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"WILL YOU STILL NEED ME . . . WHEN I'M SIXTY-FOUR?": FORCED RETIREMENT FOR EXECUTIVES UNDER THE ADEA

Mark A. Shaiken†

*"If, as Dostoevski observed, one test of a civilization is the way in which it treats its elderly, the existence of age-based mandatory retirement in the U.S. earns our country poor marks."*¹

I. INTRODUCTION

Ralph Waldo Emerson once said, "Old age is not disgraceful, but immensely disadvantageous."² In 1967, Congress sought to make old age less disadvantageous by passing the Age Discrimination in Employment Act (ADEA),³ designed to promote "employment of older persons based on their ability rather than age."⁴ Although Congress thereby outlawed many discriminatory employment practices, one practice, that of involuntary retirement,⁵ continued. Eleven years later, the ADEA was amended to proscribe most forms of involuntary retirement for workers forty to seventy years old.⁶ With that amendment, however, came an additional provision which excepted employees occupying executive or high policymaking positions from the Act's protection against forced retirement.⁷

This article examines involuntary retirement in the United States both before and after the adoption of the ADEA and focuses on the exception in the ADEA that permits involuntary retirement of high level employees. The author criticizes the exception as lacking statistical and logical support and contravening the stated purposes of the Act.

II. SOCIETAL ATTITUDES — THE NEED FOR CONGRESSIONAL ACTION

One commentator has noted that formal age discrimination in employment was born when mandatory retirement was institutionalized in

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1. Pepper, *We Shouldn't Have to Retire at 65*, WASH. POST PARADE MAG., Sept. 4, 1977, at 12, 15 [hereinafter cited as Pepper].

2. R.W. EMERSON, *Old Age*, in SOCIETY AND SOLITUDE 320 (4th ed. 1904).

3. 29 U.S.C. §§ 621-634 (1976 & Supp. II 1978).

4. *Id.* § 621(b) (1976).

5. The terms "mandatory," "forced," and "involuntary" retirement are used interchangeably in this article and are intended to describe the situation in which an employer determines at what age an employee must retire, regardless of the employee's wishes.

6. 29 U.S.C. § 631(a) (Supp. II 1978) (amending 29 U.S.C. § 631 (1976)).

7. *Id.* § 631(c)(1).

Germany in 1889.⁸ As a political maneuver, Chancellor Otto Von Bismarck declared that sixty-five was the age of mandatory retirement.⁹ During the twentieth century the practice of involuntary retirement has become the first phase of a type of "social conspiracy," whereby persons are forced to retire, "put on the shelves, kicked upstairs . . . , stripped of their *raison d'être*, and grossly exploited economically."¹⁰ The number of conspirators has grown to the point that age discrimination is an omnipresent employment practice.

Age discrimination differs in many ways from other forms of discrimination. Employers who refuse to hire older workers or who insist on a fixed age of retirement are not motivated by malice or dislike.¹¹ A 1977 survey by *Harvard Business Review* suggests that employers subconsciously engage in age discrimination and when asked for their opinions about older workers, the employers generally favored elimination of involuntary retirement.¹² The survey indicates that subconscious discrimination often is based on unsubstantiated and false assumptions regarding an older worker's inability to meet the physical and mental demands of a job.¹³ These attitudes, though nonexistent in ancient Greek, Chinese or Roman societies,¹⁴ are today deeply imbedded in our minds by advertisements portraying everyone as young and vigorous. These advertisements suggest that people over fifty have only to look forward to retirement, senility and "demise under the sun of the South's golden rim."¹⁵

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8. See Hansen, *The Age Discrimination in Employment Act Amendments of 1978: A Legal and Economic Analysis*, 7 PEPPERDINE L. REV. 85, 88 n.23 (1979).
 9. *Id.* Bismarck was trying "to thwart an impetus toward socialism. At the time the average life expectancy was from 40-45 years. Chancellor Bismarck initiated the policy with the understanding that very few individuals would be able to collect on this social insurance program." *Id.*
 10. Pruyser, *Aging: Downward, Upward, or Forward?*, in TOWARD A THEOLOGY OF AGING 102, 107 (S. Hiltner ed. 1975).
 11. Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U.L. REV. 383, 394 (1966).
 12. Rosen & Jerdee, *Too Old or Not Too Old*, HARV. BUS. REV., Nov. 1977, at 97.
 13. *Id.* Some of the false assumptions are: older workers cannot meet the physical requirements of the job; are less adaptable to the job; have a greater tendency to be absent and to have accidents; resent younger supervisors; are set in their ways; have less drive and enthusiasm; and, performance and intelligence decreases with age. *Id.* Most employers who believe these attitudes have factual bases are nevertheless satisfied with older workers, as compared to younger workers, in nine out of ten characteristics of job performance. Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U.L. REV. 383, 394 (1966). From studies performed, there is simply no evidence that an older employee is necessarily a less competent employee. Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 577 (1979). See also Werner, *The Age Discrimination in Employment Act Amendments of 1978 and Their Effect on Collective Bargaining*, 30 LAB. L.J. 477, 477-78 (1979) (Indeed, in many tasks the older workers perform better than the younger ones.).
 14. Whiteside & Batt, *The Effects of Mandatory Retirement*, 18 J. FAM. L. 761, 764 (1980).
 15. *Id.* at 762.

