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Kaye K. Vance

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Repository Citation
Kaye K. Vance, Fitness or Age as an Occupational Qualification for Protective Service Workers: A Choice Between Bona Fide Criterion or Arbitrary Discrimination?, 69 Marq. L. Rev. 422 (1986).
Available at: http://scholarship.law.marquette.edu/mulr/vol69/iss3/6

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FITNESS OR AGE AS AN OCCUPATIONAL QUALIFICATION FOR PROTECTIVE SERVICE WORKERS: A CHOICE BETWEEN BONA FIDE CRITERION OR ARBITRARY DISCRIMINATION?

I. INTRODUCTION

The assertion of an employer's right to discriminate on the basis of age is made frequently in the protective service occupations of police officers and firefighters. This occurs despite the prohibition of age discrimination set forth in the Age Discrimination in Employment Act (ADEA or the Act).\(^1\) The purposes of the ADEA are threefold: "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 upon employment."\(^2\) Protective service employers are entitled to protection from age discrimination.

Although the Act serves to protect older employees, it does not require an employer to hire or retain an individual who is not qualified. It does require that in order to terminate an individual an employer have proof, other than age, that an individual is \textit{not} qualified. The Act acknowledges that all or most persons over a certain age may be unable to meet the demands of a particular job. It is for this reason a bona fide occupational qualification exception (BFOQ) is included in the ADEA.\(^3\)

Police officers and firefighters must be qualified and competent to do their jobs, just as employees in other professions must be duly competent. However, because police officers and firefighters are involved with public safety, job fitness is a par-

\(^1\) 29 U.S.C. §§ 621-34 (1976 & Supp. III 1979). Generally, the ADEA prohibits discrimination in employment against individuals who are at least 40 years of age but less than 70 years. As originally passed in 1967, the Act did not apply to federal, state or municipal employers. In 1974, Congress extended the Act to these employers by amendment of § 11(b) of the Act, 29 U.S.C. § 630(b).


\(^3\) 29 C.F.R. § 860.102 (1980) (citing examples of BFOQ exemptions including age requirements for pilots and actors).
amount concern; age, therefore, is liberally asserted as a BFOQ in these professions.

In a recent age discrimination case, the Supreme Court in *Western Airlines v. Criswell* ⁴ accepted the BFOQ as an extremely narrow exception to the prohibition of age discrimination contained in the ADEA. The Court acknowledged safety as a legitimate consideration. However, it also noted that safety considerations "are only relevant at the margin of a close case, and do not relieve the employer from its burden of establishing the BFOQ by the preponderance of credible evidence." ⁵ "Safety" is not a BFOQ. However, "safety" is the reason articulated for police and firefighter mandatory retirement standards as low as age fifty. ⁶ There are also requirements that no one over age twenty-nine may be hired. ⁷ These standards have imposed a discriminatory criterion based solely upon age. Those older than a designated retirement or hiring age are assumed to be unfit for the job. Therefore, age as a BFOQ is asserted as necessary to assure competent protection of the public.

There is no proof that the public would be jeopardized if this arbitrary age discrimination were not imposed. Fitness for the job, rather than age, is the logical employment criterion and focus of the BFOQ analysis. If age is to be a reason for discharge or refusal to hire, it should be supported by empirical data which validates a BFOQ. This data can be provided only by assessment of the police officer's and firefighter's job-related abilities as interfaced with an objective age factor. Although the public deserves to be protected by a capable protective service force, youth is no guarantee of public safety.

Section 4(f) of the ADEA sets forth the affirmative defenses of a bona fide occupational qualification: "It shall not be unlawful for an employer, employment agency or labor or-

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⁴ 105 S. Ct. 2743 (1985).
⁵ Id. at 2754 n.29. The Court went on to state that "[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to the safe operation of the business." Id. at 2754.
⁶ See, e.g., Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984).
⁷ See, e.g., Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985); EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984).
ganization (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 . . . .”

Thus, the BFOQ defense entails an admission that age is a determining factor in an employment decision, but that the use of age can be justified. The finding of a BFOQ permits the age-based discrimination that the ADEA is designed to prevent. The BFOQ is to be construed narrowly; to do otherwise undermines the intent of the ADEA.

Although the process of aging impacts equally on each federal district, the various districts continue to hold differing views on how the universal aging process affects the protective service worker.9 Depending on the district, the “narrow” BFOQ exception may encompass an entire police force or an individual worker.

This Comment considers the BFOQ exception to the prohibition of age discrimination as it is applied to the protective service employee. The focal point of the BFOQ exception inquiry is “the particular business.” Courts differ over whether that term should be broadly or narrowly defined. In other words, the threshold question is whether it is the desk sergeant’s job or the police officer’s job that constitutes a “particular business?” This Comment concludes that the legislative intent of the ADEA, as well as United States Supreme Court’s

8. 29 U.S.C. § 623(f) (1976 & Supp. III 1979). The remaining affirmative defenses are: “to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . to observe the terms of . . . a bona fide seniority system . . . or any bona fide employee benefit plan . . . or to discharge or otherwise discipline an individual for good cause.” Id.

The defenses of “reasonable factors other than age” and “good cause” are used by the defendant to support the proposition that there is no causal connection between the employment action and age. The remaining defenses — BFOQ, the seniority system, and benefit plan defenses — are true affirmative defenses. The employer acknowledges that age was the reason for the challenged decision but asserts that the decision is justified. Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978) (establishing the distinction between the defenses).

