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Note: Involuntary Retirement Under the Age Discrimination Employment Act: The Bona Fide Employee Benefit Plan Exception

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INVOLUNTARY RETIREMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: THE BONA FIDE EMPLOYEE BENEFIT PLAN EXCEPTION

I. Introduction

The purpose of the Age Discrimination Employment Act (ADEA)[1] is "to promote employment of older persons based on their ability rather than age . . . ."[2] ADEA covers workers who are at least forty years of age but less than sixty-five.[3] The setting of these age limits, particularly the lower limit,[4] was the cause of much debate during the formation of the law.[5]

After examining the problems of older persons seeking employment, Congress concluded that the unemployment rate for older workers was much higher than for younger workers.[6] It found that

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1. 29 U.S.C. §§ 621-34 (Supp. V, 1975), *amending* 29 U.S.C. §§ 621-34 (1970).
2. *Id.* § 621(b) (1970).
3. *Id.* § 631.
4. H.R. REP. No. 805, 90th Cong., 1st Sess. 13-15 (1967) (Supp. Views). Airline stewardesses were one of the groups pushing for a lower age limit than forty. The subcommittee concluded that this problem could be solved without the lowering of the age limit below that age. It decided to focus the limited resources of the government on protecting workers over age forty in order to confront the problem where the most flagrant abuses had been recognized. *Id.*
5. The age limits of the ADEA have met with considerable criticism on both practical and constitutional grounds. *See* Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQUESNE L. REV. 227, 229-30 (1974); Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311 (1974). In addition to the constitutional infirmities and social harshness noted by the commentators, the ADEA age limits, apparently designed to maximize the law's effectiveness, may actually have the opposite effect: "By establishing 65 as an age at which workers are no longer entitled to statutory protection against age discrimination, the Act may lend support to the common misconception that the aging process renders older workers incompetent, a misconception that discourages voluntary compliance with the ADEA." Note, *Age Discrimination in Employment*, 50 N.Y.U. L. REV. 924, 945 n.110 (1975).

> Nevertheless, after having heard all the legal and philosophical arguments in favor of change, Congress, when it amended the Act in 1974, decided to retain the original upper and lower age limits. Therefore, at least for the moment, the "relatively" old and young have been left without the benefits of federal law to aid them in protecting their employment status.

Levien, *supra*, at 230.

6. "[H]alf of all private job openings are barred to applicants over 55; a quarter to those over 45. Over a third of all men who have been employed 27 weeks or more—the 'hard core'

the setting of arbitrary age limits had become common within industry and that the only effective way to combat this problem was to enact legislation which would eliminate age discrimination in employment hiring practices.[7]

ADEA makes it unlawful for an employer:[8]

> 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; or . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

Responsibility for the enforcement of the statute rests with the Secretary of Labor.[9] Its legislative history demonstrates that Congress wanted the Secretary to implement the informal methods of conciliation, conference and persuasion before taking legal action.[10]

The problems encountered in the enforcement of ADEA can be divided into two types: (1) problems similar to all civil rights legislation (*i.e.*, the need to prove a prima facie case of discrimination);[11] and (2) those problems unique to ADEA.[12] Within the second cate-

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unemployed—are over 45—although this group makes up slightly less than a quarter of the work force." 113 CONG. REC. 34746 (1967) (remarks of Representative John H. Dent). "[Also] over three-quarters of a million persons 45 years of age or older—most of them under 65—are looking for work and cannot obtain it; they comprise 27 percent of the unemployed but 40 percent of the long-term unemployed; and they account for three-quarters of the one billion in unemployment benefits which are disbursed annually." 113 CONG. REC. 34752 (1967) (remarks of Representative Florence P. Dwyer).

7. 29 U.S.C. § 621 (1970).

8. *Id.* § 623(a).

9. *Id.* § 626(b).

10. *See* Levien, *supra* note 5, at 231-35.

11. Under the provisions of ADEA, a plaintiff has the burden of proving a prima facie case of age discrimination. In ascertaining what criteria will constitute a showing of age discrimination the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applied a four prong test: (1) the complainant must be within the protected group; (2) he must have applied for and been qualified for a job for which the defendant was seeking applicants; (3) despite his qualifications, he must have been rejected; (4) after his rejection the complainant must show that the defendant continued to seek applicants for the position. *Id.* at 802. Although *McDonnell Douglas* was brought under Title VII of the Civil Rights Act of 1964, the similarity between the substantive provisions of Title VII and ADEA leads to the conclusion that the same standards of proof apply in cases of age discrimination. *See* Wilson v. Kraftco Corp., 501 F.2d 84, 86 (5th Cir. 1974).