Prior to the adoption of the ADEA, neither the judiciary nor the Congress worked to alleviate the effects of these attitudes. At common law, an employer was not prevented from discharging an employee based on age.¹⁶ Furthermore, although Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex or nationality,¹⁷ it does not proscribe age discrimination.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

"Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination."¹⁸ With this statement, President Johnson recommended the adoption of legislation to prevent such discrimination.¹⁹ When the ADEA was passed, it became unlawful for employers, employment agencies, and labor organizations²⁰ to engage in age discrimination when a person was between the ages of forty and sixty-five.²¹ Prohibited discrimination included refusing to hire, discharging, or generally discriminating with respect to compensation or terms of employment when the action or decision was based solely on age.²² Although not specifically mentioning involuntary retirement as a proscribed discriminatory employment practice, the ADEA appeared to prevent forced retirement of individuals within the protected age group because it was an employment policy based solely on age.

Employers seeking to validate involuntary retirement programs,

16. *See, e.g., Johnson v. United States Steel Corp.*, 348 Mass. 168, 202 N.E.2d 816 (1964); 15 AM. JUR. 2d *Civil Rights* § 226 (1976).

17. 42 U.S.C. § 2000e (1976 & Supp. III 1979).

18. 113 CONG. REC. 34, 743, 744 (1967) (remarks of President Johnson).

19. Purver, *Age as a Bona Fide Occupational Qualification Under ADEA*, in 15 AM. JUR. PROOF OF FACTS 2d 488 (1978).

20. The terms "employer," "employment agency," and "labor organization" are defined in the Act. *See* 29 U.S.C. § 630(b)-(d) (1976). An employer is

a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Id. § 630(b). An "employment agency" is "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person, but shall not include an agency of the United States." *Id.* § 630(c). A "labor organization" is "a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning . . . terms or conditions of employment." *Id.* § 630(d).

21. *Id.* § 631 (amended 1978) (changing protected age group to 40-70 years old).

22. *See* Annot., 24 A.L.R. FED. 808, 824 (1975).

however, seized upon a subsection of the ADEA, 623(f)(2),²³ allowing an employer "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter."²⁴ Employers argued that this subsection was an exception authorizing involuntary retirement pursuant to a bona fide retirement pension plan.²⁵ The federal courts differed in their interpretation of section 623(f)(2). The United States Courts of Appeals for the Third and Fifth Circuits determined that the provision did allow involuntary retirement of persons protected under the Act.²⁶ The Third Circuit, distinguishing between outright discharge and retirement, noted, "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."²⁷ The United States Court of Appeals for the Fourth Circuit, however, in *McMann v. United Air Lines, Inc.*²⁸ rejected the Third Circuit's interpretation and held that involuntary retirement was not allowed unless the employer could show the early retirement policies had some economic or business purpose other than arbitrary age discrimination.²⁹

Another issue on which the federal courts disagreed was whether a retirement or pension plan constituted a subterfuge evading the Act's purposes. This issue arose in many forms. In *Steiner v. National*

23. 29 U.S.C. § 623(f)(2) (1976) (amended 1978).

24. *Id.*

25. *See, e.g.,* *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). *See also* *Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

26. *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). In *Zinger*, the plaintiff had worked for thirty-one years as a staff attorney for Penn Central. Seven months prior to his sixty-fifth birthday, he was forced into early retirement and given a pension pursuant to company policy. *Zinger v. Blanchette*, 549 F.2d at 903. He then brought suit seeking an injunction and damages to increase his pension to what it would have been had he remained an employee until age sixty-five. *Id.* at 901. *Zinger* contended that the ADEA proscribed involuntary retirement before sixty-five. *Id.* at 904. Similarly, in *Brennan*, the Secretary of Labor brought suit under the ADEA alleging that the defendant employer had violated the Act by compelling the employee to retire at age sixty in accordance with a retirement plan and refusing to rehire him. *Brennan v. Taft Broadcasting Co.*, 500 F.2d at 215. The Secretary sought an injunction and damages. *Id.* at 213.

27. *Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978). Other courts implicitly reached the same result in holding that various retirement/pension plans satisfied the "bona fide" and no "subterfuge" requirement of § 623(f)(2). *See, e.g.,* *de Loraine v. MEBA Pension Trust*, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); *Steiner v. National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C.D. Cal. 1974). For a discussion of these cases, see text accompanying notes 30-35 *infra*.

28. 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977).

29. *Id.* at 221. The court found that § 623(f)(2) only authorized an adjustment of benefits a retiree could receive under a pension plan. *See id.* at 222 n.6.

