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Age Discrimination in Employment: The Scope of Statutory Exceptions to the Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 (ADEA) was enacted to protect older workers from arbitrary employment practices, such as the establishment of age requirements unrelated to the ability needed for a job, and to meet the problem of increasing numbers of older workers who are unable to retain employment after job displacement. The ADEA, in language similar to the employment practices sections of the Civil Rights Act of 1964, prohibits an employer from discriminating against any employee or applicant for employment who is between forty and sixty-five years of age because of such person's age. Specifically, the employer may not discharge or refuse to hire any such individual because of his age, nor discriminate against him with respect to the compensation, terms, conditions, or privileges of his employment.

There are also broad exceptions to the Act. The ADEA establishes three defenses to otherwise unlawful acts of age discrimination by providing that it is lawful for an employer: (1) to discharge, demote, or transfer an employee, or refuse to hire a prospective employee where age is a bona fide occupational qualification reasonably necessary to the normal operations of a particular business, or where


2. In its statement of findings and purpose, Congress succinctly summarized the problems of the displaced older worker when it found that: (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs, (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice and certain otherwise desirable practices may work to the disadvantage of older persons, (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing, and their employment problems grave. Id. § 621(a).


5. Id. § 623(f).

6. Id. § 623(f)(1).
differentiation is based on reasonable factors other than age, (2) to retire or refuse to hire an employee pursuant to the terms of a legitimate seniority system or employee benefit plan that is not a subterfuge to evade the purposes of the Act, or (3) to discharge or otherwise discipline an individual for good cause.

This article examines the scope of ADEA defenses to age discrimination suits to determine to what extent and under what circumstances an employer may discriminate on the basis of age. The article focuses on policies, regulations, and interpretations of the ADEA by Congress and the Department of Labor. In addition, the discussion includes an examination of federal courts' constructions of ADEA defenses.

AGE DISCRIMINATION AND THE BONA FIDE OCCUPATIONAL QUALIFICATION

In Griggs v. Duke Power Co., the Supreme Court held that the defense of business necessity would be allowed when an employment practice that operated to exclude a class of individuals could be shown to be job-related. The ADEA explicitly recognizes the defense of business necessity and permits an employer, labor organization, or employment agency to make certain discriminations based upon age if age is a bona fide occupational qualification (bfoq) reasonably necessary to the normal operation of a particular enterprise.

The bfoq defense stems from section 703(c) of Title VII, which provides that it shall not be an unlawful practice for an employer to discriminate on the basis of religion, sex, or national origin in those instances where religion, sex, or national origin constitutes a valid occupational criterion. In the context of Title VII, the bfoq defense is of limited applicability. Title VII does not define bfoq and the EEOC in its interpretive regulations has construed the defense narrowly. Asserted primarily in sex discrimination cases, the bfoq defense does not apply to race discrimination and is rarely used as a defense to national origin or religious discrimination.

Judicial and legislative construction of bfoq under the ADEA has been similarly restricted. The ADEA gives the Secretary of Labor

7. Id. § 623(f)(2).
8. Id. § 623(f)(3).
12. Id.
statutory authority to issue rules and regulations and to establish reasonable exemptions from any provisions of the Act as he might find necessary and proper in the public interest.\textsuperscript{13} Pursuant to that authority, the Secretary has provided

that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.\textsuperscript{14}

These regulations also include illustrations of possible bfoq's. According to the interpretations promulgated by the Department of Labor, the statutory exemptions of bfoq's are limited to compulsory age limitations for hiring or retirement without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public such as mandatory retirement schemes for airline pilots.\textsuperscript{15} In addition, bfoq's may include age requirements for actors when particularly youthful or elderly characterizations are needed\textsuperscript{16} and situations where the employee is used to promote or advertise the sale of products designed for and directed to appeal exclusively to either youthful or elderly customers.\textsuperscript{17}

