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A Proposal to Use a "Knowing and Voluntary" Standard to Evaluate the "Voluntariness" of Early Retirement Incentives

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A PROPOSAL TO USE A "KNOWING AND VOLUNTARY" STANDARD TO EVALUATE THE "VOLUNTARINESS" OF EARLY RETIREMENT INCENTIVES

I. Introduction

XYZ Corporation (XYZ) is experiencing extreme financial difficulties. Management responds to the crisis by offering early retirement incentives[1] in order to reduce its work force. The offer includes an immediate ten-thousand dollar severance payment and the company's regular retirement benefits. To be eligible for the incentive, employees must be age fifty-five or older, and have been employed by the company for at least ten years. The offer is open for one month. Management hopes that the incentive will induce a sufficient number of employees to retire, thereby precluding layoffs.

Sam Goodworker is a fifty-five year old employee who has worked for XYZ for the past thirty years. Sam accepts the early retirement incentive fearing that if he fails to do so he may be laid off without any benefits. After he retires, Sam brings an action against XYZ based on the Age Discrimination in Employment Act (ADEA),[2] claiming that his retirement was involuntary.[3] XYZ defends on the ground that Sam's retirement was purely voluntary. Although this hypothetical is representative of many lawsuits brought under ADEA,[4] the criteria used in determining whether retirement is truly voluntary

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1. An early retirement incentive refers to the practice of extending the option of a financial incentive beyond normal pension benefits in exchange for early retirement. *See Most Firms Still Offering Incentives, New Conference Board Survey Concludes*, [Jan.-June] Pens. Rep. (BNA) No. 4, at 152 (Jan. 28, 1985) (survey entitled, Managing Older Workers: Company Policies and Attitudes) [hereinafter Managing Older Workers].

2. 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

3. It is illegal to force an employee age 40 or older to retire because of his age. Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2) (1982).

4. *See, e.g.*, Paolillo v. Dresser Indus., Inc., 821 F.2d 81 (2d Cir. 1987); Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987); Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981); Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480 (N.D. Ill. 1987).

remain unclear.[5] Moreover, the legislature has been silent on this issue and the courts have been unilluminating.

This Note argues that a standard is needed to judge the "voluntariness" of early retirement incentives. Part II of this Note examines the need for clear guidelines to evaluate the voluntariness of early retirement incentives in light of their increasing use in a society that is growing older and retiring earlier. Part III discusses the aims and prohibitions of ADEA, and the procedure by which plaintiffs can establish a prima facie case of age discrimination. Part IV sets forth the cases that discuss early retirement incentives, and then criticizes the courts for failing to offer clear guidelines for judging whether early retirement is voluntary. Part V discusses the similarites between early retirement incentives and releases,[6] and proposes that the "knowing and voluntary" standard used to determine the validity of releases serves as an appropriate model on which to evaluate the voluntariness of early retirement incentives.

II. The Need for Standards to Evaluate the "Voluntariness" of Early Retirement Incentives

Employers have had to adapt to a society that is growing older[7] and retiring earlier.[8] The use of early retirement incentives has been

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5. *See infra* notes 103-19 and accompanying text.

6. "A release is a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition." *See* RESTATEMENT (SECOND) OF CONTRACTS § 284(1) (1979).

7. The United States population is becoming increasingly older. Census data indicates that while the total American population is expected to increase by 33% from 1982 to 2050, the growth rate of people age 55 and older will climb by 113%. By the year 2020 the oldest baby boomers will be 75 and the youngest 56. The work force will reflect this trend. By the year 2010 nearly half of all employed persons will be 40 and older. *Older Americans in the Workforce: Challenges and Solutions*, 14 Pens. Rep. (BNA) No. 28, at 925 (July 13, 1987) (report by the Bureau of National Affairs Inc. (BNA)) [hereinafter *Older Americans*].

8. There is a strong trend toward early retirement across the country. One explanation may be the culmination of employers' efforts to structure the work force through the use of early retirement incentives. *See* Kass, *Early Retirement Incentives and the Age Discrimination in Employment Act*, 4 HOFSTRA LAB. L.J. 63 (1986) [hereinafter Kass]. Statistics from a BNA report show that the proportion of persons age 65 and older in the work force fell from 27% to 12% between 1950 and 1982. *See Older Americans*, *supra* note 7, at 925. A 1986 General Accounting Office report concluded that the total number of people between 50 and 65 who were receiving pensions nearly doubled between 1973 and 1983. *Id.* A survey based on 363 companies by The Conference Board Inc. found that most firms encourage retirement before age 65, and that in most companies the average retirement age is lower than it was 12 years ago. Managing Older Workers, *supra*

a popular response.[9] An "early retirement incentive" or "open-window offer" refers to the practice of extending the option of a financial incentive beyond pension-related inducements in exchange for early retirement.[10] The offer is of limited duration and is directed to a particular employee or group of workers who satisfy specified minimum age or service requirements.[11] A typical early retirement incentive may include supplementary payments,[12] retirement benefits calculated as if the retiree ended his employment at some future age,[13] and extra medical and life insurance coverage.[14]

Early retirement incentives have proven to be useful to employers. An employer may be motivated to extend these incentives for reasons that include: (1) opening career paths for younger workers;[15] (2) avoiding

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note 1, at 152. The survey further noted that in 51% of the companies, the average retirement age was 62 or younger, up from 23% in 1972. *Id.* at 153; *see* SELECT COMMITTEE ON AGING, 95TH CONG., 1ST SESS., MANDATORY RETIREMENT: THE SOCIAL AND HUMAN COST OF ENFORCED IDLENESS 9 (Comm. Print 1977) ("there is clearly a strong trend toward early retirement").