9. Compare Popkins v. Zagel, 611 F. Supp 809 (C.D. Ill. 1985) (court found that state statute requiring police officers to retire at age 60 satisfied the equal protection clause by assuring physical preparedness of police) with EEOC v. City of Bowling Green, 607 F. Supp. 524 (W.D. Ky. 1985) (court held that the EEOC was entitled to a preliminary injunction because city had failed to demonstrate that age was a BFOQ necessary for the normal operation of the business).
interpretation of the Act, supports the view that an individual job is the relevant point of inquiry.

This Comment then compares the BFOQ in both a hiring and retirement context. In a hiring context, the BFOQ is supported by neither data nor logic as an exception to the ADEA's policy against age discrimination. On the other hand, it is possible to empirically support a BFOQ in a retirement context. Thus, reliable data based on job-related fitness assessments of employees can support at least a rebuttable presumption of retirement at a designated age.

Objective job-related fitness assessments are feasible and desirable to ensure the safety of the public by ensuring the competence of protective service employees at any age. These objective assessments are the only way to obtain relevant data in support of a BFOQ exception to the ADEA.

II. THE FOCAL POINT OF THE INQUIRY: THE MEANING OF "PARTICULAR BUSINESS"

The ADEA requires that a BFOQ must be "reasonably necessary to the normal operation of the particular business ...."10 As applied to protective service occupations, the "reasonably necessary" standard has been interpreted as meaning necessary to protect the safety of the public.11 A protective service employee's tasks can require a wide range of abilities. Police work involves confrontation with criminals as well as assisting school children across the street; fire department jobs include a chief as well as firefighters. Because of these variances, the courts have issued varied opinions on what is meant by the statutory phrase: "normal operation of a particular business."12 Courts may focus on an assignment, a job, or the profession as a whole.

The Seventh Circuit addressed the issue in EEOC v. City of Janesville.13 That case concerned an attack on the city's mandatory retirement age of fifty-five for police officers. The city contended that by "particular business" the Act meant

13. 630 F.2d 1254 (7th Cir. 1980).
the entire police department. The EEOC contended that the phrase "particular business" referred to the particular activities of the individual employee, or category of employees, within the department.\textsuperscript{14}

The Seventh Circuit accepted the city's argument, interpreting the statutory phrase "particular business" to mean the primary function of the employer's business. This decision was reached despite the fact that previous cases on the issue had analyzed the BFOQ issue in terms of the duties of the particular job.\textsuperscript{15}

The \textit{City of Janesville} court opined that the "plain meaning" of the statutory language should be strictly construed. The court stated that "[C]ongress was certainly at liberty to limit the applicability of a BFOQ to a particular 'occupation' rather than to a 'business' if it so intended,"\textsuperscript{16} but Congress chose not to do so. In ascertaining the "plain meaning," the court dismissed the legislative history of the ADEA as yielding no support for a narrower "occupation" construction.\textsuperscript{17} Thus, it is ironic that the \textit{Janesville} court attributed its "plain meaning" to "particular business" because Congress left the term ambiguous.

The Eighth Circuit identified a different "plain meaning." In \textit{EEOC v. City of St. Paul},\textsuperscript{18} the court examined the relevant legislative history and concluded that Congress intended that employment decisions be based on ability rather than age. The court asserted further that the goal of the ADEA would be undermined if retirement and hiring age requirements were imposed on a generic class rather than on various occupations within a "particular business."\textsuperscript{19} As the Eighth Circuit concluded: "We cannot believe that the ADEA was intended to

\textsuperscript{14} \textit{Id.} at 1258-59.
\textsuperscript{16} \textit{Janesville}, 630 F.2d at 1258.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} 671 F.2d 1162 (8th Cir. 1982).
\textsuperscript{19} \textit{Id.} at 1165-66.
allow a city to retire a police dispatcher because that person is too old to serve on a SWAT team.\textsuperscript{20}

The plain meaning of "particular business" was subject to yet another interpretation by the First Circuit. That court chose to take an approach somewhere in between treating employees as a generic class and treating each job individually. In \textit{Mahoney v. Trabucco},\textsuperscript{21} the court decided that a Massachusetts law requiring uniformed state troopers to retire at age fifty did not violate the ADEA because the retirement age was imposed on a police sergeant assigned to an administrative position. The unanimous opinion expressed the concept that within any particular business, specific occupations may exist requiring separate age limitations.\textsuperscript{22} However, among the Massachusetts police, the First Circuit did not find distinct occupations warranting separate age requirements; instead the court found officers with varying assignments. On this point, the court reasoned as follows:

When, however, a person signs up in a paramilitary uniformed force, where one is subject to generally unrestricted reassignment and performance of the most strenuous duties in any emergency, and undergoes the military training required of all recruits, with the expectation of receiving special pension and disability benefits, we would be loath to equate particular "assignments," even if of long duration, to "occupations."\textsuperscript{23}

In 1985 the United States Supreme Court considered the issue and held that the term "particular business" in the Act's BFOQ provision is "the job from which the protected individual is excluded."\textsuperscript{24} This holding, however, did not clarify the issue; it merely shifted the semantic debate from "particular

\textsuperscript{20} Id. at 1166.

The Eighth Circuit appeared to alter its position on the "particular business" issue in \textit{EEOC v. Missouri State Highway Patrol}, 748 F.2d 447 (8th Cir. 1984). Although not addressing the specific interpretation of the "particular business" language, the court supported a mandatory retirement age of 60 for all state highway patrol members, a maximum hiring age of 32 for all patrol members and a maximum hiring age of 32 for radio operators. \textit{Id.} at 448. The dissenting opinion regarding the maximum hiring age for radio operators, referred to the earlier \textit{St. Paul} decision in noting the job differences between regular highway patrol members and radio operators. \textit{Id.} at 457-58.

