEA than under the state acts. Thus far, the trend in the federal courts

88. 382 F. Supp. at 1320.

89. See MICH. COMP. LAWS ANN. § 423.303a(e) (1975). It should be noted that the July 1, 1965, cutoff date provides that retirement policies or systems established after that date do not come within the statutory exception if they provide for a mandatory retirement age of less than sixty-five.

90. 382 F. Supp. at 1321.

has been to uphold involuntary retirement practices. However, a significant minority viewpoint would considerably restrict the employer's ability to force retirement. These two differing viewpoints are best represented by the recent decisions of *Zinger v. Blanchette*⁹¹ and *McMann v. United Air Lines, Inc.*⁹²

Zinger is the most recent and the most cogent decision in a line of cases under the ADEA which uphold, for various reasons, the involuntary retirement of older workers prior to age sixty-five. The *Zinger* holding and its rationale are best understood when viewed from an historical perspective, best arrived at through an examination of the problems which have plagued the courts in deciding involuntary retirement cases under the ADEA.

The first in this line of federal cases is *Grossfield v. Saunders*.⁹³ In that case the plaintiff sought to enjoin the defendant from involuntarily retiring him at age sixty-four pursuant to an existing pension plan. The court denied the plaintiff relief on both procedural⁹⁴ and substantive grounds. As a substantive basis for its decision, the court stated that, in retiring the plaintiff, the employer did no more than observe the terms of a retirement plan which in its opinion was not a subterfuge to evade the purposes of the Act.⁹⁵ The court made no attempt to define what constituted a "subterfuge" within the meaning of the statute, nor was the plan or any of its provisions analyzed.

Grossfield was followed two years later by *Stringfellow v. Monsanto Co.*,⁹⁶ an action brought by a group of employees between the ages of forty and sixty-five who were involuntarily retired after plant shutdowns necessitated a reduction in the employer's work force. The reductions were not based on seniority, but rather on the results of an evaluation of the ability and job performance of each employee. The court upheld the employer's decision on the ground that both the employee eval-

91. 549 F.2d 901 (3rd Cir. 1977).

92. 542 F.2d 217 (4th Cir. 1976).

93. 1 LAB. REL. REP. (BNA) Fair Emp. Prac. Cas. 624 (S.D.N.Y. 1968), No. 68 Civ. 4923.

94. The plaintiff had failed to properly notify the Secretary of Labor of his intent to file an action under the ADEA, a condition precedent to bringing a suit under the Act. 29 U.S.C. § 626(d) (1970).

95. 1 LAB. REL. REP. (BNA) Fair Emp. Prac. Cas. at 625; Cf. 29 U.S.C. § 623(8)(2) (1970).

96. 320 F. Supp. 1175 (W.D. Ark. 1970).

uation program and the subsequent work force reduction were based on reasonable factors other than age and thus were not within the prohibitions of the Act.⁹⁷ The court also stated that involuntary retirement was not prohibited by the ADEA where the company observes the terms of a "bona fide Employee Retirement Benefit Plan which . . . did not constitute a subterfuge to evade the purposes" of the Act.⁹⁸ But the court failed to examine the plan itself or explain why the plan was bona fide and not a subterfuge.

Finally, in 1971 in the decision in *Hodgson v. American Hardware Mutual Co.*,⁹⁹ the purpose and scope of the bona fide retirement plan exception were analyzed. In *Hodgson* the district court held that an employer could not mandatorily retire a sixty-two year old employee who did not participate in the company retirement benefit plan, even though the Act allowed the employer to retire participating employees at that age.¹⁰⁰ In addition, the court intimated that one of the congressional purposes behind the exception allowing employers to observe otherwise proper retirement or benefit plans was to encourage the hiring of older workers by allowing an employer to refuse to permit an employee over the maximum entry age of the plan to enroll in it. In the words of the court, "A requirement that newly hired older workers be entitled to the same retirement benefit provisions as younger ones would make the cost of funding such retirement plans prohibitive and discourage employers from adopting them."¹⁰¹ The legislative history of the ADEA clearly supports the court's interpretation of the purpose behind the bona fide retirement plan exception.¹⁰² *Hodgson* is the first decision to consider the statutory exception as anything other than a mere justification for mandatory early retirement. It also represents the first opinion in which the language of the provision was evaluated in light of the stated purposes of the Act.¹⁰³

97. 29 U.S.C. § 623(f)(1) (1970) allows differentiation between older employees where based on reasonable factors other than age.