League of Professional Baseball Clubs,³⁰ a plan for National League umpires required retirement on a specified date in the year an umpire became fifty-five, unless permission for later retirement was obtained from the League. The United States District Court for the Central District of California held that the plan was not a subterfuge.³¹ First, the plan was adopted years before the ADEA was enacted. Second, by reference to labor regulations,³² the court determined that a bona fide plan was not rendered invalid simply because it provided an employer with discretion to permit some employees to work beyond the plan's retirement age.³³ In *de Loraine v. MEBA Pension Trust*,³⁴ a labor union plan provided for mandatory retirement and imposed a forfeiture of plan benefits if the retiree returned to employment in the industry. The United States Court of Appeals for the Second Circuit held the plan to be bona fide and not a subterfuge.³⁵ Other courts, however, created a presumption of subterfuge.³⁶ For example, one court held that lowering the mandatory retirement age from sixty-five to sixty-two in a plan was prima facie evidence of a subterfuge.³⁷ The federal courts of appeals and an administrative agency also differed in their opinions as to whether a plan adopted before enactment of the ADEA could be a subterfuge. The Fifth Circuit held that a finding of subterfuge was precluded if the plan was adopted prior to enactment of the ADEA.³⁸ The Wage and Hour Division of the United States Department of Labor agreed.³⁹ The Fourth Circuit held a plan adopted before the ADEA was enacted could be a subterfuge,⁴⁰ and the Third Circuit agreed.⁴¹

30. 377 F. Supp. 945 (C.D. Cal. 1974).

31. *Id.* at 948.

32. See 29 C.F.R. § 860.110 (1981).

33. 377 F. Supp. 945, 949 (C.D. Cal. 1974). The court also found that plaintiff's performance rating in his last year was very low, and that those umpires who were permitted to work beyond the plan's retirement age had very high performance ratings. *Id.* at 947-48.

34. 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

35. *Id.* at 50.

36. See *Marshall v. Eastern Airlines Inc.*, 474 F. Supp. 364 (S.D. Fla. 1979). *Contra*, *Marshall v. Atlantic Container Line, G.I.E.*, 470 F. Supp. 71 (S.D.N.Y. 1979) (lowering age not prima facie subterfuge). See also *EEOC v. Baltimore & O.R.R.*, 632 F.2d 1107 (4th Cir. 1980) (prima facie subterfuge when company selected employees for retirement on basis of age-related pension entitlement and thereafter reduced mandatory retirement age), *cert. denied*, 102 S. Ct. 113 (1981).

37. *Marshall v. Eastern Airlines Inc.*, 474 F. Supp. 364 (S.D. Fla. 1979).

38. *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974).

39. See French & Batten, *The 1978 Amendments to ADEA: Impact of Section 4(f)(2) on Employee Benefit Systems*, 4 J. PENSION PLAN. & COMPLIANCE 351, 353-54 (1978) (citing Wage & Hour Div., Wage and Labor Standards Admin., U.S. Dep't of Labor, Age Discrimination in Employment Act of 1967: Interpretive Bulletin (1970), *codified in* Age Discrimination in Employment, 29 C.F.R. § 860 (1981)). In accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1976), the Secretary of Labor was authorized to issue rules and regulations to carry out the purposes of the ADEA. 29 U.S.C. § 628 (1976).

40. *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977).

41. *Zinger v. Blanchette*, 549 F.2d 901, 904-05 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

The United States Supreme Court granted certiorari in *United Air Lines, Inc. v. McMann*⁴² to resolve the conflict in the circuits as to the following issues: (1) whether section 623(f)(2) was an exception authorizing involuntary retirement of persons within the protected age group; (2) what types of retirement or pension plans constituted a subterfuge; and (3) whether a plan adopted prior to the ADEA's enactment could be a subterfuge. Addressing the first issue, the Court held that section 623(f)(2) did authorize involuntary retirement.⁴³ The majority, pointing to the plain language of the provision, agreed with the Third Circuit's interpretation of the statute.⁴⁴ The dissenting justices⁴⁵ strongly protested, finding that the statutory language was not clear because it was susceptible of two interpretations: either the section permitted forced retirement of an employee within the protected age group or it allowed different treatment of older employees only with respect to benefits paid or available under a retirement plan.⁴⁶ The dissenters indicated that the ADEA, in its original form, allowed employers to "separate involuntarily an employee under a retirement policy or system."⁴⁷ Noting that this provision was deleted from the ADEA prior to its adoption, they concluded that Congress also removed "authorization for involuntary retirement from the exceptions to the statute's prohibitions."⁴⁸

Confronting the subterfuge issues, the Court defined subterfuge as a scheme, plan, or artifice of evasion.⁴⁹ It agreed with the Fifth Circuit that a plan adopted before the ADEA was enacted could not have been used to evade an act not yet in existence and, thus, could not be a subterfuge.⁵⁰ Justices White,⁵¹ Marshall, and Brennan⁵² disagreed, claiming that the date of adoption did not insulate a plan from a subterfuge finding.

After the Supreme Court's decision, it became apparent that only four requirements were necessary to force employees within the ADEA protected age group to retire. First, involuntary retirement had to be pursuant to an employee benefit plan, such as a profit-sharing retirement plan,⁵³ but not a plan in which the individual employee did not

42. 434 U.S. 192 (1977).

43. *Id.* at 199, 203.

44. *Id.* at 204.

45. Justice Marshall was joined in his dissent by Justice Brennan.

46. *Id.* at 209-10 (Marshall, J., dissenting).