These narrow interpretations of bfoq have been substantially followed by the courts, but the decisions have created a somewhat broader exception. The basic principle against class-based assumptions of inability was asserted to reject an age-based bfoq for bus drivers. In the first test of this exception, the United States District Court for the Southern District of Florida upheld a bus company's practice of refusing to consider applicants over a certain age for employment as drivers.\textsuperscript{18} The Secretary of Labor in \textit{Hodgson v. Tamiami Trail Tours, Inc.},\textsuperscript{19} sought to enjoin the company's refusal to employ extra board drivers forty years of age or older. Extra board

\begin{thebibliography}{99}
\bibitem{14} 29 C.F.R. § 860.102(b) (1975).
\bibitem{16} 29 C.F.R. § 860.102(e) (1975).
\bibitem{17} \textit{Id.}
drivers are those individuals who have insufficient seniority to bid for regular routes. They are on call twenty-four hours per day, seven days per week, filling in for regular drivers, charters, and unscheduled trips on a first in, first out basis.\(^\text{20}\)

The employer testified that forty was a valid cut-off point in light of the rigors of extra board duty, which in the long run could not be safely undertaken by older persons. Without becoming specific, the district court stated that evidence has shown that functional age, as distinguished from chronological age, could not be determined with sufficient reliability to meet the safety obligations of motor carriers.\(^\text{21}\) The court reasoned that the limitations and requirements of the company’s seniority system together with the extraordinary stamina, flexibility, and adaptation associated with extra board work justified an age requirement to ensure the continued safe operation of the business.\(^\text{22}\)

An Illinois federal district court reached an opposite conclusion in Hodgson v. Greyhound Lines, Inc.,\(^\text{23}\) where the defendant refused to consider applicants between the ages of forty and sixty-five for the position of interstate bus driver. The company produced evidence suggesting that newly hired drivers over thirty-five were more likely to be involved in accidents than drivers hired at a younger age.\(^\text{24}\) The court held that Greyhound failed to meet its burden of proving that age was a bfoq. While recognizing the foremost concern for public safety, the court felt that functional capacity and not chronological age should be the primary factor in determining whether an individual could perform a job safely.\(^\text{25}\)

This decision was subsequently overturned by the Seventh Circuit one year later.\(^\text{26}\) In reversing the judgment for the plaintiff, the

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20. Since the seniority system in Tamiami operates even within the extra board, the driver may not have the privilege of selecting a particular extra board since any other driver with more seniority can select that particular run. Thus, extra board drivers with relatively low seniority are inevitably relegated to the most difficult extra board runs and locations.

21. 4 Emp. Prac. Dec. 6051 (S.D. Fla. 1972). The court concluded that the employer need not deal with each applicant over 40 years of age on an individual basis by considering his particular functional ability to perform safely the duties of a driver if it was not practical to do so. Id., at 6050. See 29 C.F.R. § 1604.1(a)(ii) (1976), wherein the EEOC mandates that the principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group. See also Note, Age Discrimination in Employment, 50 N.Y.U.L. Rev. 924, 929-30 (1975).

22. Id. at 6048.


25. Id. at 239; see Note, Constitutional Attacks on Mandatory Retirement: A Reconsideration, 23 UCLA L. Rev. 549 (1976).

26. 499 F.2d 859 (7th Cir. 1974).
court of appeals considered inapplicable the standard set by the
lower court that the employer must show a factual basis for believ-
ing that all or substantially all applicants over the age of thirty-five
would be unable to perform the duties safely and efficiently. In the
case of bus drivers, the court reasoned that concern must go beyond
the welfare of the job applicant to include consideration for the well-
being of bus passengers and highway motorist\textsuperscript{2}.27

According to the court, the appropriate standard was whether the
bus company could demonstrate that it had a rational basis for
believing that the elimination of its maximum hiring age would
increase the risk of harm to its passengers.\textsuperscript{28} The court regarded as
persuasive the company's evidence relating to the rigors of work
assignments and expert medical testimony showing the degenera-
tive physical and sensory changes brought on in humans by the
aging process. Moreover, statistical evidence demonstrated that the
company's safest bus drivers were those between the ages of fifty
and fifty-five with sixteen to twenty years of driving experience.\textsuperscript{29}
The Seventh Circuit concluded that such evidence vindicated a
maximum age hiring policy based upon a good faith judgment with
respect to the safety of the passengers. In neither \textit{Tamiami} nor
\textit{Greyhound} did the bus companies establish a maximum age beyond
which a driver was not permitted to work.