98. 320 F. Supp. at 1181.

99. 329 F. Supp. 225 (D. Minn. 1971).

100. This view is in accord with that expressed in the interpretative bulletin of the Department of Labor, 29 C.F.R. § 860.110 (1975).

101. 329 F. Supp. at 229.

102. See SENATE REPORT, *supra* note 31, at 4 and 14 (Individual Views of Senator Javits); HOUSE REPORT, *supra* note 4, at 4.

103. See 29 U.S.C. § 621(b) (1970).

The ADEA retirement plan exception was considered for the first time by a federal court of appeals in the 1974 case of *deLoraine v. MEBA Pension Trust*.¹⁰⁴ deLoraine voluntarily retired in 1964 under a pension plan which required a forfeiture of his pension rights if he returned to employment in the maritime industry.¹⁰⁵ During the Vietnam war, the plaintiff and other retirees were granted permission to return to their former occupations. In 1970, after the increased demand for marine engineers subsided, permission to work was withdrawn by the trustees and plaintiff, fearing a loss of benefits under the plan, retired once again. After unsuccessfully pursuing state remedies,¹⁰⁶ the employee commenced an action in federal court, charging that the withdrawal of permission to work in 1970 was motivated by a desire to replace older engineers with younger ones. The lower court granted the defendants' motion for summary judgment on the grounds that the plaintiff had failed to set forth sufficient evidence of a discriminatory policy.¹⁰⁷

The circuit court affirmed the finding that the plaintiff voluntarily retired and that the pension trust, which was created long before the passage of the Act, paid substantial benefits to a broad class of workers. Based on these facts, the court concluded that "the Trust is certainly not itself a subterfuge to evade purposes of the statute."¹⁰⁸

A similar result was arrived at by the Fifth Circuit Court of Appeals in *Brennan v. Taft Broadcasting Co.*,¹⁰⁹ an action brought by the Secretary of Labor on behalf of a worker who had been compelled to retire at age sixty pursuant to a profit sharing retirement plan and was then refused reemployment when he applied after his termination. The Secretary contended that the plan was not bona fide within the meaning of the statute because its compulsory retirement feature had not been adequately communicated to the participating employee.

104. 499 F.2d 49 (2nd Cir. 1974).

105. Mr. deLoraine had retired in 1964 after 20 years of service as a marine engineer. 499 F.2d at 49.

106. Plaintiff's charge of age discrimination under New York law was dismissed on the merits by the State Division of Human Rights in May 1971. The State Human Rights Appeal Board affirmed in December 1971, both on the merits and on jurisdictional grounds.

107. *deLoraine v. MEBA Trust*, 355 F. Supp. 89, 92 (S.D.N.Y. 1973).

108. 499 F.2d at 50.

109. 500 F.2d 212 (5th Cir. 1974).

The appeals court summarily rejected this contention, stating that the plan "was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion."¹¹⁰ The court failed to consider the fact that the Act prohibits plans which are subterfuges to evade the purposes of the ADEA, not merely those which seek to avoid compliance with the Act itself.¹¹¹

The legislative history of the ADEA clearly indicates that plans existing prior to the Act do not automatically satisfy the exception.¹¹² However, the *Taft* majority declined to examine the Act's legislative history, choosing instead to rely on "the straightforward language of the statute" and the "practical difficulty of deciding, on a case by case basis, whether a given course of conduct is within the Congressional purpose."¹¹³

In *Taft*, the court also rejected the Secretary's claim that the employer violated the Act by refusing to hire the retired employee. The Secretary relied on the provision of the Act which states that "[no employee benefit plan] shall excuse the failure to hire any individual."¹¹⁴ However, in the court's opinion, the Secretary's interpretation would render the retirement plan meaningless, a result which Congress could not have intended.