12. 29 U.S.C. § 623(f) (1970).

gory are the three exceptions[13] to the statute's general prohibition against age discrimination.

The first exception simply allows an employer to make employment decisions for valid reasons other than age (*e.g.*, good cause discharges).[14] However, an employment decision that is in any way motivated by age factors remains unlawful.[15] The remaining exceptions specifically allow age considerations to enter the employment decision. Thus, it is not unlawful for an employer, employment agency or labor organization "to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."[16] The most common example is the mandatory retirement of commercial airline pilots at age sixty. This exception is predicated upon considerations of public safety.[17] The last exception allows an employer to retire an employee before the age of sixty-five, if that employee is covered by such a bona fide employee benefit plan.[18]

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13. *Id.*

14. The employee may continue to make employment decisions "where the differentiation is based upon reasonable factors other than age," *Id.* § 623(f)(1), or "to discharge or otherwise discipline an individual for good cause." *Id.* § 623(f)(3).

15. Bishop v. Jelleff Assocs., 7 Fair Empl. Prac. Cases 510 (D.D.C. 1974); Brennan v. Reynolds & Co., 367 F. Supp. 440, 444 (N.D. Ill. 1973) (good cause discharge).

16. 29 U.S.C. § 623(f)(1) (1970). Most of the Bona Fide Occupational Qualification (BFOQ) defense cases deal with employers who are entrusted with serving the public and with the occupational skills of employees which are affected by the degenerative physical changes caused by aging. *See* Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230 (N.D. Ill. 1973), *rev'd on other grounds*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). There must be a well documented case showing that the age group discriminated against cannot perform the job because of their age (*e.g.*, a showing of degenerative physical changes caused by aging that have a detrimental impact on motor skills, *inter alia*, fast reflex action). "Of particular note was the court's apparent acquiesence [in the *Greyhound* case] in the general proposition that *all* people undergo the same type of degenerative physical changes as they age, and that each 'over 35' applicant therefore need not be given an individualized test to discover whether or not he qualifies for employment." Levien, *supra* note 5, at 238-39. *See also* Hodgson v. Tamiami Trail Tours, Inc., 4 Fair Empl. Prac. Cases 728 (S.D. Fla. 1972). *Greyhound* thus rejected the Labor Department's position regarding the rejection of applicants due to a BFOQ. 29 C.F.R. §§ 860.103(d), 860.103(f)(1)(iii) (1975).

17. Courts have been more lenient in sustaining a finding of BFOQ exception where the job places the employee in a special relationship to the public at large. *See* Airlines Pilots Ass'n v. Quesada, 286 F.2d 319 (2d Cir.), *appeal dismissed*, 366 U.S. 962 (1961); McIlvaine v. Pennsylvania State Police, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974).

18. The most significant aspect of the exemption, the legal meaning of the words "bona fide," remains to be defined by the government and tested in the courts. The United States

Excluding the procedural issues of notice[19] and jurisdiction,[20] the most litigated section of ADEA is the bona fide employee benefit plan exception.[21] This Note will examine that exception and the conflicting court interpretations of it.[22] These interpretations deal with the applicability of the statute to benefit plans effectuated before its passage, and the validity of involuntary retirement before age sixty-five pursuant to a bona fide employee benefit plan.

II. Bona Fide Employee Benefit Plans

Section 623(f)(2) of ADEA provides:[23]

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona

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Department of Labor in its interpretative bulletin stated that "[a] retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older workers may thereby receive a lesser amount of pension or retirement benefits . . ." 29 C.F.R. § 860.120 (1975). This points out the need for employers not to discriminate between younger and older workers in administering employee benefit plans, but it does not answer the question what is a bona fide plan. In Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974), the plaintiff claimed that the company's profit sharing plan would not be a bona fide employee benefit plan under the ADEA since the plan failed to meet the requirements of the Internal Revenue Service (IRS) guidelines concerning bona fide pensions. These guidelines defined retirement plans "as including only those plans where employer contributions are based upon the anticipated costs of retirement, thereby excluding plans such as Taft's 'Profit Sharing Retirement Plan', in which contributions are based only upon profit." *Id.* at 216. The court rejected the plaintiff's argument concluding that "the purpose of the [IRS] Bulletin is to provide guidance for taxpayers in obtaining special tax treatment afforded by I.R.C. §§ 401-404. The purpose of the Act [ADEA] is to outlaw discrimination against older workers. There is no apparent relationship between what the IRS says for the purpose of taxpayer guidance and what Congress means when it passes a statute for the purpose of promoting employment of older workers." *Id.* Although it is entirely unclear what a bona fide employee benefit plan is under ADEA, Congress has recently enacted legislation dealing specifically with retirement and pension plans. The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1381 (Supp. V, 1975), might possibly become the guideline courts will use in the future when deciding what is a bona fide employee benefit plan under ADEA. For a discussion of the substantial benefits test in determining if a pension plan is bona fide or not, *see* note 53 *infra*.