Apparently, the Fifth Circuit in \textit{Tamiami} adopted a test of a bfoq
set forth in \textit{Weeks v. Southern Bell Telephone Co.},\textsuperscript{30} a Title VII sex
discrimination case in which the court stated that in order to rely
on the bfoq exception, an employer must prove that he had reasona-
brable cause to believe that all or substantially all women would be
unable to perform their duties safely and efficiently. However, the
Seventh Circuit in \textit{Greyhound}\textsuperscript{31} held that the burden of proof test
was that of the Fifth Circuit's \textit{Weeks} decision but
rather that of the same court in \textit{Diaz v. Pan American Airways}.
\textsuperscript{32} Here again, a Title VII sex discrimination case established prece-

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 861.
\item \textsuperscript{28} \textit{Id.} at 863.
\item \textsuperscript{29} 354 F. Supp. at 236-37; 499 F.2d at 864-65.
\item \textsuperscript{30} 408 F.2d 228, 235 (5th Cir. 1969).
\item \textsuperscript{31} 499 F.2d at 862.
\item \textsuperscript{32} 442 F.2d 385 (5th Cir. 1971). In \textit{Diaz}, Pan American Airlines was charged with a
violation of the 1964 Civil Rights Act because of its refusal to hire male flight cabin attendants
solely because of their sex. Pan American argued that being female was a bfoq for the position
of flight cabin attendant because females were superior in performing nonmechanical aspects
of the job, and could better cater to the psychological needs of passengers. The court rejected
Pan American's basis as being merely "tangential to the essence of the business involved."
442 F.2d at 388.
\end{itemize}
dent. Diaz held that the standard of proof required to support a bfoq reasonably necessary to the normal operation of a particular enterprise is a business necessity test rather than a business convenience test. Because Greyhound contended that the hiring of older drivers would endanger the lives of its passengers, the court found that a maximum-age hiring limit was clearly a question of business necessity. The court then proceeded to interpret Spurlock v. United Air Lines, Inc., which had upheld the airline’s educational and training requirements for flight officers, as reducing the burden on an employer to demonstrate the job relatedness of his employment criteria where the economic and human risks of hiring unqualified applicants were great. Because the same risks were involved in Greyhound, the Seventh Circuit concluded that the defendant need only show a rational basis for believing that the elimination of its maximum hiring age would increase the risk of harm to its passengers.

The bus driver cases are probably applicable to any job where sudden illness presents a substantial safety risk to the employee, fellow employees, or the general public. Examples might well be truck drivers, pilots, firemen, police officers, and steeplejacks. Moreover, the rationale behind maximum-age hiring limitations may apply equally to the establishment of mandatory retirement ages in discharge situations. The involuntary retirement of an employee does not violate the ADEA where the employer was motivated by reasonable factors other than age. If age enters the employer’s decision to fire an employee, the ADEA is violated unless there exists good cause for the discharge. No precise and unequivocal determination can be made pertaining to the scope of the phrase “differentiation based on reasonable factors other than age.”

33. 442 F.2d at 388. The business necessity test is not synonymous with business convenience. Both the EEOC and the courts have emphasized that it is not enough for a business to show that a class was excluded simply because that was the best and easiest way of doing business. Before any such discrimination can be practiced, it must not only be shown that hiring a class is impractical, but also that the hiring policy is absolutely essential to the business, not merely tangential. See generally United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).
34. 475 F.2d 216 (10th Cir. 1972).
35. Id. at 219-20. The plaintiff in Spurlock alleged a discriminatory impact in the defendant’s minimum requirements, including 500 hours of flight time, a commercial pilot’s license and instrument rating, and a college degree. The impact of the college degree requirement was mitigated by the waiver of this qualification if the applicant’s other qualifications were superior.
36. See 29 C.F.R. §§ 860.102, 860.103; see note 15 supra.
Whether such differentiation exists must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.  

**DISCRIMINATION BY REASONABLE FACTORS OTHER THAN AGE**

Among the reasonable factors other than age that an employer may consider, the Department of Labor cites physical fitness requirements reasonably necessary for the work to be performed, quantity or quality of production, the results of employment testing, educational levels validly related to specific job requirements and consistently applied to persons of all ages, and a uniform policy against hiring the relatives of present employees. Thus, a differentiation based on a physical examination, but not on age, may be recognized as legitimate in jobs where strict physical requirements contribute to the safety of the individual employees or in occupations that are particularly hazardous by nature: ironwork, bridge building, demolition, and other jobs calling for rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.  