\textsuperscript{21} 738 F.2d 35 (Ist Cir. 1984).

\textsuperscript{22} Id. at 39.

\textsuperscript{23} Id.

business” to “job” so that the confusion persists.25 Therefore, even despite “direction” from the Supreme Court, courts continue to leave the focal point of the BFOQ analysis in doubt. Is the analysis applied to an assignment, a job, or an occupation?

A generic business focal point, as opposed to an individual assignment focus is desired by some employers.26 These employers argue that if assignments or jobs were treated individually, employees could switch from jobs with a mandatory retirement age to jobs without one. However, this employee option has already been endorsed by the Supreme Court in Trans World Airlines v. Thurston.27 In that case, involving the transfer of pilots to flight engineers, the Court stated: “Nothing in the legislative history [of the Act] . . . indicates a congressional intention to allow an employer to discriminate against an older worker seeking to transfer to another position, on the ground that age was a BFOQ for his former job.”28

In fact, the purpose of the ADEA is to encourage employment of older Americans.29 The availability of transfer facilitates employment. This does not mean special treatment, just equal treatment. If a vacancy occurs older employees should have the same option to transfer that is available to others. The BFOQ exception exists only in the protective services for public safety concerns.30 Transfers or promotions to positions...
not directly involved with the safety of others render this basis for the BFOQ exception to ADEA inapplicable.

The application of BFOQ to a protective service profession as a generic whole permits broad interpretation of the BFOQ. This is contrary to the intent of its inclusion in the ADEA. "[T]he BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of age discrimination contained in the ADEA."31 Thus, the employer seeking to rely on a BFOQ must demonstrate that because of the duties involved in a particular job, the use of age as an indicator of fitness for the particular job is justified.32

Language in other sections of the ADEA supports this narrow interpretation of a BFOQ. The ADEA makes it unlawful for an employer "to . . . classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's age."33 For example, classifying all police officers under one heading such as "protective service occupation" allows for individual differences in police department jobs to be ignored. While a chief at age fifty-five may not be able to do the work of a patrol officer, a chief may still be a capable administrator. A generic classification would require retirement of the chief at age fifty-five, irrespective of administrative capabilities. The ADEA's ban on classifications that adversely affect older workers was intended to prohibit just this type of employment practice.34

Legislative history supports this conclusion. Senate findings indicate as follows: "For capable older workers the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding

32. See, e.g., Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984); EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743 (7th Cir.), cert. denied, 104 S. Ct. 484 (1983); Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982); EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982); EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982); Kossman v. Calumet County, 600 F. Supp. 175 (E.D. Wis. 1985); Hahn v. City of Buffalo, 596 F. Supp. 939 (S.D.N.Y. 1984).
when to retire, provided they are still physically and psychologically able to perform *their* jobs in a satisfactory manner."

One of the ADEA purposes is to promote employment of older persons based on their ability rather than age. It would be inconsistent with this purpose to permit a city to retire its police chief, who was completely able to fulfill the duties of that job, because of an inability to fulfill the duties of another position within the department. The narrow construction of the BFOQ exception is facilitated only by a job-specific analysis.

III. DEFINING A BONA FIDE OCCUPATIONAL QUALIFICATION

A. By Statute

The language of the ADEA does not provide a definition of what constitutes a BFOQ. The courts have assumed the task. In an attempt to assert age as a BFOQ for protective service personnel, courts have looked to factors outside of the individual case, preferring to apply statutorily-defined BFOQ's. In this vein, courts have applied municipal, state, and federal statutes to the ADEA. However, imposing these requirements of municipal, state and federal statutes on the ADEA is not always consistent with the public policy incorporated in the ADEA.

The United States Supreme Court has noted that although some statutes allow mandatory retirement of federal protective service employees, this does not provide a blanket BFOQ for all protective service workers. "The mere fact that some federal firefighters are required to cease work at age 55 does


37. See supra note 8 and accompanying text.

not provide an absolute defense to an ADEA action challenging state and local age limits for firefighters."39

The Court did, however, allude to situations where a federal requirement may be a defense for a mandatory age limitation. If such a federal requirement is based on a BFOQ under the Act, it may be extended in application to permit state and local age requirements.40 Thus the federal laws, as well as state and local government laws, which limit employment op-

39. Id. at 2722. Commenting on the federal statute mandating retirement at age 55 for federal firefighters, the Supreme Court stated:

The history of the civil service provision, however, makes clear that the decision to retire certain federal employees at an early age was not based on bona fide occupational qualifications for the covered employment. The history demonstrates instead that Congress has acted to deal with the idiosyncratic problems of federal employees in the federal civil service. Id. at 2723.

And noting that the retirement age for the F.B.I. was based on less than an empirical certainty, the Court stated:

However, neither the language of the 1974 amendment nor its legislative history offers any indication why Congress wanted to maintain the image of a "young man's service," or why Congress thought that 55 was the proper cut-off age, or whether Congress believed that older employees in fact could not meet the demands of these occupations. Indeed, Congressmen who opposed the bill voiced their concern for the singling out of one group of employees for preferential treatment through enhanced annuities and early retirement, and did not even acknowledge that the exigencies of the job might have anything to do with Congress' willingness to accord special treatment to a group of employees. H.R. Rep. No. 93-463, supra, at 20. Moreover, the allowance that firefighters who had not yet served for 20 years could remain in their jobs, see id., at 6, along with other exceptions to the general rule of retirement, casts serious doubt on any argument that Congress in fact believed that either the employee or the public would be jeopardized by the employment of older firefighters. Id. at 2724.