47. *Id.* at 211 (Marshall, J., dissenting) (citing S. 830 and H.R. 4221, 90th Cong., 1st Sess. (1967)).

48. *Id.* at 212-13 (Marshall, J., dissenting).

49. *Id.* at 203.

50. *Id.*

51. *Id.* at 204-05 (White, J., concurring).

52. *Id.* at 219 n.13 (Marshall, J., dissenting).

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

participate.⁵⁴ Second, the plan had to be bona fide. A plan was bona fide if it was genuine, authentic, and actually paid substantial benefits to the retiree.⁵⁵ Third, the plan had to authorize early retirement at a specified age. Section 623(f)(2) did not permit involuntary retirement of an employee prior to a plan's specified retirement age.⁵⁶ Finally, the plan could not be a subterfuge to evade the purposes of the ADEA.⁵⁷

Although the Supreme Court's decision in *United Air Lines* seemed to settle most involuntary retirement issues, the decision soon became moot. Congress, dissatisfied with judicial interpretations of section 623(f)(2), passed an amendment to the provision before the Supreme Court's opinion was published.⁵⁸

IV. 1978 AMENDMENTS

A. Section 623(f)(2)

In amending section 623(f)(2), the House of Representatives conferees expressly disagreed with the Supreme Court's decision in *United Air Lines* and declared that the ADEA did not permit mandatory retirement.⁵⁹ As amended, the section provides that an employer can "observe the terms of a . . . bona fide employee benefit plan . . . except that no such employee benefit plan shall . . . require or permit the

54. See *Hodgson v. American Hardware Mut. Ins. Co.*, 329 F. Supp. 225 (D. Minn. 1971).

55. See, e.g., *Marshall v. Hawaiian Tel. Co.*, 575 F.2d 763, 766 (9th Cir. 1978); *Zinger v. Blanchette*, 549 F.2d 901, 909 n.20 (3d Cir. 1977), cert. denied, 434 U.S. 1008 (1978). See also *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 207-08 (1977) (White, J., concurring).

56. *Sexton v. Beatrice Foods Co.*, 630 F.2d 478 (7th Cir. 1980).

57. See text accompanying notes 30-41 and 49-52 *supra*.

58. *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 218 (1977) (Marshall, J., dissenting). Justice Marshall stated,

The mischief the Court fashions today may be short lived. Both the House and Senate have passed amendments to the Act. . . . The amendments . . . expressly provide that the involuntary retirement of employees shall not be permitted or required pursuant to any employee benefit plan. Thus, today's decision may have virtually no prospective effect.

Id.

59. H.R. REP. NO. 95-950, 95th Cong., 2d Sess. 8, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 504, 529. The Conference Report stated that the purpose of the amendment is

to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.

In *McMann v. United Air Lines* . . . the Supreme Court held to the contrary The conferees specifically disagree with the Supreme Court's holding and reasoning in that case.

Id. (citation omitted). See *Davis v. Boy Scouts of America*, 457 F. Supp. 665 (D.N.J. 1978); French & Batten, *The 1978 Amendments to ADEA: Impact of Section 4(f)(2) on Employee Benefit Systems*, 4 J. PENSION PLAN. & COMPLIANCE 351, 353 (1978).

involuntary retirement of any individual" forty to seventy years old solely because of the individual's age.⁶⁰ The amendment, however, is not intended to cripple an employer financially.⁶¹ As the Fourth Circuit had pointed out earlier, differentials in benefits under a retirement plan are allowed between older and younger workers if the differentials are cost justified. Differentials are cost justified when "the actual amount of payments made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage."⁶² The Department of Labor, interpreting the ADEA,⁶³ determined that an employer was permitted to make a benefit reduction based on age where age was "actuarially significant" in the "benefit design," that is, when the "costs of providing a particular benefit to older workers exceeds the cost of providing that benefit to younger employees."⁶⁴ Reduced benefits to an older worker without cost justification would probably be considered a subterfuge.⁶⁵

B. Exceptions Allowing Involuntary Retirement

With the amendment to and clarification of section 623(f)(2), most involuntary retirement issues were laid to rest. However, Congress provided two exceptions to its proscription of involuntary retirement. First, until June 30, 1982, an employee sixty-five years of age or older could be forced to retire if "serving under a contract of unlimited ten-

60. 29 U.S.C. § 623(f)(2) (Supp. II 1978). Courts have held that the amendment applies prospectively only. See, e.g., *Marshall v. Delaware River & Bay Auth.*, 471 F. Supp. 886 (D. Del. 1979).

61. See generally Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979).

62. 124 CONG. REC. S4450 (daily ed. Mar. 23, 1978) (remarks of Sen. Javits).

63. For the source of the Department of Labor's authority to issue such interpretations of the Act, see note 39 *supra*.

64. Comment, *The Effect of the Age Discrimination in Employment Act Employee Benefit Plan Exception on Small Businesses*, 13 U.C.D. L. REV. 969, 979 (1980). For example, age is actuarially significant in providing employment benefits such as long term disability, medical, hospital, and life insurance plans, because these insurance plans typically cost more for older employees. *Id.* An employer could, for example, reduce life insurance coverage of older employees "to a level which approximates the cost of providing greater amounts of insurance for employees ages fifty-five to sixty." *Id.* at 980.