The dissent challenged the majority's conclusion that the plan was bona fide since the employee was merely provided with a summary of its provisions that contained only a brief reference to a "normal retirement date" after age sixty. The dissent contended that the statutory exception "would not justify the company to deprive an employee of rights otherwise accorded him under the Act unless the so-called plan expressly provided for compulsory termination at age sixty."¹¹⁵

The dissent also questioned the scope of the retirement plan exception:

110. 500 F.2d at 215.

111. See *Dunlop v. Haw. Tel. Co.*, 415 F. Supp. 330, 331 (D. Haw. 1976) in which the *Taft* rationale was rejected. See also *Age Discrimination in Employment*, *supra* note 35, at 950.

112. "It is important to note that [the 29 U.S.C. § 623(f)(2)] exception applies to new and existing employee benefit plans" HOUSE REPORT, *supra* note 4 at 4; SENATE REPORT, *supra* note 31, at 4.

113. 500 F.2d at 217.

114. 29 U.S.C. § 623(f)(2) (1970).

115. 500 F.2d at 218 (Tuttle, J., dissenting).

The language of the statute creating an exception, if, in fact, it really does create an exception, is not artfully worded. It says only that 'it shall not be unlawful for an employer . . . to observe the terms of a 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 . . .' In addition to the fact that rules of construction require that this language, as an exception to the general provision of the Act, is subject to the narrow construction rule, the language itself falls short of saying "it shall not be unlawful for an employer to 'enforce' or 'carry out' the terms, etc."¹¹⁶

Although the *Taft* dissent has received some recent reconsideration,¹¹⁷ the *Taft* majority opinion and its automatic exemption of plans which antedate the passage of the Act are largely discredited today.¹¹⁸ Today, *Taft* merely serves as an illustration of the problems which the courts have had in interpreting and applying the "subterfuge" clause of the Act.

A chronological analysis, similar to that of the *Taft* case, appears in *Steiner v. National League of Professional Baseball Clubs*.¹¹⁹ Former umpire Steiner challenged his forced retirement under a plan requiring all league umpires to retire on the January 1st following attainment of age fifty-five, unless the league commissioner consented to postretirement date service.¹²⁰ The retirement plan, which had been the subject of collective bargaining between the National League and the umpires' association, provided for the payment of a fixed income to the retiree upon termination of service. The plaintiff agreed to continue as an umpire for an additional season after his normal retirement date. After completion of the additional season, the plaintiff received poor performance ratings in an evaluation conducted by the League and the League decided

116. *Id.* at 220 [emphasis in original]. Judge Tuttle also noted the requirement that a party relying on an exception establish that it plainly and unmistakably falls within the "terms and spirit of the legislation." *Id.* See *Phillips Co. v. Walling*, 324 U.S. 490 (1945).

117. *McMann v. United Air Lines, Inc.*, 542 F.2d 217, 219-20 (4th Cir. 1976).

118. See text accompanying notes 127, 131, *infra*; *Age Discrimination in Employment*, *supra* note 35, at 950; *Dunlop v. Haw. Tel. Co.*, 415 F. Supp. 330, 331-32 (D. Haw. 1976).

119. 377 F. Supp. 945 (C.D. Cal. 1974).

120. Since the plan was adopted in 1956, ten umpires had reached retirement age, and in each case the League had requested, and the individual umpires had agreed, that retirement be deferred for some period of time. 377 F. Supp. at 947.

not to request further deferral of his retirement.

The plaintiff's claim rested on two arguments: (1) that the retirement provision of the plan constituted a subterfuge to avoid the purposes of the ADEA, and (2) that he was discriminated against because other umpires were retained in service to a later age. The court rejected both contentions. The court summarily rejected the claim of subterfuge noting, as did the *Taft* court, that the plan was implemented before age discrimination was prohibited, and therefore, "could not have been evolved in an attempt to circumvent any public policy or law."¹²¹ The court also rejected the umpire's claim that the discretionary postretirement service feature was discriminatory. The court relied on the Secretary of Labor's published interpretation that such provisions do render invalid an otherwise bona fide plan.¹²²

In 1976, Annie Thompson again challenged her discharge from the Chrysler Corporation. This time her action was based on the provisions of the ADEA. The case of *Thompson v. Chrysler Corp.*,¹²³ (*Thompson II*) involved the same parties, the same district court, and even the same chief judge presiding as *Thompson I*. Predictably, in *Thompson II*, the court also reached the same result.