However, a claim for differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age will become physically unable to perform the duties of the job. Surveys of employer attitudes have shown that employers tend to stereotype the older worker as being less productive due to declining physical ability, more likely to be involved in costly on-the-job accidents, more prone to absenteeism, generally deficient in work skills, and possessed of negative attitudes toward their work. In contrast to this stereotype, research in industrial gerontology has consistently disclosed that there is more variation in the ability of workers in the same age group than there is between age groups, and therefore, the ability of any worker to render an acceptable job performance cannot accurately be assessed solely by reference to his chronological age. Thus, in many instances a person at age sixty may physically outperform another individual of thirty.

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38. 29 C.F.R. § 860.103(b) (1975).
39. Id. § 860.103(f)(1)(i).
40. Id. § 860.103(f)(2).
41. Id.
42. Id. § 860.104(c).
43. Id. § 860.103(f)(1)(ii).
44. Id. § 860.103(f)(1)(iii).
46. Id. at 1316.
The Secretary of Labor will not accept a general assertion that the average cost of employing older workers is higher than the average cost of employing younger workers unless a statutory exemption applies. An employer who classifies employees solely on the basis of age in order to compare costs assumes that age alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the ADEA and the purpose of Congress in enacting it.

The scope of the "reasonable factors" exception was first tested in Stringfellow v. Monsanto Co. After economic necessity required the employer to reduce the extent of its chemical plant operations, the plant manager requested the superintendents of the maintenance, manufacturing, and personnel departments to submit evaluations of their employees' work performance based on certain criteria. These evaluations dictated continuation or termination of employment. Nearly all terminated employees were over forty. The discharged employees contended that the method of selection, although based on performance evaluations, resulted in age discrimination. However, the district court found that the evaluation plan resulted in discharge under a method of differentiation based on reasonable factors other than age. The court reasoned that the terminated employees were given an explanation for their dismissal and an opportunity to review the evaluations. The court also noted that the employer attempted to diminish the economic impact of discharge by establishing a placement program and by exploring transfer possibilities through inquiries to other facilities.

The reasonable factors exception was further defined by the federal district court in Bishop v. Jelleff Associates. In Jelleff the court held that despite the inclusion of the employee's age as one factor in the company's decision to terminate the employee, the ADEA was not violated because the employer demonstrated that the discharge was actuated by reasonable factors other than age. In that case, a retail women's specialty store, after leaving its downtown location in favor of an outlying area, initiated a sales policy designed to appeal to a younger clientele and simultaneously reduced the number of its employees in order to cut expenses. The

47. 29 C.F.R. § 860.103(h) (1975).
51. Id. at 1180-82.
52. Id. at 1181.
53. Id. at 1180.
court found that the employer did not violate the ADEA with respect to all employees between the ages of forty and sixty-five whose employment was terminated after the store's new sales policy went into effect. However, the court did find that the policy had resulted in individual unlawful discharges. Dividing the terminations into three basic categories—resignations, discharge for cause, and terminations pursuant to the policy of reduced personnel—the court construed the bfoq defense as permitting discharges not only for cause but whenever premised upon a rational business decision made in good faith and not influenced by age bias. Under this construction, an employer would be able to lay off employees because of adverse business conditions or discharge a company officer or executive whose business views or abilities disaffected management.

For example, in *Gill v. Union Carbide Corp.*, an employer successfully proved that an employee had been dismissed because economic considerations compelled a reduction in the work force. Each employee had been evaluated as to ability, effectiveness, versatility, and other performance-related considerations developed by management. The performance evaluation applied to all employees involved in the reduction regardless of age, but a provision gave preference for job retention to employees over forty. The employer created a procedure to review evaluations. The court dismissed the plaintiff's action, concluding that the performance evaluation criteria were proper and that the employer had applied them conscientiously.