65. French & Batten, *The 1978 Amendments to ADEA: Impact of Section 4(f)(2) on Employee Benefit Systems*, 4 J. PENSION PLAN. & COMPLIANCE 351, 364 (1978). Therefore, an employer must choose between several alternatives in deciding how to distribute benefits to older workers. First, an employer can provide the same benefits to all workers, regardless of age. Second, an employer can decide on his own which distinctions between age group benefits are allowed. Last, an employer can hire a consultant. This is the safest of alternatives and the most cost prohibitive to a small business employer. See Comment, *The Effect of the Age Discrimination in Employment Act Employee Benefit Plan Exception on Small Businesses*, 13 U.C.D. L. REV. 969, 974 (1980).

ure . . . at an institution of higher learning."⁶⁶ Litigation soon arose regarding the constitutionality of this exception, and courts held that the provision does not violate the equal protection or due process provisions of the Constitution, because age is not a suspect class and the right to work is not a fundamental right.⁶⁷

Potentially more expansive is the second exception, a concession to industry's desires. Industry lobbied for an exception to the Act that would allow involuntary retirement of certain "expensive" employees, those occupying high level executive and policymaking positions. There are a number of reasons why industry wanted such an amendment. Generally, industry seeks to terminate high level executives for three reasons. First, firing high level personnel cuts salary costs and pension liabilities.⁶⁸ Second, it makes room at the top for young achievers.⁶⁹ Third, particularly tempting during recessionary times, corporations may thereby trim other excess expenses.⁷⁰ Industry representatives argued that without such an exception, incapable older executives would have to be fired rather than be allowed to retire with

66. 29 U.S.C. § 631(d) (Supp. II 1978).

67. *See, e.g.,* *McAloon v. Bryant College of Business Administration*, 520 F. Supp. 103 (D.N.H. 1981). *See also* *Lamb v. Scripps College*, 627 F.2d 1015 (9th Cir. 1980) (considering state provisions that parallel the ADEA). The *Lamb* and *McAloon* courts relied on *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), in which the United States Supreme Court described a suspect class as a group "[s]addled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 313-14. The *Murgia* Court explained that age is not a suspect class, but rather "a stage that each of us will reach if we live out our normal span." *Id.* A fundamental right, on the other hand, "simply recognizes . . . an established constitutional right." *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969)). Courts have not recognized the right to work as a fundamental one. *San Antonio School Dist. v. Rodriguez*, 411 U.S. at 28. Accordingly, the rational basis test was applied by the *Lamb* court. Many reasons were given for the tenured professor exception, including: employment opportunities would open up for young professors and minorities; advancement opportunities would be provided for younger faculty members with fresh ideas and techniques; and difficulties in evaluating professors over sixty-five would be avoided. *Lamb v. Scripps College*, 627 F.2d at 1021-22. The Ninth Circuit in *Lamb* stated, however,

In rejecting Lamb's equal protection challenge . . . , we make no endorsement of mandatory retirement as a matter of social policy. We are aware of both the debilitating effect that compulsory retirement can have on an individual, and the potential loss to society in terms of human resources that may result therefrom.

Id. at 1023. Before the 1978 ADEA amendments, mandatory retirement was regularly held constitutionally valid. *See generally* Annot., 81 A.L.R.3d 811 (1977).

68. *See* Ross, *Retirement at Seventy: A New Trauma for Management*, FORTUNE, May 8, 1978, at 106 [hereinafter cited as Ross]; Whiteside & Batt, *The Effects of Mandatory Retirement*, 18 J. FAM. L. 761, 785 (1980).

69. Pepper, *supra* note 1, at 15; Whiteside & Batt, *The Effects of Mandatory Retirement*, 18 J. FAM. L. 761, 784 (1980).

70. Pepper, *supra* note 1, at 15; *see* Ross, *supra* note 68, at 107.

dignity.⁷¹ Furthermore, without a system of involuntary retirement, an employer would be forced to make individual determinations of fitness.⁷² This would be more time consuming, less convenient, and less equitable than involuntary retirement. Finally, industry representatives argued that without a system of involuntary retirement, the overall retirement picture would no longer be certain, and an employer could not accurately predict its staffing needs.⁷³

Industry, however, did not convince all congressmen. Senator Jacob Javits opposed this exception because mandatory retirement at any age fails to account for the effects of aging on different skills, and a system of mandatory retirement accelerates an individual's aging process.⁷⁴ Senators Allan Cranston and Donald Riegle argued that competence, not age, should determine job performance capability regardless of the work involved. They also opposed the exception because industry did not present any data to substantiate the need for it.⁷⁵

Although Congress recognized that mandatory retirement could be harmful to both the individual and society,⁷⁶ it also recognized that without mandatory retirement, employment opportunities would not be open to younger employees.⁷⁷ Therefore, it passed section 631(c), which allows involuntary retirement of an employee sixty-five years of age or older if the employee

for the two year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing saving, or deferred compensation plan, or any combination of such plans, of the employer of such employee,