In granting the defendant's motion for summary judgment, the court relied on its earlier conclusion that the plaintiff was retired for health reasons pursuant to a bona fide retirement plan which had not been established as a subterfuge to evade the purpose of the law. Despite the employer's claim that the employee was terminated for health reasons,¹²⁴ and contrary to the plaintiff's allegation of good health, the court found no triable issues of fact as to the existence of a disability. The court refused to look beyond the face of the defendant's "special early" retirement plan and to consider the effect of the plan on the objectives of the ADEA. Instead, the court was "not persuaded that even a narrow construction of the excepted employment practices in 29 U.S.C. § 623(f) compels the result

121. 357 F. Supp. at 948.

122. See 29 C.F.R. § 860.110 (1976). However, the Secretary has apparently changed his position on this question. See *McMann v. United Air Lines, Inc.*, 542 F.2d at 219-20.

123. 406 F. Supp. 1216 (E.D. Mich. 1976).

124. As noted earlier, the retirement plan in this case provided for early retirement only upon the existence of certain health related conditions. See note 55 *supra*.

which the plaintiff seeks.”¹²⁵ Thus the court concluded that the plaintiff was retired for health reasons without receiving any evidence of the actual condition of her health. Furthermore, it concluded that the retirement was made pursuant to a bona fide plan, without evaluating the provision of the plan. Apparently, the court relied on the presumption it had manufactured in its earlier decision in *Thompson I*.

A more thoughtful approach to the early retirement problem was taken by the court in *Dunlop v. Hawaiian Telephone Co.*¹²⁶ Although the eight individuals who were involuntarily retired prior to age sixty-five were denied recovery under the Act, the court adopted a sensible definition of the “subterfuge” provision of the statutory exception. The *Dunlop* court rejected the *Taft* approach of “automatically grandfathering” all pre-ADEA plans into the bona fide plan exclusion of section 4(f)(2) of the Act.¹²⁷ The court noted that a plain reading of “subterfuge” in the statute would appear to render the exception meaningless, and then developed a workable construction, interpreting “‘subterfuge’ as denying . . . [an employer] the protection of § 4(f)(2) only if the . . . [employer] uses a retirement plan as a subterfuge to retire an employee without the payment of substantial benefits.”¹²⁸ Since in the court’s opinion the defendant’s plan provided sufficient benefits upon retirement, the court concluded that the company’s involuntary retirement of the eight employees prior to age sixty-five was done pursuant to a bona fide retirement plan and that the company’s actions were thus exempt from the proscriptions of the ADEA.¹²⁹

Hawaiian Telephone was followed by *Zinger v. Blanchette*.^{129.1} In *Zinger*, the plaintiff was involuntarily retired several months before his sixty-fifth birthday. Upon his retirement he was entitled to receive pension benefits from several sources. However, due to his early retirement he received fewer benefits than he would have had he worked until age sixty-five.

125. 406 F. Supp. at 1217.

126. 415 F. Supp. 330 (D. Haw. 1976).

127. 29 U.S.C. § 623(f)(2) (1970).

128. 415 F. Supp. at 331. This analysis compares favorably with the approach taken by the Wisconsin court in *Walker Mfg. Co. v. Indus. Comm’n*, 27 Wis. 2d 669, 685, 135 N.W.2d 307, 314 (1965).

129. 415 F. Supp. at 333.

129.1. 549 F.2d 901 (3rd Cir. 1977).

Zinger sued claiming that he was discriminated against under the early retirement plan which, although bona fide, was a "subterfuge."¹³⁰

The defendant, Penn Central Transportation Company, relying on *Brennan v. Taft Broadcasting Co.*, contended that since the retirement plan predated the ADEA, it could not be considered a subterfuge. After examining the legislative history¹³¹ and noting that the statute speaks of evading the "purposes" of the Act and not the Act itself, the court rejected the defendant's chronological argument and the *Taft* rationale.