19. 29 U.S.C. § 626(d) (1970).

20. 29 U.S.C. § 633(b) (Supp. V, 1975), *amending* 29 U.S.C. § 633(b) (1970).

21. 29 U.S.C. § 623(f)(2) (1970).

22. Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977); McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977) (No. 76-906); Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330 (D. Hawaii 1976).

23. 29 U.S.C. § 623(f)(2) (1970).

fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . . .

The bona fide employee retirement plan exception was enacted by Congress for the purpose of encouraging employers to hire older workers. Employers feared that they would be forced to hire older employees and offer them the same pension benefits that younger workers were receiving.[24] Aware of this problem, the House Education and Labor Committee stated in its report on ADEA: "It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill,—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans."[25] Congressman Dominick V. Daniels, a member of the General Subcomittee on Labor which held the hearings on ADEA, commented on the effect this bill would have on employers: "[T]he bill takes into full consideration . . . the problem of employers in the field of pension and other benefit plans. The bill would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is designed to maximize employment possibilities without working an undue

24. One commentator has noted:

> The original Johnson administration version of the ADEA allowed an employer 'to separate involuntarily an employee under a retirement policy or system where such . . . system is not merely a subterfuge to evade the purpose of this Act' . . . [T]his exception was 'intended to protect retirement plans . . .' [T]he exact nature and object of this protection, however, is ambiguous: [the protection could have been for the policy of involuntary retirement itself], or that these pension . . . plans [were to be] protected from the Act's prohibitions when involuntary retirement is necessary to preserve the fiscal viability of such plans.
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> The latter interpretation is not without support. The American Telephone and Telegraph Company (AT&T), for example suggested in Senate testimony that if age classifications were prohibited in its pension plans, a 45 year-old employee with 20 years of service might be able to claim the same right to retire as the 60 year-old employee with 20 years of service—something not possible under its existing plans—thus substantially increasing the cost of the plans . . . This concern led AT&T to propose an alternative . . . [that] was adopted by Congress.

Note, *Age Discrimination in Employment*, 50 N.Y.U. L. Rev. 924, 950 n.141 (1975) (citations omitted). *See also* 113 CONG. REC. 31254-55 (1967) (remarks of Senator Javits).

25. H.R. REP. No. 805, 90th Cong., 1st Sess. (1967).

hardship on employers in providing special and costly benefits."[26]

Until recently,[27] both judicial[28] and administrative rulings[29] on cases have interpreted section 623(f)(2) literally and found it permissible for an employer to compel the retirement of an employee under the age of sixty-five pursuant to a bona fide retirement plan.[30] However, the employer is expressly forbidden from retiring the same employee involuntarily if he is not a participant in such a plan.[31]

In *Brennan v. Taft Broadcasting Co.*, [32] the earliest decision dealing with this problem, the Fifth Circuit broadly construed the wording of section 623(f)(2) to permit an employer to retire an employee before age sixty-five if the employee was a member of a bona fide retirement plan. In *Taft* a voluntary participant[33] in the defendant's "Profit Sharing Retirement Plan"[34] was forced to retire at the age of sixty, the plan's normal retirement age.[35] Although a clause in the plan empowered the company to permit employment beyond that date, the employer denied the request for later retirement. The

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26. 113 CONG. REC. 34746 (1967).

27. *See* Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977); McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977) (No. 76-906); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330 (D. Hawaii 1976).

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

29. 29 C.F.R. § 860.110(a) (1975).

30. *McMann* states a contrary view: the "voluntary" act of an employee in joining a plan is not voluntary in the sense that it would effectuate a waiver of his statutory protection under the law. 542 F.2d at 219 n.1.

31. Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971); 29 C.F.R. § 860.110(b) (1975).

32. 500 F.2d 212 (5th Cir. 1974).