A contrary result was reached in *Schultz v. Hickok Manufacturing Co.*, where the employer unsuccessfully attempted to justify the termination of a salesman on the ground that he should have done more business. In light of testimony by the plaintiff that he had been informed he was being discharged to make room for a younger man, statistical evidence which showed that the average age of salesmen had dropped thirteen years since the defendant had assumed control of the business, and the employer's failure to impeach the witnesses' testimony, the court rendered a judgment for

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55. *Id.* at 7043. Because the reasons given for termination varied, the court found it necessary to analyze each plaintiff's circumstances separately to determine whether any individual was the subject of age discrimination. Since the court had to give each plaintiff separate consideration, it did not find any basis for awarding class relief.

56. *Id.* at 7043-48.

57. *Id.* at 7049-50.


59. *Id.* at 367-69.

the discharged employee that included reinstatement, back pay, and attorney's fees.\footnote{61}

Thus, through a straightforward defense premised on a conscientious and good faith effort to use performance-related considerations, a defendant employer may be able to rebut an employee's allegations of age-based discrimination.

Although the federal regulations that allow a federal statutory or regulatory limit of a bfoq do not discuss the efficacy of state maximum-age regulations, there is strong indication that equal dignity will be given to regulatory schemes of state or local governments. The United States Supreme Court in \textit{Massachusetts Board of Retirement v. Murgia}\footnote{62} held it permissible for the Commonwealth of Massachusetts to declare that medically fit state troopers were nevertheless unfit legislatively to serve as policemen after they reached the age of fifty. In Massachusetts, the primary function of state police officers is to protect persons and property and to maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies, patrol highways, investigate crimes, apprehend suspects, and provide back-up support for local police.\footnote{63} The Court observed that these arduous tasks required stamina and versatility leaving "few, if any, backwaters available for the partially superannuated."\footnote{64}

Under the guise of an equal protection and due process rubric, the Court found the statute clearly constitutional, since the state's classificationrationally furthered the purposes identified by the state.\footnote{65}

\footnote{61} \textit{Id.} at 1217. The court discounted the fact that the average age of the salesmen remained within the 40-65 age range protection of the ADEA, noting that the steep decrease in the average age indicated that several salesmen within the protected age group were replaced by men who were younger than the age group protected by the Act.


\footnote{63} 376 F. Supp. at 754; 427 U.S. at 310.

\footnote{64} \textit{Id.} Uniformed state police officers had to pass a comprehensive physical examination biennially until age 40. After that, until the mandatory retirement age of 50, officers had to pass a more comprehensive test. Officer Murgia had passed such an examination four months before he was retired and there was no dispute that he was in excellent physical and mental health when he was retired.

\footnote{65} Ordinarily, the command of equal protection is only that the government must not impose differences in treatment except for some reasonable differentiation fairly related to the object of the regulation. This traditional scrutiny focuses solely on the legislative means. Here, the courts do not demand a close fit between classification and purpose—judges are prepared to allow legislators considerable flexibility to act on the basis of broad generalizations and to tolerate some overinclusiveness in classification schemes. See generally G. \textit{Gunther}, \textit{Constitutional Law: Cases and Materials} 687-68 (9th ed. 1975); \textit{Gunther}, \textit{The
The Court reasoned that through mandatory retirement at age fifty the legislature sought to protect the public by assuring the physical preparedness of its uniformed police. Because physical ability generally declines with age, involuntary retirement removed from police services those whose fitness for police work had diminished. Thus, age was clearly related to the state's objective. Though the state chose not to determine fitness more precisely through individualized testing after age fifty, the objective of assuring physical fitness was nevertheless rationally furthered by a maximum-age limitation. Perhaps with respect to the interests of all parties concerned, the state had not chosen the best means to accomplish its purpose. However, where rationality is the test, a state does not violate the equal protection clause merely because its statutory classifications are imperfect.

Though the Court in Griggs v. Duke Power Co. obliged deference to EEOC guidelines, in Murgia the Court displayed insufficient appreciation of those guidelines. The EEOC has declared that the reasonableness of differentiations based on factors other than age should be determined on an individual case-by-case basis. Nevertheless, the Murgia Court chose to predicate its decision on a class concept. Because Murgia made no claim under the ADEA, the Court was able to neglect entirely the will of Congress as expressed in the EEOC regulations. Were the Court confronted with an ADEA action on similar facts, it would then need to deal with the congressional purpose of promoting employment of older persons based upon their ability rather than age. It is submitted that the rational basis test should yield to legislative intent in such a circumstance.