71. Pepper, *supra* note 1, at 15; Ross, *supra* note 68, at 110.

72. Pepper, *supra* note 1, at 15; Ross, *supra* note 68, at 110.

73. Pepper, *supra* note 1, at 15; Ross, *supra* note 68, at 110.

74. S. REP. NO. 95-493, 95th Cong., 2d Sess. 31-33 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 525-27.

75. S. REP. NO. 95-493, 95th Cong., 2d Sess. 34-35 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 527-28.

76. S. REP. NO. 95-493, 95th Cong., 2d Sess. 4 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 507. The report provided, "Substantial evidence exists that mandatory retirement may have a severe deteriorative impact on the physical and psychological health of older individuals It detracts from the quality of life by taking away a sense of fulfillment and self-sufficiency" *Id.*

77. S. REP. NO. 95-493, 95th Cong., 2d Sess. 7-8 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 510-11. During the committee's deliberations, concerns were expressed regarding the impact that the elimination of mandatory retirement would have on the ability of employers to assure promotional opportunities for younger workers.

Therefore in order to permit employers to replace certain key employees and to keep promotional channels open for younger employees, the committee adopted an amendment offered by Senator Pell which would permit compulsory retirement of highly compensated management employees at age 65

which equals, in the aggregate, at least \$27,000.⁷⁸

Congress thereby provided two major elements that must be present before section 631(c) can operate to except an employee from the prescription of mandatory retirement. First, an employee must qualify as a bona fide executive (BFE) or high policymaker (HP).⁷⁹ Second, an employee must have an annual retirement salary of at least \$27,000.⁸⁰

1. Qualifying as a Bona Fide Executive or High Policymaker

The House conferees intended that the definition of BFE promulgated in regulations by the Department of Labor's Wage and Hour Division should apply to the ADEA executive.⁸¹ These regulations provide that a BFE is any employee who: (1) primarily manages a department of an enterprise; (2) directs two or more employees; (3) has authority to hire, fire, or whose suggestions for hiring and firing are given particular weight; (4) has discretionary powers; (5) devotes 80% or more of the work week to these activities; and (6) earns at least \$250 a week in the private sector.⁸² The House conferees also suggested a number of other factors necessary for an employee to be a BFE. Their suggestions were made in the context of a corporate enterprise, but were not intended to exclude any employer covered by the Act.⁸³ The conferees indicated that BFE's should include "the head of a significant and substantial local or regional operation of a corporation, such as a major production facility or retail establishment."⁸⁴ In the conferees' opinion, the exception should also apply to "individuals at higher levels in the corporate organizational structure" with responsibility and authority comparable to or greater than the head of a corporate operation.⁸⁵ In addition, heads of major divisions of a corporation located at the corporate or regional headquarters, such as the head of the "finance, marketing, legal, production and manufacturing" departments were included in their suggestions.⁸⁶ In larger corporations, "the immediate subordinates" of department or division heads could also be BFE's.⁸⁷

78. 29 U.S.C. § 631(c)(1) (Supp. II 1978).

79. *Id.*

80. *Id.*

81. H.R. REP. NO. 95-950, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 530. The definition of bona fide executive originally appeared in the Fair Labor Standards Act of 1938 which excluded BFE's from its protection against detrimental labor conditions. *See* 29 U.S.C. § 213 (1976 & Supp. II 1978).

82. 29 C.F.R. § 541.1(a)-(f) (1981).

83. H.R. REP. NO. 95-950, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 531.

84. *Id.* This does not include "the head of a minor branch, warehouse or retail store."

Id.

85. *Id.*

86. *Id.*

87. *Id.*

These suggestions were incorporated into rules promulgated by the Equal Employment Opportunity Commission (EEOC).⁸⁸ Under the EEOC rules, both the Wage and Hour Division criteria and the House conferees' suggestions must be satisfied before an individual can be labeled a BFE and forced to retire before age seventy.⁸⁹ The EEOC rules make it clear that the BFE exception "does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business."⁹⁰

If an employee is not a BFE, involuntary retirement is still permissible if the employee is in a high policymaking position.⁹¹ An HP does not have a BFE's authority, "but [their] . . . position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof."⁹² Examples of HP's are chief economists and chief research scientists.⁹³

Finally, the BFE or HP must have occupied the position for the two years immediately prior to retirement.⁹⁴ Congress added the two-year requirement to prevent employers "from circumventing the law by appointing an employee to" an executive position shortly before compelling the employee's retirement.⁹⁵

2. Retirement Income

Even if an employee qualifies as a BFE or HP, forced retirement before age seventy is still prohibited unless the employee's annual retirement salary is at least \$27,000.⁹⁶ Originally the Senate set the annual salary figure at \$20,000 and provided for an annual cost-of-living

88. *Id.* See Age Discrimination in Employment Act, 29 C.F.R. § 1625.12 (1981). Promulgating rules for the ADEA was originally the function of the Department of Labor's Wage and Hour Division. See note 39 *supra*. Pursuant to the President's Reorganization Plan, the responsibility for enforcement of the ADEA was transferred to the EEOC. The purpose of the reorganization was to centralize, in one agency, the enforcement and regulation of all equal opportunity laws. See Comment, *The Effect of the Age Discrimination in Employment Act Employee Benefit Plan Exception on Small Businesses*, 13 U.C.D. L. REV. 969, 977 n.37 (1980).