33. The appellant in *Taft* argued that he never saw the complete provisions of the plan but only a summary; therefore, he was not a voluntary participant since he was never informed that age sixty was the mandatory retirement age of the plan. Thus the plan was not binding on him. *Id.* at 217.

34. The appellant also argued that the Taft retirement plan was not bona fide since it was entirely funded from company profits, and not based upon "the anticipated cost of retirement." The appellant pointed out that the plan did not qualify as a bona fide retirement plan under the guidelines established by the IRS. The court concluded that the guidelines were meaningless because there was no apparent relationship between what the IRS states for the purpose of taxpayer guidance and what Congress means when it passes a statute for the purpose of promoting employment of older workers. *Id.* at 216. The court reasoned that the key words in section 623(f)(2) were "bona fide employee benefit plan" and that the words "retirement, person or insurance" were just descriptive, which did not exclude any other types of employee benefit plans. *Id.* at 215.

35. *See* note 32 *supra*.

employee then brought suit to enjoin the violation of his rights under ADEA.[36] The court of appeals affirmed the district court decision[37] in favor of the defendant declaring that the plan was bona fide,[38] and that the plan could not have been a subterfuge to evade the statute[39] because it was effectuated prior to the enactment of ADEA.[40]

In *Dunlop v. Hawaiian Telephone Co. (Hawtel)*,[41] the services of defendant's employees were terminated involuntarily pursuant to a bona fide retirement plan adopted prior to the effective date of ADEA.[42] The plan permitted a member to retire voluntarily upon attaining the age of sixty,[43] and it also allowed the company to compel retirement at that age.[44] The plan made retirement mandatory at the age of seventy;[45] however, a member could be retained beyond that age at the election of the company.[46] The district court, in finding for the defendant, concluded that a new interpretation of section 623(f)(2) was required so as to give its application some meaning.[47] It held that in order for the bona fide employee benefit plan exception[48] to have any purpose, the phrase "subterfuge to evade the purposes of this chapter"[49] could not be construed literally because the exception allowed by section 623(f)(2) was just such a subterfuge.[50] The court interpreted the term "subterfuge" as deny-

36. 29 U.S.C. § 623(a)(1) (1970).

37. Brennan v. Taft Broadcasting Co., 7 Fair Empl. Prac. Cases 222 (N.D. Ala. 1973).

38. *See* note 33 *supra*.

39. The *Taft* court concluded that all plans that were enacted prior to ADEA were bona fide. Brennan v. Taft Broadcasting Co., 500 F.2d 212, 215 (5th Cir. 1974).

40. The plaintiff had become a member of the plan in 1963, but the provisions of the ADEA were not enacted until 1967. 500 F.2d at 214.

41. 415 F. Supp. 330 (D. Hawaii 1976) [hereinafter referred to as *Hawtel*].

42. Hawtel's plan was adopted in 1931. Although the plan was amended in 1965, 1967 and 1971, section 3(1)(b), pertaining to retirement, and at issue in this dispute has never been amended. *Id.* at 331.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 332.

48. 29 U.S.C. § 623(f)(2) (1970).

49. *Id.*

50. ADEA's purpose as defined makes it unlawful "to fail or refuse to hire or to discharge any individual . . . because of such individual's age . . . ." 29 U.S.C. § 623(a)(1). The exception for bona fide employee benefit plans allows employers to do that, which is exactly forbidden by the statute.

ing the protection of section 623(f)(2)[51] to a defendant employer "only if the defendant uses a retirement plan as a subterfuge to retire an employee without the payment of substantial benefits."[52] Because the plaintiffs had received substantial benefits under the plan subsequent to their retirement, the court ruled that the plan was not a subterfuge and therefore the defendant had the right to assert this exception as a valid defense.[53]

Taft concluded that any plan adopted prior to ADEA was immune to the prohibitions of the statute whereas the *Hawtel* court stated that all plans, whether adopted prior to or after ADEA, were subject to its provisions. *Hawtel* also noted that forced retirement before age sixty-five pursuant to a bona fide employee benefit plan was valid only if the plan paid out substantial benefits to the retirees.

Recent decisions have disagreed with *Taft's* conclusion that any plan which is adopted prior to ADEA is immune from the statute's prohibitions.[54] In *McMann v. United Air Lines, Inc.*,[55] plaintiff employee had been retired involuntarily by defendant United Air Lines pursuant to a voluntary employee benefit plan.[56] Defendant obtained a summary judgment in the district court because the mandatory retirement provision had been adopted prior to AEDA.[57] In holding for the plaintiff, the court of appeals stated that an employer may not retire employees involuntarily before the age of

51. 415 F. Supp. at 332. The court relied heavily on the interpretations promulgated by the Secretary of Labor concerning this section of the Act, 29 C.F.R. § 860.110(a) (1975), which states: "the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2) . . . ."