THE BONA FIDE EMPLOYEE BENEFIT SYSTEMS EXEMPTION

The ADEA does not prohibit an employer, an employment agency, or a labor organization from maintaining or observing the terms of a bona fide employment benefit plan, such as a seniority

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66. 427 U.S. at 316-17.
69. 29 C.F.R. §§ 860.103(b), (d) (1975).
system, retirement, pension, or insurance plan,\textsuperscript{72} so long as it is not a subterfuge to evade the purposes of the Act.\textsuperscript{73} The words "bona fide" are given their ordinary meaning in determining whether a given plan falls within this exception to the ADEA.\textsuperscript{74} To be considered bona fide, a plan need not provide the same pension, retirement, or insurance benefits to older workers as it provides to younger workers, so long as any difference between them is in accordance with the terms of a bona fide plan.\textsuperscript{75} Rather, a plan providing unequal benefits to older workers complies with the Act if the actual amount of payment made or cost incurred on behalf of an older worker is equal to that made or incurred on behalf of a younger employee.\textsuperscript{76} For example, an employer may provide lesser amounts of insurance coverage to older workers under a group insurance plan than he does to younger workers, provided the plan was not designed to evade the purposes of the ADEA. Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act when such benefits are determined by a formula involving age and length of service requirements.\textsuperscript{77}

\textbf{Seniority Systems}

In order to qualify as a bona fide seniority system eligible for exemption from the requirements of the ADEA, the plan must have length of service as the primary criterion for the equitable allocation of employment opportunities among younger and older workers.\textsuperscript{78} A seniority system may be qualified by such factors as merit, capacity, or ability.\textsuperscript{79} It may operate on an occupational, departmental, plant, or company-wide basis.\textsuperscript{80}

A seniority system that classifies, segregates, or otherwise discriminates on the basis of race, color, religion, sex, or national origin will not be recognized as bona fide within the meaning of the

\begin{itemize}
\item \textsuperscript{72} The list of plans that may be considered bona fide under the statute is not considered to be exhaustive, but in order to be considered bona fide, a plan must be similar to the types listed. \textit{See} Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).
\item \textsuperscript{73} 29 U.S.C. § 623(f)(2) (1970).
\item \textsuperscript{74} Brennan v. Taft Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974); Wage-Hour Administrator Op., WH-138, June 29, 1971.
\item \textsuperscript{75} 29 C.F.R. § 860.120(a) (1975).
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id. § 860.105(a).
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id.
\end{itemize}
ADEA.\textsuperscript{81} Similarly, the adoption of a seniority system that gives employees with longer service fewer rights and results in discharge or less-favored treatment to those within the protection of the statute may be a "subterfuge" to evade the purposes of the ADEA.\textsuperscript{82} Furthermore, any seniority system that perpetuates age discrimination existing prior to the effective date of the Act will not be considered bona fide under the Act.\textsuperscript{83}

It should also be noted that the Department of Labor believes that the failure to communicate the essential terms and conditions of an alleged seniority system to the employees it affects will disqualify the system from an exemption to which it would be otherwise eligible under the ADEA.\textsuperscript{84}

\textit{Employee Benefit Plans}

Like seniority systems, employment benefit plans such as retirement, pension, or profit-sharing plans may provide a reasonable basis for differentiation based on age.\textsuperscript{85} The ADEA authorizes involuntary retirement irrespective of age provided that such retirement is pursuant to the terms of a plan meeting the requirements. A plan is bona fide if it is authentic and genuine, even though an employee who elects to participate in it is shown only a summary of the plan and not a full copy.\textsuperscript{86} The fact that an employer may decide to permit certain employees to continue working beyond a stated age in a formal retirement program does not, in and of itself, render the otherwise bona fide plan invalid.\textsuperscript{87} However, the Department of Labor interprets the statute as forbidding pre-sixty-five mandatory retirement of employees who are not participants in the employer's retirement or pension program, and has secured judicial concurrence in this view.