40. Id. at 2726-27.

FAA regulations supporting the mandatory retirement at age 60 were apparently based on a 1959 report. See 49 Fed. Reg. 14692 (proposed April 12, 1984). Despite this, a federal district court, deferred to the FAA expertise and granted a summary judgment upholding a mandatory retirement age for pilots based on FAA regulations stating:

The court is convinced that, because the FAA regulation is based on considerations that would support a BFOQ, the regulation may establish a BFOQ for jobs similar to that of an airline pilot. Whether the regulation does establish a BFOQ for such jobs depends on various factors addressed in the next section of this Order. EEOC argues that Johnson, ___ U.S. ___, 105 S. Ct. 2712, precludes adoption of a regulation as a BFOQ for jobs to which the regulation is inapplicable. The court does not read Johnson this way. In the court's view, Johnson merely precludes adoption of a regulation without examination of the reasons for the regulation.

opportunities based on age, must meet the standards for the establishment of a valid BFOQ. If they do not they should be superseded by public policy as reflected in the ADEA. 41

B. The Development of a BFOQ Standard

The language of the protective service BFOQ in the ADEA is borrowed directly from Title VII of the Civil Rights Act of 1964. 42 The similarity between Title VII and the Act has been reaffirmed by the United States Supreme Court. 43 The Title VII analogy has formed the basis for the judicial interpretation of the intent of the ADEA, including the BFOQ language.

Based on Title VII cases, the Supreme Court has recently adopted a two-element standard in Western Airlines v. Criswell. 44 This two-element test was previously adopted by the Fifth Circuit in Usery v. Tamiami Trail Tours. 45 The second Tamiami element had two parts: First, proof of the unfitness of at least some members of the class had to be established and second, proof of the infeasibility of individual determinations of fitness for the job was required. The latter proof requirement alone was considered insufficient. 46 Nevertheless, the

41. Neither the states nor the federal government should be permitted to ignore the intent of the ADEA. As the Eighth Circuit pointed out: "[S]tate law could create a class of 'all state employees' and thereby allow the state to retire a clerk because he or she is too old to fight fires." EEOC v. City of St. Paul, 671 F.2d at 1162. See also Tuohy v. Ford Motor Co., 65 F.2d 842 (6th Cir. 1982) (holding that a federal retirement scheme does not preempt further inquiry into the reasonable necessity of a mandatory retirement policy established by some other body). But see Gathercole v. Global Assocs., 727 F.2d 1485 (9th Cir. 1984) (defendant air transportation company did business with the army which required retirement at age 60 per FAA regulations; the court upheld the retirement age as a matter of law).


43. See Trans World Airlines v. Thurston, 105 S. Ct. 613 (the substantive provisions of the ADEA "were derived in haec verba from Title VII." (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978))).

44. 105 S. Ct. 2743 (1985).

45. 531 F.2d 224 (5th Cir. 1976).

46. Accord EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983) (explaining the necessity of both parts of the second Tamiami element). These courts also applied the two-part Tamiami test: EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984); Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984); EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir.), cert. denied, 104 S. Ct. 484 (1983); Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982); EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982); Hahn v. City of Buffalo, 596 F. Supp. 939
Tamiami test, as adopted by the Supreme Court, can be stated as follows:

Unless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, the age for mandatory retirement less than 70 must be an age at which it is highly impractical for the employer to ensure by individual testing that the employees will have the necessary qualifications for the job.\(^\text{47}\)

The Court's interpretation of the Tamiami test requires employers to establish either that employees over a certain age are unqualified or that it is administratively impossible to screen for individuals who are in fact unqualified. The inclusion of "or" in this adaptation is curious. It is contrary to the purposes of the Act to escape a determination of discrimination by proving the latter without also having to prove the former. To do so would allow an arbitrary administrative exception to the Act based on a factor unrelated to the ability to do a job. Courts that applied the Tamiami test prior to Criswell considered it an inclusive two part analysis.

IV. APPLYING THE CRISWELL/TAMIAMI STANDARD

A. The First Test: All or Nearly All Employees Above a Certain Age Lack Qualifications Required for the Position

The establishment of an age limit because all or nearly all employees over a certain age lack necessary qualifications (the

\(^{47}\) Criswell, 105 S. Ct. at 2756. The two-element BFOQ standard adopted by the Supreme Court was derived directly from two Title VII cases. The first element is from Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971). It is a requirement that the employer demonstrate that the job qualification of an age requirement is reasonably necessary to the essence of the business. Diaz, 442 F.2d at 388. The second element is the rule articulated in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). In Weeks, a sex discrimination case in which the job required the lifting of weights, the Fifth Circuit said that an employer could rely on the BFOQ exception in proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Id. at 235. The court provided that as an alternative to this element of the test a qualification may be justified if the employer demonstrates "that it is impossible or highly impractical to deal with women on an individualized basis." Id. at 235, n.5.
“business necessity” rationale) must be analyzed in terms of the unique nature of age discrimination:

Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Those discriminations result in non-employment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance. As a general rule, ability is ageless.48

Indeed, the Senate Committee report resulting in the 1978 ADEA amendments noted that arguments for retaining existing mandatory retirement policies are primarily based on misconceptions rather than upon a careful analysis of the facts. The report did acknowledge that: “in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs. . . .”49 Based on these considerations, an employer of protective service personnel should be allowed to discriminate


There continues to be little support for the widespread belief that job performance declines with age. In fact, it may be just the opposite. After extensive analysis of 13 studies conducted between 1940 and 1983 by David Waldman and Bruce Avolio, two state of New York Psychologists, strong evidence of a correlation between performance improvements and increasing age was found. In addition, assessment of older workers abilities varied depending on type of measurements used, with older workers facing better when objective measures of job-related abilities were employed. Waldman & Avolio, A-Meta Analysis of Age Differences in Job Performance, 71 J. APPLIED PSYCHOLOGY 33-38 (1986).