52. 415 F. Supp. 330, 331 (D. Hawaii 1976).

53. The eight plaintiff's had received over $120,000 in the form of retirement benefits among them. The court did not rule on what constituted substantial benefits but just stated that in this case the benefits were adequate. *Id.* at 331. For a discussion of what constitutes substantial benefits, see Walker Mfg. Co. v. Industrial Comm'n, 27 Wis. 2d 669, 135 N.W. 2d 307 (1965).

54. *See* Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977); McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977) (No. 76-906); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330 (D. Hawaii 1976).

55. 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977) (No. 76-906).

56. 542 F.2d at 218-19.

57. *Id.* at 218.

sixty-five if they are members of a bona fide employee retirement plan, and if their retirement is predicated on an arbitrary age provision in the plan.[58] The court concluded that there must be some basis, other than age, for a plan which discriminates between employees on that basis.[59] Thus, it found United Air Lines' retirement plan was not entitled to the protection of section 623(f)(2) because United conceded that the economic survival of its pension plan would not be impaired by allowing employees to continue working up to the age of sixty-five.[60]

In arriving at its decision the court of appeals faced two distinct issues. First, the court rejected United's argument that its pension plan was not subject to the prohibition of ADEA because it was adopted prior to the enactment of that statute. The court noted that it was the intent of Congress to make all employee benefit plans subject to ADEA.[61] The court pointed to the House Education and Labor Committee report on section 623(f)(2) which clearly stated that the section applied to both existing as well as new employee benefit plans.[62]

Second, the court found that United's retirement plan was not entitled to the protection of 623(f)(2) because it was "a subterfuge to evade the purposes of the Act."[63] The court stated that "what is forbidden is not a subterfuge to evade the *Act,* but a subterfuge to evade the *purposes* of the Act."[64] Any other reading of the "subterfuge" clause, the court reasoned, would produce inequitable results.[65] In arriving at this decision the court considered the inher-

58. *Id.* at 221-22. The court did state that "if legitimate considerations other than an employer's preference for youth justify the forced retirement of employees before age 65, 29 U.S.C. § 623(f)(2), as we construe it, permits such action." *Id.* at 222. The court stated that United could assert other valid defenses, such as a BFOQ, but in order for them to avail themselves of its protection they would have to carry the burden of proof in establishing these defenses. *Id.* at 219 n.3.

59. *Id.* at 221. *See* note 58 *supra* for an explanation of when an employee benefit plan may discriminate on the basis of age.

60. 542 F.2d at 222.

61. *Id.* at 221.

62. H.R. REP. No. 805, 90th Cong., 1st Sess. (1967); *see* text accompanying note 25 *supra.*

63. 542 F.2d at 220.

64. *Id.*

65. *Id.* at 220-21. The court made its strongest argument in favor of its interpretation of the meaning of the word subterfuge by pointing out that following the logic of the *Taft* decision "would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire

ent ambiguity of the statute.[66] The court also relied on the new interpretation of 623(f)(2) made by the Department of Labor in a January 1975 report pertaining to ADEA which stated:[67]

> Retirements before 65 are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) is essential to the plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the plan for the sole purpose of moving out older workers, which purpose has now been made unlawful by the ADEA.

Thus in holding for the plaintiff, the court concluded that *Taft*, which rested its holding on a reading of the "unambiguous language of the statute,"[68] had disregarded "the legislative history and policy considerations which it had conceded might support a different result."[69]

The Fourth Circuit's decision in *McMann* can be contrasted with the Third Circuit's decision in *Zinger v. Blanchette*.[70] Plaintiff, an employee of the defendant, was involuntarily retired before the age of sixty-five pursuant to a bona fide retirement plan.[71] He asserted that this forced retirement discriminated against him because of his age, and therefore it violated his rights under ADEA.[72] Plaintiff also relied on the Secretary of Labor's interpretation of section 623(f)(2) which prohibited the forced retirement of an employee before the age of sixty-five pursuant to a bona fide benefit plan except where the fiscal viability of the plan was in danger.[73] Defendant company

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the presumptively otherwise-qualified individual for 29 U.S.C. § 623(f)(2) explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual . . . ." *Id.* The court also pointed out that "'[c]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old.'" *Id.* at 221, *quoting* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225, 229 (D. Minn. 1971).