89. Age Discrimination in Employment Act, 29 C.F.R. § 1625.12(a)-(d)(2) (1981).

90. *Id.* § 1625.12(d)(2).

91. 29 U.S.C. § 631(c)(1) (Supp. II 1978).

92. H.R. REP. NO. 95-950, 95th Cong., 2d Sess. 10, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 531.

93. *Id.*

94. 29 U.S.C. § 631(c)(1) (Supp. II 1978); Age Discrimination in Employment Act, 29 C.F.R. § 1625.12(f) (1981).

95. H.R. REP. NO. 95-950, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 530.

96. 29 U.S.C. § 631(c)(1) (Supp. II 1978); Age Discrimination in Employment Act, 29 C.F.R. § 1625.12(j)(1) (1981).

adjustment.⁹⁷ The House conferees raised the annual salary to \$27,000 and eliminated any annual adjustments.⁹⁸

A number of limitations are placed on the computation of the \$27,000 annual salary figure. Only the important limitations are highlighted here. The benefits comprising the annual salary must be non-forfeitable.⁹⁹ If retirement benefits are to cease, for example, when the employee sues the former employer, or when the employee works for the former employer's competitors, then the plan's benefits are forfeitable and are not counted toward the \$27,000 annual figure.¹⁰⁰ The retirement plan must offer the employee the option to receive payments of either: (1) \$27,000 per year, each year after retirement,¹⁰¹ (2) a lump sum with which the employee could purchase one life annuity yielding at least \$27,000 annually,¹⁰² (3) benefits of an aggregate value on the date of retirement based on the employee's life expectancy of \$27,000 annually,¹⁰³ (4) any other option the employee chooses if the previous options are available.¹⁰⁴ Only pension, profit-sharing, and savings deferred compensation plans, or combinations of these plans are counted toward the retirement income.¹⁰⁵ Social security, employee and roll-over contributions are excluded from the retirement income calculation.¹⁰⁶ Significantly, contributions of prior employers are also not counted toward the retirement income.¹⁰⁷

C. *Effect of Section 631(c)*

Actual statistics on the potential effect of section 631(c) are few, in part because no statistics were presented to Congress before section 631(c) was adopted. Also, no judicial decisions have addressed this provision. Industry leaders, however, have made some guesses. The president of Metropolitan Life Insurance Company estimated that only executive employees with long service and earning in excess of \$50,000 per year will be subject to involuntary retirement under section 631(c).¹⁰⁸ A General Motors (GM) executive estimated that twelve to

97. S. REP. NO. 95-493, 95th Cong., 2d Sess. 8 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 511.

98. H.R. REP. NO. 95-950, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 530.

99. Age Discrimination in Employment Act, 29 C.F.R. § 1625.12(k)(1) (1981).

100. *Id.*

101. *Id.* § 1627.17(c)(1).

102. *Id.* § 1627.17(c)(2).

103. *Id.* § 1627.17(c)(3).

104. *Id.* § 1627.17(c)(4).

105. *Id.* § 1627.17(d). Plans include "stock bonus, thrift and simplified employee pensions." *Id.* Plans excluded are health and life insurance plans. *Id.*

106. These terms are as defined in 26 U.S.C. §§ 411(c), 402(a)(5), 403(a)(4), 408(d)(3), 409(b)(3)(C) (Supp. IV 1981).

107. Age Discrimination in Employment Act, 29 C.F.R. § 1627.17(e) (1981). See text accompanying note 114 *infra*.

108. See Ross, *supra* note 68, at 111.

fifteen percent of GM's top executives would have been subject to the section 631(c) exception between the years 1976 and 1978.¹⁰⁹

V. CRITICISMS

Several congressmen have criticized section 631(c) as a perpetuation of documented involuntary retirement evils.¹¹⁰ Furthermore, one commentator has noted that "[by] allowing a group to qualify for mandatory retirement on the basis of income and job responsibility alone without requiring a determination of vocational competence, this amendment on its face contradicts its stated purpose — to broaden and strengthen the Act's coverage and further eliminate arbitrary discrimination based on age."¹¹¹

Many of the reasons given by industry lobbyists to convince Congress to adopt a BFE exception¹¹² are groundless and untenable. For example, industry claimed that mandatory retirement would relieve employers of the costly burden of determining which employees were competent. Employers, however, regularly evaluate all employees in making personnel decisions.¹¹³ Industry offered no explanation in support of its argument, and it is difficult to understand how mandatory retirement of BFE's reduces the cost of employee evaluations. There is also no equity or dignity in forcing all BFE's to retire, rather than determining which employees are competent and allowing the competent employees to continue working. Industry claimed that mandatory retirement was necessary to accurately predict the overall retirement picture and staffing needs. Seventy-year-old employees, however, are not protected under the ADEA, and can be forced to retire. The knowledge that some employees can be forced to retire before they reach age seventy cannot possibly allow more accurate predictions of staffing needs than the knowledge that all employees can be forced to retire when they reach that age.