The court also considered the broad question of whether the ADEA proscribes all involuntary retirements before age sixty-five. In view of the conflicting results in the *McMann* and *Taft* cases, the court conducted an extensive examination of the legislative background of the ADEA.

The court distinguished between outright discharge and retirement, noting that "[w]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor."¹³² The legislative history of the Act supported the conclusion that "while cognizant of the disruptive effect retirement may have on individuals, Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge."¹³³

In both *McMann* and *Taft*, the Secretary of Labor urged the courts to adopt the Labor Department's current position that:

[R]etirements [before 65] are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide

130. Plaintiff had also contended that he was protected from early retirement by an agreement made by his former employer, the Pennsylvania Railroad Company, prior to its merger with the New York Central Railroad. See, *Pennsylvania Railroad Company-Merger-New York Central Railroad Company*, 327 I.C.C. 475, 544-45. This contention was rejected by the court, finding that even if he was covered under the agreement, plaintiff was not thereby exempted from involuntary early retirement. 549 F.2d at 904-05.

131. See, e.g., HOUSE REPORT, *supra* note 4, at 4; SENATE REPORT, *supra* note 31, at 4.

132. 549 F.2d at 905. See generally, HEARINGS ON EARLY RETIREMENT AND RELATED SUBJECTS BEFORE THE SUBCOMM. ON RETIREMENT AND THE INDIVIDUAL OF THE SENATE SPECIAL COMM. ON AGING, 90th Cong., 1st Sess., 2 (1967); *Mandatory Retirement: The Law, the Courts, and the Broader Social Context*, 11 WILLAMETTE L.J. 398 (1975).

133. 549 F.2d at 905. See 133 Cong. Rec. 1089-90 (Message of President Johnson); HEARINGS ON S. 830 BEFORE THE SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 90th Cong., 1st Sess., 27-28, 43, 53, 251, 304, 306 (1967); HEARINGS ON H.R. 4221 BEFORE THE GENERAL SUBCOMM. ON LABOR OF THE HOUSE COMM. ON LABOR AND PUBLIC WELFARE, 90th Cong., 1st Sess. 40 (1967).

pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) is essential to the plan's economic survival or to some other legitimate purpose — i.e., is not in the plan for the sole purpose [sic] of moving out older workers, which purpose has not been made unlawful by the ADEA.¹³⁴

The *Zinger* court rejected the Secretary's interpretation, noting that the Department's current stance ignored the "obvious and important distinction" between discharge without pay and retirement on a pension, which were implicitly recognized in previous Department bulletins. Moreover, the Secretary's subsequent position is entitled to lesser weight because it is in conflict with his predecessor's interpretation, which was made contemporaneously with the consideration and passage of the Act.¹³⁵

Recognizing that there are many cogent and persuasive arguments against involuntary retirement before age sixty-five, even with an adequate pension,¹³⁶ the court chose to base its decision solely on statutory interpretation:

An exemption's merits are properly matters of legislative concern and evaluation. Congress has chosen to exclude retirements pursuant to bona fide retirement plans so long as the plan is not a subterfuge. That choice is binding upon us.

. . . .

134. U.S. DEPT. OF LABOR, JANUARY 1975 REPORT PERTAINING TO ACTIVITIES IN CONNECTION WITH THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 17 (1975); *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976). Brief for the Secretary of Labor, United States Department of Labor as Amicus Curiae, at 8-9; *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974).

135. See *General Electric v. Gilbert*, 429 U.S. 125 (1976), wherein the Court was confronted with an analogous situation and stated:

The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute.

. . . .

We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. [citations omitted]. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)]. 429 U.S. at 142-43.

136. See, e.g., *Levien, The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227 (1974); Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311 (1974).

We leave to congressional consideration the broad policy questions underlying the desirability of regulating the minimum age for compensated involuntary retirement.¹³⁷

Thus the court concluded that "involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful."¹³⁸

McMann v. United Air Lines, Inc.^{138.1} stands in opposition to the foregoing line of cases. This was an action brought by a worker involuntarily retired pursuant to an employee pension plan. The plan provided for a normal retirement age of sixty, with continued service permitted at the employer's request.¹³⁹ Participation in the program was voluntary at the option of the employee.¹⁴⁰ The plan under consideration had been implemented prior to the effective date of the ADEA.¹⁴¹ Based on this fact, and relying on the *Taft* rationale, the district court granted summary judgment in favor of the defendant.