66. *See* note 65 *supra*.

67. U.S. DEP'T OF LABOR, JANUARY 1975 REPORT PERTAINING TO ACTIVITIES IN CONNECTION WITH THE AGE OF DISCRIMINATION IN EMPLOYMENT ACT OF 1967, at 17 (1975).

68. 542 F.2d at 220, *quoting* Brennan v. Taft Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974).

69. 542 F.2d at 220.

70. 549 F.2d 901 (3d Cir. 1977).

71. *Id.* at 902.

72. *Id.* at 904.

73. *See* note 67 *supra* and accompanying text.

asserted that the bona fide employee plan exception permitted it to retire the plaintiff before the age of sixty-five.[74]

In holding for the defendant, the court of appeals rejected the Secretary's interpretation of section 623(f)(2)[75] because: (1) it was in contradiction with an earlier interpretation which was sanctioned by the Secretary soon after the passage of ADEA;[76] (2) it was not in accord with the intent of Congress as evidenced by the legislative history;[77] and (3) it was attempting "to change the Act by court decision or administrative fiat."[78]

The *Zinger* court conceded that there were several reasons why involuntary retirement, even with an adequate pension, should not be permitted before the age of sixty-five.[79] However, it concluded that the merit of the bona fide employee benefit plan exception was a matter of legislative concern and evaluation.[80]

III. Conclusion

Over eleven million employees are members of retirement plans which require retirement before the age of sixty-five;[81] several million employees are members of plans which permit employees to compel retirement before the age of sixty-five.[82] Because of the di-

74. 549 F.2d at 904-05.

75. *Id.* at 908-09.

76. 34 Fed. Reg. 9709 (June 21, 1969). "Thus the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2)." *Id.*

76. The court pointed out the attempt by labor organizations to influence an amendment to ADEA which would have prohibited involuntary retirement before age sixty-five. The proposed amendment was not included in the final draft of the bill which eventually became ADEA. 549 F.2d at 907. The court also pointed out that ADEA contained section 624, which called upon the Secretary of Labor "to study the institutional arrangements giving rise to involuntary and to report his findings, together with any legislative recommendations to the President and to Congress." *Id.* at 908.

77. *Id.* at 909.

78. The court was aware of the reasoning in *McMann* concerning the anomaly under ADEA whereby a worker could be involuntarily retired before age sixty-five pursuant to a bona fide retirement plan by one company but could not be discriminated against by another company. The court merely stated that Congress was aware of the problem, and if it decided to await further information before taking action that was within its scope of authority. *Zinger* concluded that "[i]t is not the function of the courts to accelerate that process when Congress unquestionably is acting within its proper scope." *Id.*

80. *Id.*

81. *See* MONTHLY LAB. REV., April 1973, at 41-42.

82. *Id.*

vergence in the decisions by the various circuits on the scope of section 623(f)(2),[83] the creators of these employee benefit plans are in a state of uncertainty as to the fiscal viability of their plans. Thus, a uniform interpretation of the scope of section 623(f)(2) by the Supreme Court is essential.

The resolution of *McMann* and *Zinger* is imminent. The Supreme Court will review the *McMann* decision in the near future.[84] The Court should recognize that all employee benefit plans, whether effectuated before or after ADEA, are subject to the statute's prohibitions against age discrimination.[85] A close reading of the legislative history of section 623(f)(2) supports a decision overruling *McMann*, because Congress never intended to prohibit involuntary retirement before age sixty-five pursuant to a bona fide employee benefit plan.[86] However, it seems clear from the trend of recent Supreme Court decisions[87] that the Court will decide *McMann* in favor of the employer.

Robert F. Tully

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83. *See* Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977); McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977) (No. 76-906); Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974); Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330 (D. Hawaii 1976).

84. McMann v. United Airlines, Inc., 542 F.2d 217 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977) (No. 76-906).

85. Except for *Taft*, all of the other decisions have agreed that ADEA applies to employee benefit plans adopted prior to as well as after the enactment of that Act.

86. *See* notes 78-79 *supra* and accompanying text. The direction by Congress to the Secretary of Labor to study the effects of involuntary retirement on workers and report his findings back to them is ample evidence in itself that they had not prohibited involuntary retirement in the bill. *See* 29 U.S.C. § 624 (1970).

87. General Elec. v. Gilbert, 97 S. Ct. 401 (1976); United Housing Foundation v. Forman, 421 U.S. 837 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974).