In \textit{Hodgson v. American Hardware Mutual Insurance Co.},\textsuperscript{88} a pen-
sion plan requiring the retirement of male employees at sixty-five and female employees at sixty-two was held to violate the ADEA insofar as it permitted the employer to retire sixty-two year-old employees who were not participants in the plan. The district court rejected the employer's contention that it would be unreasonable to discriminate between participants and nonparticipants, since the pension plan met the conditions of the exception to the ADEA under which the employer could observe the terms of a bona fide benefit plan. The court noted that while the retirement of members was compelled under the terms of the plan, retirement of nonmembers occurred only at the employer's convenience. Though parochial interests (such as the encouragement of plan membership) might have been served by the discharge of nonmembers, the court deemed that the overall economic interests of the country, as determined by Congress in prohibiting age discrimination, were overriding. Moreover, the court stated that there was no conceptual distinction between an employer's imposing mandatory retirement upon an employee at sixty-two and his refusing to hire a sixty-two year old person because of his age. The court dismissed the employer's contention that the retirement of all females at age sixty-two, and not merely those who were members of the plan, was required by the Internal Revenue Code. The Code provided that the age of retirement under a pension plan, if less than sixty-five, must comport with the age at which employees customarily retire in the company or industry. The court determined that the Internal Revenue Code and the ADEA are not in pari materia because the purposes of the two acts are totally unrelated. The court concluded that the tax regulation was intended to prevent employers from using a very low retirement age to increase the annual tax deduction for the employer's contribution to the retirement plan, and that there appeared to be no conflict between that regulation and the present retirement plan as lawfully put into effect.

Contrary to the arguments of the Secretary of Labor, the Fifth Circuit has held that a plan providing for normal retirement at age sixty justifies mandatory retirement at that age, even though such

89.  Id. at 228.
90.  Id.
91.  Id. at 229.
93.  The Internal Revenue Code is designed to raise revenue and § 401(a) in particular is concerned with expensing by employers of their contributions to employee benefit plans. To the contrary, the ADEA is designed to promote the employment of older workers. Thus, although both the Code and the ADEA have provisions dealing with employee retirement plans, the scope, direction, and reasons for the provisions are almost wholly unrelated.
retirement is not designed as a cost-saving device. In *Brennan v. Taft Broadcasting Co.*, a broadcasting station employee who at age sixty offered to waive his benefits under a profit-sharing retirement plan in exchange for a later retirement, but who was nevertheless terminated in accordance with the plan schedule, was declared not to have been discriminated against in violation of the ADEA. Under the terms of the plan, employees were required to retire at age sixty unless consent of the company for a later retirement date was obtained.

The Department of Labor has not acquiesced in this decision. The *Brennan* majority rested its decision on a reading of the “unambiguous language of the statute,” thereby disregarding legislative history and policy considerations that it conceded might support a different conclusion. The *Brennan* court disposed of the “subterfuge clause” in the statute by reasoning that since the defendant employer’s retirement plan was effectuated before the enactment of the ADEA in 1967, it could not act as a subterfuge. This logic is unconvincing because what is forbidden is not a subterfuge to evade the Act, but a subterfuge to evade the purposes of the Act. These purposes are articulated in the ADEA and speak to concerns older than the Act itself:

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

Thus, in order to qualify for the exemption to the ADEA, there must be some reason other than age for a plan or a provision of a plan that discriminates between employees of different ages. Any other reading of the subterfuge clause would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no other reason than age, but then could not refuse to rehire the presumptively otherwise qualified individual because the ADEA explicitly provides that no such employee benefit plan “shall excuse the failure to hire any individual.”

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94. *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974).
95. *Id.*
96. *Id.* at 217. A similar argument was considered and rejected in *Braunstein v. Comm'r*, 374 U.S. 65 (1963).
97. *Id.* at 215.
99. *Id.* § 623(f)(2).
According to the Department of Labor regulations, a profit-sharing plan normally does not qualify for an exemption as a bona fide employee benefit system under the ADEA.\(^{100}\) However, this type of plan may constitute a bona fide exception where its primary purpose is to provide retirement benefits for employees.\(^{101}\) Still, an employer's "thrift plan" was held by the Department of Labor not to be entitled to an exemption from the ADEA where (1) it required mandatory employee contributions, (2) its costs were not related in any way to the age of participating employees, and (3) contributions to the plan depended upon the amount of the company's profits and the amount of payroll deductions authorized by the participants.\(^{102}\) Since the plan limited employee eligibility to those between twenty-five and sixty years old, and since a clause in the plan could be read as requiring compulsory retirement for sixty-year olds who had at least fifteen years of continuous service, the plan would violate the ADEA.