On appeal the circuit court reversed. The court rejected the chronological argument advanced in the *Taft* case as "unconvincing because what is forbidden is not a subterfuge to evade the Act, but a subterfuge to evade the purposes of the Act."¹⁴² In view of the stated purposes of the ADEA,¹⁴³ the court concluded that a plan must not be a subterfuge to evade the

137. 549 F.2d at 909.

138. *Id.* at 910. Based on its holding in *Zinger*, the Third Circuit Court of Appeals reached a similar conclusion in *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977), filed the same day as the decision in *Zinger*.

138.1. 542 F.2d 217 (4th Cir. 1976).

139. In view of the fact that the employer's policy had been to retire all employees at the normal retirement age under the plan, and had never retained employees beyond that date, the court regarded the plan as requiring retirement at age sixty for purposes of its decision. 542 F.2d at 219. *Cf.*, *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 200 (1974) (Tuttle, J., dissenting).

140. The court attached no significance to the voluntary participation feature of the plan. "Realistically, an employee's decision whether or not to forego lucrative benefits, funded in part by employer contributions he would not otherwise receive, is not 'voluntary' in the sense we think it would have to be in order to find a waiver of statutory protection." 542 F.2d at 219 n.1.

141. The effective date of the Act was June 12, 1968. Pub. L. No. 90-202 § 15, 81 Stat. 602, 1967.

142. 542 F.2d at 220 (emphasis in original).

143. It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b) (1970).

Act's prohibition of arbitrary age discrimination. "Stated otherwise, there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages."¹⁴⁴

In support of this conclusion, the court noted that any other reading of the "subterfuge clause" would produce an absurd result: an employer could discharge a worker pursuant to a retirement plan solely on the basis of age, but could not refuse to rehire the presumptively otherwise-qualified individual since the statute provides that the existence of such a plan shall not excuse the failure to hire any individual.¹⁴⁵ Citing *Hodgson v. American Hardware Mutual Ins. Co.*,¹⁴⁶ the court noted that "conceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old."¹⁴⁷

The court noted that in providing for the retirement plan exception, Congress addressed the problem of the older worker seeking employment at a later age and that Congress did not intend to validate retirement plans which discriminate on the basis of age. The court asserted that "the statute as drafted does permit an employer to discharge employees 'to observe the terms of' a plan. However, as we have already observed, in order to escape condemnation as a 'subterfuge,' an early retirement provision must have some economic or business purpose other than arbitrary age discrimination."¹⁴⁸ Although the *McMann* court did reach what would be considered by many to be a laudatory result, its rationale is weak. The judicially-imposed requirement that there be some basis other than age for the operation of a permissible retirement plan ignores the basic nature and structure of such programs. Invariably these plans operate on the basis of the age of the employee, or on a formula which uses a combination of age and years of service.¹⁴⁹ In fact, the Act specifically excepts from the prohibition against age bias, differential treatment based on reasonable

144. 542 F.2d at 220.

145. 29 U.S.C. § 623(f)(2) (1970).

146. 329 F. Supp 225 (D. Minn. 1971).

147. 542 F.2d at 221, citing 329 F. Supp. at 229.

148. 542 F.2d at 221.

149. See BNA PENSION & OTHER RETIREMENT BENEFITS, PPF Survey No. 103, Oct. 1973, 1-11.

factors other than age.¹⁵⁰ If there must always be some reasonable factor other than age before an individual may be retired under a pension or benefit plan, then the bona fide retirement plan exclusion in the statute serves no purpose since such conduct is permitted under section 4(f)(1) of the Act.¹⁵¹

IV. DISCUSSION

The preceding review of the various involuntary retirement cases illustrate the problems confronting the courts in attempting to resolve disputes arising under the age laws. This difficulty is understandable and perhaps inevitable in any piece of legislation which bans discharge for reasons of age, yet paradoxically at the same time excepts from its prohibitions an employer's actions in "observing" a bona fide retirement or benefit plan which is not a "subterfuge" to evade the purposes of the legislation. The task before the courts is to seek a solution which protects the older worker while allowing continued observance of plans which are not inconsistent with the purposes of the laws.