This study concluded that:

Perhaps what is needed is less consideration of or reliance on chronological age and greater use of intrinsic predictors of job performance. In other words, through the use of job analysis, specific mental and physical requirements can be identified for workers in a given job. These abilities may decline for different workers to various degrees with increasing age. The arbitrary use of younger age as an employment criterion would unavoidably discriminate unfairly against an older worker whose capacity remains high . . . .

Id. at 37.

49. 123 CONG. REc. 34,319 (1977) (statement of Sen. Javits) (emphasis added). Congressman Dent, Chairman of the Subcommittee, reportedly made this noteworthy statement: “I can’t see the logic of assuming that a person over 40 or 45 or 50 is physically unfit without even taking the time to make an examination or give an examination to determine whether or not he can meet [job requirements].” See James & Alaimo, BFOQ: An Exception Becoming the Rule, 26 CLEV. ST. L. REV. 1, 9 n.73 (1977).
based on age only when there is sufficient empirical evidence to support the assumption that an older person will be a risk to the safety of the public.

The Eighth Circuit in *EEOC v. City of St. Paul* held that age was not a BFOQ for a fire chief. The court rejected the assertion that advanced age equals incompetence. The court found that tests, and not age alone, can accurately determine an individual's ability to perform the tasks required of a chief. Specifically, the court held that medical tests are a more accurate predictor of health problems than age. Based on evidence derived from such tests, the court found that public safety would not be jeopardized by allowing a fire chief to work past age fifty-five.

The facts used to prove that an age limit is a qualification required for employment are asserted as empirical data. Actually, however, such data merely gives rise to broad generalizations regarding the relationship of the job to the safety of the public. For example, the First Circuit in *Mahoney v. Trabucco* applied the *Tamiami* standard and found that a mandatory retirement age was a BFOQ by stating that the "first" element was met because "police function" is related to the protection of person, property, law and order. This rationale avoids any empirically-based link of age with the business necessity of public safety.

The business necessity element in cases where public safety is the concern has similarly been supported by broad descriptions of the particular qualifications needed for the particular job of the protective service profession. The broad job descriptions are a basis for the assertion that physical strength

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50. 671 F.2d 1162 (8th Cir. 1982).
51. Id. at 1168.
52. 738 F.2d 35 (1st Cir. 1984).
53. Id. at 37. *See also* Hahn v. City of Buffalo, 596 F. Supp. 939, 946 (W.D.N.Y. 1984) (the "reasonably necessary to the essence of the business" element addressed by the generalization that "becoming a police officer requires good physical conditioning").
54. *See, e.g.*, EEOC v. Missouri State Highway Patrol, 748 F.2d 447, 451 (8th Cir. 1984). The court found that the state patrol's obligations to the public included: patrolling of the road; handling abusive and violent motorists; engaging in high speed chases; assisting motorists; and participating in strenuous work. The court went on to say that "[P]hysical ability and ability to withstand stress are job qualifications which are reasonably necessary to the performance of its functions and that in these terms there is a correlation between the mandatory retirement age of sixty and the safe and efficient performance of the Patrol's functions." *Id.*
and the ability to function under stress are required and, consequently, all employees must be within a particular age grouping. The implication is that persons over a certain age are not capable of tasks involving physical strength or high levels of stress. Therefore, it is necessary to broadly discriminate against them on the basis of their age. There are two problems with this argument. First, the argument is not credible when the protective service department pays minimal attention to the physical condition of younger officers. The court indicated that the county’s failure to require annual physical examinations of any of its employees rendered their BFOQ for age argument unpersuasive. Protective service employers have considered physical fitness programs impractical to implement. This impracticality may in essence be a measure of the importance truly attached to fitness by protective service employers. If the physical fitness of an officer over age fifty-five is so vital to the

55. See generally Nelson, Age Discrimination in Police Employment, 9 J. Police & Sci. Ad. 428 (1981). See also EEOC v. Pennsylvania, 768 F.2d 514 (3d Cir. 1985). Overturning a district court decision upholding a mandatory retirement age, the court noted as follows:

[T]he district court apparently assumed that good health and physical strength are job qualifications reasonably necessary to the essence of [a police officer’s] business, but made no particularized factual finding to that effect. This omission is particularly troubling in light of the appellant’s allegations that [Pennsylvania State Police] makes no attempt to monitor the health and physical prowess of younger officers, and indeed permits some of them to remain on the job with serious disabilities.

Id. at 518.


57. Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984).

58. Id. at 1198-99.

If [the] county requires such examination it could argue . . . that this showed the genuineness of its concern with the physical fitness of its deputy sheriffs and this in turn would be an argument for a mandatory retirement age, since as we have said physical examinations are not infallible tests of continuing fitness. But the premise is missing; the county does not require examinations.

Id.

59. Missouri State Highway Patrol, 748 F.2d at 454 (employer stated that it would be impractical to force patrol members to participate in a fitness program).
profession that retirement is mandated, it seems inconsistent that the fitness of all officers is given such minimal attention.