In times of high inflation and uncertain economic trends, the House conferees' decision to remove the cost-of-living adjustment in the annual retirement salary figure is curious. As salaries spiral upward with concomitant increase in retirement benefits, more employees inevitably will come within the purview of the BFE exception because more employees will have an annual retirement salary of \$27,000. Furthermore, the \$27,000 annual retirement income requirement creates some anomalies when comparing long serving and short serving employees of the same age and rank. Since retirement contributions of

109. *Id.*

110. See text accompanying notes 74-75 *supra*. See also Pepper, *supra* note 1, at 15.

111. Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 CATH. U.L. REV. 767, 782 (1978).

112. See text accompanying notes 68-73 *supra*.

113. Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 578 (1979).

prior employers are not included in the \$27,000 annual income, two sixty-five-year-old executives may receive different treatment if there is a disparity in the number of years each has worked for the employer. For example, an executive who has worked for thirty years may be forced to retire because he meets the dollar requirements, whereas another executive who has worked for only twelve years would be allowed to continue working.¹¹⁴

Justice Marshall, interpreting section 623(f)(2) in his dissent in *United Air Lines, Inc. v. McMann*,¹¹⁵ pointed out an anomaly which is also applicable to the BFE exception. A BFE who is forced to retire before age seventy can reapply for the employee's old job. Under the ADEA, the employee cannot be denied employment because of age,¹¹⁶ and, "as someone with experience in performing the tasks of the 'vacant' job he once held, the individual likely will be better qualified than any other applicant. Thus the individual retired one day would have to be hired the next."¹¹⁷ It seems incongruous that Congress, in enacting the 1978 amendments, adopted Justice Marshall's interpretation of the ADEA¹¹⁸ without realizing that this anomaly applied equally to BFE's.

Certainly other alternatives exist to protect the desires of industry employers. For instance, limitations on an employee's years of service in any one position could be imposed. An employer could rotate personnel between divisions, offer increased benefits to early retirees, or develop performance tests under section 623(f)(1).¹¹⁹ "In light of those alternatives, Congress may have been ill-advised to respond totally to business needs by removing [BFE's] . . . from the Act's coverage."¹²⁰

Even more disconcerting is that employers can still attempt to terminate high salaried executives who might not qualify as BFE's despite section 623(f)(2). An employee alleging discrimination in violation of

114. Ross, *supra* note 68, at 112. "Jones, with thirty years' service, has to retire at sixty-five because he meets the dollar requirements, whereas Smith, with twelve years' service can stay on. Smith may have the same pension expectations as Jones, but not from a single employer." *Id.*

115. 434 U.S. 192 (1977) (Marshall, J., dissenting).

116. See 29 U.S.C. § 623(a)(1) (1976), which provides: "It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"

117. *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 217 (1977) (Marshall, J., dissenting).

118. See note 58 and accompanying text *supra*.

119. Pursuant to § 623(f)(1), an employer may "take any action . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1976); see Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 CATH. U.L. REV. 767, 782 (1978).

120. Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 CATH. U.L. REV. 767, 783 (1978).

the ADEA must demonstrate a prima facie case — that he is within the protected age group and that age was a “determinative consideration” in his discharge.¹²¹ The employer must then rebut by producing evidence of “an articulate, legitimate, nondiscriminatory reason for” the employee’s discharge.¹²² One plaintiff’s attorney, criticizing this judge-made doctrine, speculated, “A sophisticated employer who wants to get rid of an older, too-highly paid executive nowadays is going to do it in a subtle way over a period of time by building up a dossier on little ways he [messed] up.”¹²³

In contrast, Congress has left employees remediless. An employee arguing against mandatory retirement is faced with rebutting an employer’s assertion that the employee is a BFE or HP. To do this, he must argue that his position involves little or no discretion, management, control, or input. That is, he must urge that the position is really not too important, and that his word on various corporate business decisions is not highly regarded. If successful in avoiding forced retirement, the employee may find that the job he sought to keep may be substantially changed. The job may very well be treated as one of little importance when the employee returns to it. Thus allowed to continue working, the employee will be stripped of the dignity, power and position for which he fought.

VI. CONCLUSION

Section 631(c), without statistical substantiation, perpetuates many of the same evils Congress sought to eliminate in its disapproval of the Supreme Court’s holding in *United Air Lines, Inc. v. McMann*¹²⁴ and in its passage of the 1978 amendments to the Act. The same detrimental effects on health and society exist when considering all workers or just BFE’s and HP’s. The same data showing an employee’s ability to perform in later years applies to all workers, including BFE’s and HP’s. Indeed, it seems Congress ignored its own purpose and kowtowed in the face of industry pressure in passing section 631(c). This exception to the involuntary retirement prohibition should be eliminated.

121. *Kerwood v. Mortgage Banker’s Ass’n of America, Inc.*, 494 F. Supp. 1298, 1308 (D.D.C. 1980).

122. *Id.* at 1309.

123. *Social Issues, Wounded Executives Fight Back on Age Bias*, BUS. WK., July 21, 1980, at 109, 114; *see, e.g., Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981).

124. 434 U.S. 192 (1977).