In American industry today, pension and retirement plans are almost invariably part of the employee's compensation.¹⁵² This fact must be kept in mind in any legal analysis of the forced retirement issue. Many of these plans, voluntarily established and mutually accepted by both labor and management, provide for permissible involuntary retirement of employees prior to age sixty-five.¹⁵³ However, a significant number of workers find themselves subject to premature retirement under systems unilaterally established by the employer.¹⁵⁴ In such instances, there is a greater risk of discriminatory superannuation of older workers.¹⁵⁵ Placed in this perspective, it is clear

150. 29 U.S.C. § 623(f)(1) (1970).

151. *Id.* This section also permits otherwise discriminatory action where age is a bona fide occupational qualification reasonably necessary to the operation of the business.

152. A recent survey discloses that settlements regarding pension and retirement benefits are included in ninety percent of the collective bargaining agreements between labor representatives and management. See BNA PENSION & OTHER RETIREMENT BENEFITS, PPF Survey No. 103, Oct. 1973, at 1.

153. See Korvasky & Korvasky, *supra* note 1, at 907-11.

154. See 113 Cong. Rec. 31256-57 (1967) (remarks of Sen. Young); 1967 Senate Hearings, *supra* note 9, at 22.

155. See HOUSE REPORT, *supra* note 4, at 2 (message of President Johnson); LEGAL PROBLEMS AFFECTING OLDER AMERICANS: HEARINGS BEFORE THE SPECIAL SENATE COMM.

that a workable solution to the problems of the older worker, especially a solution to the problem of involuntary retirement, must give due consideration to the realities of the industrial setting and the retirement programs established through the joint efforts of labor and management.

In evaluating the validity of an early retirement under such a plan, one commentary¹⁵⁶ suggests that the courts consider the following factors: "(1) whether the plans are unilaterally established by employers or with unions; (2) the compulsory age of retirement; (3) the circumstances under which retirement can be postponed; (4) whether retirement is voluntary or compulsory; and (5) the benefits paid."¹⁵⁷

Another commentator¹⁵⁸ has urged that the courts take a more restrictive approach when evaluating a benefit plan which employs age restrictions. It is suggested that a court consider whether age restrictions are intended to evade the purposes of the ADEA and whether they are in fact unrelated to the economic viability of the plan itself.¹⁵⁹ If either inquiry can be answered affirmatively, the writer would have the court strike down the retirement benefit plan as being in conflict with the ADEA.¹⁶⁰

Of these two proffered analyses, the first is the more practicable. The second approach reads into the bona fide plan exception a requirement not intended by Congress but drawn from an admittedly ambiguous fragment of the Act's legislative history.¹⁶¹ The five-factor analysis¹⁶² of the first approach pro-

ON AGING, 91st Cong. 2d Sess. 19 (1970); RESEARCH MATERIALS, *supra* note 4, at 67-69; *Older Worker*, *supra* note 4, at 384-88; Note, *Age Discrimination*, *supra* note 4, at 380.

156. Kovarsky & Kovarsky, *supra* note 1.

157. *Id.* at 908.

158. Note, *Age Discrimination in Employment*, *supra* note 35.

159. This latter consideration of the relation to the fiscal viability of the plan, roughly related to one of the stated considerations in *McMann v. United Air Lines, Inc.*, 542 F.2d at 221, is apparently derived from a statement made by the Secretary of Labor that the § 4(f)(2) exception was "intended to protect retirement plans." HEARINGS ON AGE DISCRIMINATION IN EMPLOYMENT BEFORE SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 90th Cong., 1st Sess. 53 (1967). It is acknowledged that the nature and purpose of this intended protection is ambiguous. Note, *Age Discrimination in Employment*, *supra* note 35, at 950 n.141.