Considering the inherent problems associated with the arguments set forth above, a BFOQ based on a nexus between an assumption of incompetence due to age and the necessity of physical fitness to the business of protective service is at best an assertion of good faith on the part of the defendant. 60 The Seventh Circuit has noted that while public safety is a legitimate municipal goal, the ADEA requires that mandatory retirement policies designed to achieve that goal must be based on something more than mere speculation or the subjective belief that older employees are generally less capable of handling the rigors of a physically demanding job. 61 The courts applying the Criswell/Tamiami test attempt to analyze cases by an "objective" step-by-step approach: the defendant must demonstrate with empirical evidence that an age discrimination practice is justified. The test does not contain an intent requirement; the good faith or bad faith of the employer does not enter into the analysis. 62

**B. The Second Element: Impracticality**

The second element of the Criswell/Tamiami test requires proof that age is the only practical means of assuring employee competence. This language should encourage the collection of relevant empirical data as evidence. However, the use of empirical evidence has simply resulted in competing ex-

60. EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1974) (upholding a statutory retirement policy because of the "good faith" of the legislature). However, the Seventh Circuit in Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743 (7th Cir. 1983), rejected the argument that the employer's mandatory retirement policy should be upheld as long as it was made in good faith and was "not the result of an arbitrary belief lacking in objective reason or rationale." Id. at 752.

61. Orzel, 697 F.2d at 755.

"Under the Act, employers are to evaluate employees between the ages of 40 and 70 on their merits and not their age." Western Airlines v. Criswell, 105 S. Ct. 2743, 2756 (1985). See also EEOC v. University of Tex. Health Science Center, 710 F.2d 1091 (5th Cir. 1983). The court stated that "offhanded, subjective opinions by hiring officials that older applicants cannot handle the job are not by themselves sufficient to justify age restrictions . . . . The defendant must demonstrate a specific, objective, or factual basis for its hiring qualifications based on age." Id. at 1094. Accord EEOC v. County of Santa Barbara, 666 F.2d 373, 373 (9th Cir. 1982) (agreeing with the necessity for a factual foundation when asserting a BFOQ).

62. See Orzel, 697 F.2d at 755; see also, Rowland, supra note 56, at 464.
pert testimony regarding the health and physical capabilities of older persons. There are experts who claim no test is capable of determining the functional age of a worker. There are also experts who will predict with near certainty which individuals will be impaired by age.

Despite this type of conflicting testimony, expert witnesses are an integral part of ADEA litigation. Medical science changes and expert testimony must keep pace with such changes. In *Criswell*, the Supreme Court endorsed the case-by-case analysis necessary to assess problems involving age discrimination in employment. "A rule that would require the jury to defer to the judgment of any expert witness testifying for the employer, no matter how unpersuasive, would allow some employers to give free rein to the stereotype of older workers that Congress decried in the legislative history of the ADEA."

V. BFOQ'S IN APPLICATION

A. A BFOQ for Initial Employment

The use of an age limit in initial protective service hiring has been explained as necessary because of the extended periods of training and the need for the availability of career progression in order to attract candidates. The contention that investments in training are more wisely spent on younger applicants negates the entire concept of protection against age discrimination. The purpose of the Act is to prohibit the use of such criteria in hiring. The Act itself provides that: "It shall be unlawful for an employer . . . to fail or refuse to hire . . . 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."

66. Id.
In *Arritt v. Grisell*, the Fourth Circuit reversed a maximum hiring age of thirty-five for municipal police officers on BFOQ grounds. The trial court had relied heavily on an assertion that the safety of the citizens depends on the competent work of police officers. The Fourth Circuit did not accept this reasoning. The court of appeals pointed out that the only "factual support" for demonstrating that "all or substantially all" officers over the age of thirty-five were unable to perform their jobs was an affidavit by the chief of police. In this affidavit, the chief described skills believed to decline with age.

In *Arritt* the police chief's concern about older employees was that such employees might suffer declining physical capabilities. By contrast, in an age discrimination case involving pilots, a court decided that any physical deterioration was more than outweighed by gains in experience and judgment. This rationale is equally applicable to protective service employees. It makes little sense to assume that police officers or firefighters do not also gain through human experience.

Protective service employers asserting the BFOQ in hiring should be able to establish empirically that "all or substantially all" prospective employees over a certain age are unqualified for the position. However, courts have accepted bare assertions to be the requisite empirical evidence. For example, one court appeared to accept the bald assertion that persons under forty-five are better able to relate to younger students. There was no empirical evidence presented to back up this claim.

In cases where empirical evidence is presented, courts must further examine the source, context and biases associated with the data. The Eighth Circuit failed to fully consider the significance of the context and underlying assumptions of the defendant's medical expert testimony when it held that a maximum of age thirty-two was a BFOQ for hiring highway patrol members and radio operators. The medical expert based his testimony on the questionable generalization that as

69. 567 F.2d 1267 (4th Cir. 1977).
70. Id. at 1271.
72. EEOC v. University of Tex. Health Science Center, 710 F.2d 1091, 1096 (5th Cir. 1983).
73. EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984).
one ages, one becomes sedentary. "According to [the defendant's medical expert], an average 45-year-old adult male who is sedentary does not have sufficient aerobic capacity to perform the duties of the Patrol."\textsuperscript{74}

Even when evidence is fully considered, not all empirical demonstrations of the "necessity" of age criteria in hiring and retirement warrant a BFOQ. Certain rationales offered in support of hiring age ceilings are unlawful. For instance, in \textit{EEOC v. Missouri State Highway Patrol,}\textsuperscript{75} the Eighth Circuit upheld a hiring age ceiling of thirty-two apparently on economic grounds. "The maximum entry age insured that the Patrol can take advantage of the physical skills and abilities of younger persons and also provide those persons with enough experience while they are relatively young to compensate for the inevitable reduction in their physical skills and abilities that comes with aging."\textsuperscript{76} But the Act implies that differentiation based on the average cost of employing older employees as a group is generally unlawful.\textsuperscript{77} Although it may be possible to collect valid evidence to demonstrate that persons hired at a younger age will work longer and be better investments, economic considerations should not be the basis for a BFOQ.