**Discharge or Discipline for Good Cause**

Finally, under the ADEA the discharge or discipline of a covered employee is not actionable when done for good cause.\(^{103}\) The discharge does not violate the Act if the employer was motivated by reasonable considerations other than age.

It has been held that an action for an unlawful discharge in violation of the ADEA would be dismissed where from the evidence one could reasonably conclude that an employer found an employee had failed to fulfill satisfactorily the business responsibility assigned to him. This decision was rendered by the Eighth Circuit in *Surrisi v. Conwed Corp.*,\(^{104}\) in which the plaintiff, who was fifty-two years of age, failed to increase sales to the satisfaction of the employer. The employer urged that the discharge was for good cause and not based on age. In sustaining the employer's position, the court noted that the ADEA is remedial in nature. It prohibits a subtle form of discrimination, and the courts must be receptive to its purposes and accord it the intended scope.\(^{105}\) The court further reasoned that whenever an employment practice is challenged, the court should

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100. 29 C.F.R. § 860.120(b) (1975).
101. Id.
104. 510 F.2d 1088 (8th Cir. 1975).
105. Id. at 1090.
not limit its inquiry to a particular department or branch of the employer.\textsuperscript{106}

This defense was also successfully asserted in \textit{Brennan v. Reynolds \& Co.},\textsuperscript{107} where the employer was granted a motion for summary judgment to a complaint of age discrimination. The court reasoned that where there were sufficient grounds for terminating a receptionist, the employer's belief that a younger person would present a better image would not diminish the lawfulness of the discharge. Time sheets of eighteen months preceding the employee's dismissal indicated that she had been late on 210 mornings. The receptionist was warned twice that continued tardiness would result in her discharge. The court found that any such evidence proved beyond doubt that there was good cause for discharges under the ADEA.\textsuperscript{108} Though finding that the ground of tardiness was sufficient, the court also stated that the ADEA did not require it to determine whether a discharge for reason other than age was justifiable. Instead, the court intimated that the question was whether the discharge was attributable to age alone.\textsuperscript{109}

Thus, the ADEA is concerned about age discrimination: its purpose is not to solve other problems concerning employment. In approving discharge for good cause as a defense to an action under the Act, it is not the court's purpose to label as "for good cause discharge" any kind of termination other than one based merely upon the age factor. The ADEA's statutory exceptions do not thrust upon the court the duty of determining that the discharge was justifiable for reasons other than age. It serves only to prevent discharge because of age alone. However, even when age is but one of a number of reasons for discharge, the finding must be that the discharge was not for good cause within the meaning of the Act. Otherwise, the congressional intent of the statute would be defeated.

\textbf{CONCLUSION}

The ADEA prohibits age-based discrimination in employment, yet Congress inserted a statutory exception that allows discrimination on the basis of age in certain circumstances.

When age is a bona fide occupational qualification reasonably necessary to the normal operation of the business, employers, labor organizations, and employment agencies may make certain age-

\textsuperscript{106} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 444.
\textsuperscript{109} \textit{Id.}
based discriminations that would otherwise be prohibited by the Act. The phrase "bona fide occupational qualification" is a term of art subject to narrow interpretation, and the Secretary of Labor anticipates limited application on both federal and state levels.

Furthermore, the ADEA does not prohibit an employer from maintaining or observing the terms of a bona fide employee benefit plan so long as it is not a subterfuge to evade the purposes of the Act. The list of plans that may be considered bona fide in the statute is not exhaustive, except that no such plan shall excuse the failure to hire any individual.

Finally, by regulation, the discharge or discipline of a covered employee is not actionable when done for good cause and for reasons other than age.

Legislative interpretation and judicial construction of the ADEA's statutory exceptions will help to balance the right of the employee to equal employment opportunity and the employer's prerogative to make decisions that he believes will maximize the profits and efficiency of his business.

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