160. Note, *Age Discrimination in Employment*, *supra* note 35, at 950-51.

161. See *supra* note 159. See also 29 U.S.C. § 624 (1970). This provision of the Act directs the Secretary of Labor to make a study of the involuntary retirement problem, indicating the Congress' uncertainty as to how it should in fact be handled. Cf., HOUSE REPORT, *supra* note 4, at 5; SENATE REPORT, *supra* note 31, at 4.

162. Kovarsky & Kovarsky, *supra* note 1, at 907-08.

vides the court with relevant indicia of whether a retirement plan should be considered bona fide.¹⁶³ However, albeit germane, the first analysis may lack sufficient judicially manageable standards to make it a useful analytical tool.

The *Walker* and *Hawaiian Telephone* decisions may provide the most satisfactory of the proposed solutions to this problem. In both cases, the courts looked to the substantiality of the benefits received by the retirees in order to determine whether the observance of the retirement plans was a subterfuge to evade the purposes of the legislation. Certainly, the primary consideration in evaluating a retirement policy or system should be the quality of the benefits-it provides for retirees since it is the welfare of the older individual which is the motivating concern of any age discrimination legislation.

When the validity of a retirement system is challenged, this writer advocates an approach which focuses primarily on the substantiality of the post retirement benefits received. However, a number of other factors should be added into the court's analysis to prevent injustice to the older worker. A plan unilaterally established by an employer should be more strictly scrutinized than one which is the product of collective bargaining between labor and management. Additionally, the court should consider whether participation in the plan is mandatory or optional on the part of the worker. The age at which retirement occurs must also be considered. A plan with an early retirement date should provide more substantial benefits than one having a later date if it is to be excepted from the Act's prohibitions. Consideration of whether the age of retirement under the plan flexibly accommodates the individual preferences of the employee or whether retirement may be postponed are also relevant to a determination of the plan's validity.

The critical determinant of the validity of a retirement system should be the amount of benefits provided. If the retiree is able to maintain a standard of living reasonably similar to that enjoyed during preretirement years, there seems to be no reason for disallowing the employer's action in retiring the individual. Certainly, if insuring the welfare of the older American is the primary goal of age discrimination legislation, there should be no conflict with the laws as long as the retiree is able

163. 29 U.S.C. § 621(b) (1970).

to maintain a just and adequate standard of living during retirement.

Admittedly, this analysis does not emphasize the preservation of the individual's right to work, a truly legitimate concern. However, an early retirement involves a tradeoff: in exchange for the surrender of this right, the worker is given additional retirement benefits which he would not otherwise receive. Furthermore, the age discrimination laws protect the retiree from discriminatory hiring practices should he decide to seek a new job.

V. CONCLUSIONS

Whether an involuntary retirement decision is challenged under the ADEA or applicable state law, the courts must avoid losing sight of the purposes of the legislation in order to protect the older worker from unjust treatment merely because he is no longer a desirable commercial commodity. The federal and state legislatures have unmistakably declared that our country must reward those who have spent a lifetime shaping our national destiny. Whether the work was performed as a corporate president or a bookkeeper, a supreme court justice or street-sweeper, the older American is entitled to the benefits and protection of such legislative enactments as Medicare, Social Security and the age discrimination laws.

Nevertheless, the economic realities of American industry must also be accommodated. In some occupations, mandatory retirement programs are a commercial necessity. Employers must be able to predict their future labor needs. Mandatory retirement programs facilitate personnel planning decisions and add an element of stability to the problem of work force turnover. If the welfare of the older worker is insured, there seems to be no logical reason for invalidating an equitable retirement program.

The extensive legislative history of the ADEA is replete with contradictory references and confusing statements. A skillful advocate can find legislative history for virtually any reasonably coherent interpretation of the purpose and plan of the legislation. Many of the state age discrimination acts are as inartfully drafted as the ADEA. Both the courts and the older workers are now suffering the impact of this legislative indiscretion. Many of these problems, however, need not exist if the welfare of the older worker remains the predominant

consideration in the construction and application of the age discrimination laws. Certainly, an employer should be allowed to observe any retirement program which provides substantial benefits and enables the retiree to maintain a just and adequate standard of living. Such an exemplary program should be considered to be "bona fide" and not a "subterfuge" for evading the purposes of the age discrimination laws.

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