The Criswell/Tamiami test requires courts to attempt to ascertain objectively a bona fide occupational qualification. However, asserted as a defense in a case involving a maximum hiring age, the "all or substantially all" analysis is strained. It is highly unlikely that "all or substantially all" employees over the age of thirty-five or forty would be unable to perform the duties of a particular job. However, the BFOQ has been asserted to support such practices. The Ninth Circuit in \textit{EEOC v. Los Angeles County}\textsuperscript{78} held that the refusal to consider applications of those thirty-five or over for deputy sheriff or fire helicopter pilot was not a valid BFOQ defense. "[Although]

\textsuperscript{74} \textit{Id.} at 456.
\textsuperscript{75} \textit{Id.} at 447. The Eighth Circuit found that although several witnesses believed the age limit should be retained, "none of the witnesses stated that all or nearly all persons over age 40 could not perform the duties of a police officer." \textit{Id.} at 456.
\textsuperscript{76} \textit{Id.} at 453.
\textsuperscript{78} 706 F.2d 1039 (9th Cir. 1983).
strength, agility, good reflexes and ability to run appreciable distances and lift heavy objects were reasonably necessary to the jobs . . . no strict relationship [was shown] between age and physical ability . . . . [P]hysical performance tests can easily distinguish those persons who possess the necessary physical attributes and those who lack them."

Maximum hiring requirements, like the one successfully challenged in the Los Angeles County case, are based on a number of questionable assumptions concerning how younger workers differ from older workers. In another case, for example, in an attempt to justify a BFOQ for not hiring anyone over forty to do police work, testimony was presented which asserted that "older officers tend not to be 'self-starters,' whereas younger officers are highly motivated."

Protective service employers arguing in favor of a hiring age ceiling have presented evidence ostensibly demonstrating that more arrests are made by younger officers. However, this evidence may not be a plus for youth. It does not take into account the ability to defuse a situation without resorting to arrest. Also, less than one percent of an officer's time on patrol is spent on criminal events requiring an officer's attention.

Most persons over age forty are considered fit and capable of doing protective service jobs competently. Many working police officers and firefighters are over this age. The rationale for a maximum hiring age as a BFOQ is questionable. At best, it is a thinly disguised economic argument. The employer does not want to put time and money into training someone who they plan to retire ten or fifteen years later.

79. Id. at 1043 (citations omitted).
81. See Morgan, The Use of Age by Law Enforcement Policymakers as a Predictor of Performance, 8 J. POLICE SCI. & AD. 166 (1980) (quoting B. COHEN & J. M. CHAIKEN, POLICE BACKGROUND CHARACTERISTICS AND PERFORMANCE 15 (1972)). "The men who were oldest at time of appointment were least likely to advance beyond patrol assignments, had low absenteeism for sickness, and were substantially less likely than average to have civilian complaints . . . . [T]he data suggests older recruits would be best suited for assignment to sensitive communities." Id. at 169.
B. A BFOQ for Retirement

As opposed to its results in hiring cases, when applied to mandatory retirement age cases, the Criswell/Tamiami standard reflects more inherent logic. It requires essentially that the employer prove incompetence beyond a certain age or that this incompetence cannot practically be determined through individualized assessment techniques. The circuits are not in agreement as to what proof is sufficient to satisfy this BFOQ test in retirement cases. Again, often the decision turns on expert testimony. After hearing such testimony, courts are given the responsibility of determining the definitive diagnosis as to the effects of age. Different holdings reflect varying weight and credibility given by the courts to the facts presented.82 However, judicial selection of competing theories on aging is not enough to support a BFOQ. Employers claiming a BFOQ must present the courts with more objective, empirical data on the general effects of aging.83

82. For examples of differing holdings, see Popkins v. Zagel, 611 F. Supp. 809 (C.D. Ill. 1985). The court upheld a mandatory retirement age based on "undisputed medical testimony that substantially all persons over age 60 lack the physical capacity to effectively work as Illinois State Troopers." Id. at 813. Contra EEOC v. Bowling Green, 607 F. Supp. 524 (W.D. Ky. 1985). The court did not allow a mandatory retirement to occur stating that based on expert testimony "[a]ll officers in the police department could be screened periodically with physical fitness and medical tests, and those who are determined to be high risks could be given a stress test." Id. at 526.

83. In EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982), the Ninth Circuit recognized that "currently available information concerning the effects of aging is not a stagnate [sic] body of knowledge." Id. at 376. In order to prove the propriety of a BFOQ, the court indicated that a party must provide ample evidence "as to the general effects of aging on the performance of [specific] duties . . . [and] as to the possibility of determining whether individual employees could be counted on to perform their duties safely." Id. Mere speculation on the effect of aging would not be sufficient.

The United States District Court for the Northern District of Florida ruled that the Florida Highway Patrol (FHP) violated the ADEA by requiring state highway patrol officers to retire at age 62. EEOC v. State of Florida, 40 Daily Lab Report E-1 (BNA) (1986). This court concluded that the mandatory retirement age was not a BFOQ because the state can use other means to determine if officers are not physically able to perform their duties. The court also determined that FHP failed to show that "all or substantially all" persons of 62 years cannot perform a trooper's duties or that it is "impossible or highly impractical" to test troopers on an individual basis to determine physical fitness.

In an interesting observation, the court also stated that FHP's argument was undercut by the concededly adequate performance of female troopers who, because of their size, cannot reach the "anaerobic capacity" which FHP cited as one reason that officers over 62 must be retired. Id.
In order to provide the necessary empirical data, employers should provide the courts with results from fitness testing of older employees. If such testing reveals a deficiency among older employees, a BFOQ is warranted. However, if protective service departments do not require fitness testing of all employees, the assertion that "all or substantially all" older protective service personnel are unable to do their jobs effectively is likely to be backed only by the speculative evidence of partisan experts. It is on this uncertain foundation that courts are left to decide the age at which persons are incompetent to perform their jobs.

Fitness testing has been promoted by various courts in order to promote objective decisions on BFOQ. "[I]n the age bracket with which we are here concerned — 62 to 65 — there is no suggestion that the legitimate apprehension of the defendants cannot be met through periodic physical examinations."^{84}

The concern for the ability of those who are entrusted with assuring the safety of others is valid. It is a concern which is present when the police officer, or firefighter, is hired and retired. However, concern is present throughout the entire career of a protective service employee. Fitness testing should be employed to evaluate the competence of all protective service employees. Only armed with empirical data gathered from this type of institutional fitness evaluation can a protective service employer assert a valid BFOQ for mandatory retirement.

V. CONCLUSION

A BFOQ defense based on legitimate job-related criteria is a valid exception to the ADEA's prohibition against age discrimination. The purpose of the Act is not to require employers to retain those employees who cannot perform the duties of the job as a result of performance deficiencies related to age. The purpose of the Act is to prohibit arbitrary age discrimina-

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tion in employment.\(^8\) Employees in fire and police departments are entitled to its protections.

The ban against arbitrary age discrimination was included because ADEA drafters believed mandatory hiring and retirement policies are frequently based on misconceptions, not facts. If a mandatory age requirement is based on facts, it is not arbitrary discrimination. It is a bona fide occupational qualification.\(^6\) Age discrimination is similarly not arbitrary if it is based on the requirements necessary for a particular position rather than an entire class.\(^7\) The requirement of a relationship to public safety demands a BFOQ analysis focused on the individual job in question. It is unlikely that the goal of public safety requires the same level of fitness for a radio dispatcher as it does for a member of a SWAT team.

Mandatory age restrictions in protective service hiring and retirement must be interpreted in accordance with the purpose of the BFOQ. An initial employment policy related to age and unsupported by an objective rationale is arbitrary age discrimination and not a BFOQ. There has been no valid empirical data supporting the assertion that a police officer hired at forty is less able to perform the duties of the job than the forty year old officer already working.\(^8\)

Unlike its assertion in a hiring context, the use of a BFOQ in a mandatory retirement context does not necessarily equal arbitrary discrimination. It is possible to establish a bona fide age criterion for jobs within a protective service occupation. However, such a criterion must be supported by facts. The factual basis can be accomplished by proof derived from fitness testing for assessment of required job-related abilities. If the goal of a BFOQ in the protective service job is public safety, the mandatory retirement policy must be objectively linked with this goal.

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87. See supra notes 10-35 and accompanying text.
88. The lack of a factual basis to exclude a qualified older applicant will be an asset for employers of protective service workers in the future. A decline in the availability of a younger labor force is projected. The pool of qualified applicants for jobs will be expanded by the removal of an age barrier. See generally Morrison, The Aging of the U.S. Population: Human Resource Implications, 106 MONTHLY LAB. REV. 13 (1983).
The inclusion of the BFOQ in the ADEA allows protective service employers to consider the goal of public safety. It requires employers to achieve this goal in an individualized and careful manner. The assurance of public safety logically implies that those in positions of direct law enforcement have a level of physical fitness that does not compromise public safety. This can be assured only through testing of job-related skills.\(^8\)

Experts agree that as an individual's age increases the individual's capability to perform physical activities decreases. The experts also agree that the decline varies by individual and that exercise and physical training can slow this decline in physical abilities. These points of agreement form the basis for a fair retirement policy and valid BFOQ defense. The medical profession and the courts have recognized that it is feasible to identify the skills needed for each protective service position and to assess these skills.\(^9\) Testing can identify an age which is associated with a deterioration of skills. The same tests can be used by the individual who has reached the retirement age but desires to prove continued fitness for the job. This type of policy was upheld in *Adams v. James*\(^9\) in which a police department had a mandatory retirement age of sixty. This retirement age requirement, however, was coupled with the policy that any officer over that age could continue employment on a year-to-year basis as long as the officer remained physically fit to carry out his duties.

A retirement policy based on an empirical fitness assessment has advantages to the public, the employer, and the employee. It promotes public safety by encouraging fitness throughout the career of a police officer or of a fire fighter. It

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8. The physical abilities needed to perform law enforcement duties are easily tested. [There are] many simple and inexpensive tests which can easily assess a patrolman's balance, flexibility, agility, speed, power and endurance. If the Patrol is genuinely concerned about the well-being of the public and its officers, it can readily evaluate its members and discharge those who cannot perform up to standard.

9. See generally Rowland, *Age Discrimination in Retirement: In Search of an Alternative*, 8 J. L. & MED. 433 (1984). Comprehensive tests of job performances are available and include an analysis of functions necessary for a particular job and medical tests to determine whether a person would be fit for those functions. *Id.* at 449.

provides data to support a retirement age as a bona fide occupational qualification, and it allows the qualified individual the opportunity of continued employment. This is not arbitrary age discrimination and is in accord with the intent of the ADEA: "A person with the ability and desire to work should not be denied that opportunity solely because of age."92

KAYE K. VANCE

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