9. A 1986 BNA survey reported the interviews of 114 members of the Bureau's 1983-1984 Personnel Policies Forum. This group consisted of 42% manufacturing companies, 27% nonmanufacturing firms and 31% nonbusiness establishments such as health care organizations, educational institutions and government agencies. When measured by the size of the work force, 52% of the group were classified as small (fewer than 1,000 employees) and 48% were labeled as large (1,000 or more employees). The study concluded that approximately one-fifth of the companies had offered early retirement incentives in the five years prior to the survey. A higher percentage of large firms offered open-window plans than small firms by a margin of 27% to 11%. *Majority of Employers Let Older Workers Stay on Jobs Past Age 70, BNA Survey Says*, [Jan.-June] Pens. Rep. (BNA) No. 20, at 956-57 (May 19, 1986) (survey entitled, EEOC Policies and Programs). A similar result was found in a study sponsored by Hewitt Associates which reported that out of 529 companies, 121 had offered an early retirement incentive. *Firms Use Early Retirement Windows, Bonuses to Cut Workforce, Hewitt Finds*, [Jan.-June] Pens. Rep. (BNA) No. 9, at 395 (Mar. 3, 1986) (survey entitled, Plan Design and Experience in Early Retirement Windows and Other Voluntary Separation Plans). A survey of the Fortune 50 Industrials by the Wyatt Company's Research and Information Center showed that 16 out of 50 of the largest industrial companies offered early retirement incentives in 1986, compared to only 6 companies in 1985. In the past 10 years, 30 out of the 50 companies have extended open-window offers. *Top 50: A Survey of Retirement, Thrift and Profit-Sharing Plans Covering Salaried Employees of 50 Large U.S. Industrial Companies as of Jan. 1, 1987*, 14 Pens. Rep. (BNA) No. 28, at 926 (July 13, 1987).

10. *See* Managing Older Workers, *supra* note 1, at 153.

11. *Id.*

12. *See* Henn v. National Geographic Soc'y, 819 F.2d 824, 826 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).

13. *Id.*

14. *Id.*

15. *Employers Rate Plans Successful in Meeting Objectives, Survey Finds*, [Jan.-June] Pens. Rep. (BNA) No. 6, at 277 (Feb. 10, 1986) (survey conducted by Towers,

layoffs[16] or forestalling layoffs of younger workers;[17] (3) saving additional costs associated with older, generally higher paid employees;[18] (4) lowering costs[19] and achieving enhanced efficiency;[20] (5) reducing a long-term work-force imbalance;[21] (6) offsetting costs when defending against takeover bids;[22] and (7) eliminating staff redundancy arising from a merger, acquisition or a change in business direction.[23] A recent survey[24] indicates that most employers consider early retirement incentives successful in meeting management objectives.[25]

Early retirement incentives are becoming more common.[26] Authorities suggest that the use of such incentives will continue to increase particularly as society grows older and workers retire earlier.[27] In order to guard against involuntary early retirement, standards

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Perrin, Forster & Crosby of 100 large companies that have offered at least one early retirement incentive during Jan. 1983 to Dec. 1985) [hereinafter Towers Survey]; *see* EEOC v. Home Ins. Co., 672 F.2d 252, 261-62 (2d Cir. 1982); Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1482 (N.D. Ill. 1987); 1 H. EGLIT, AGE DISCRIMINATION § 16.39B, at 1s-194 (Supp. 1987) [hereinafter EGLIT].

16. *See* Towers Survey, *supra* note 15, at 277.

17. *See* EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 369 (E.D. Pa. 1986).

18. *See* Cipriano v. Board of Education, 785 F.2d 51, 54-55 (2d Cir. 1986); Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); 1 EGLIT, *supra* note 15, § 16.39B, at 1s-194.

19. *See* Towers Survey, *supra* note 15, at 277.

20. *See* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982); 1 EGLIT, *supra* note 15, § 16.39B, at 1s-194.

21. *Retirement, Severance Pay Incentives to be Offered to Hewlett-Packard Employees*, [Jan.-June] Pens. Rep. (BNA) No. 25, at 1146-47 (June 23, 1986). In 1986, Hewlett-Packard announced that it would be offering early retirement to 1,800 long-service employees and voluntary incentives to an unspecified number of employees in order to reduce a long-term work-force imbalance. A company spokeswoman noted that traditionally, temporary imbalances were addressed through transfers or retraining. Manufacturing innovations, however, have reduced the number of employees required in certain areas. The early retirement incentives are designed to eliminate an imbalance caused by people with obsolete skills.

22. *AT&T, CBS Offer Plans to Reduce Size of Workforce, Offset Takeover Fight Costs*, [July-Dec.] Pens. Rep. (BNA) No. 36, at 1231 (Sept. 9, 1985). In 1985, CBS offered early retirement incentives to 2,000 out of 30,000 employees to help offset the cost of its successful effort to block the takeover bid of Turner Broadcasting System, Inc. *Id.*

23. *See* Towers Survey, *supra* note 15, at 277.

24. *Id.*

25. *Id.*

26. *See* 1 EGLIT, *supra* note 15, § 16.39B, at 1s-194 ("[i]t has become increasingly common for employers to offer incentives to employees to retire early"); *supra* note 9 and accompanying text.

27. *See* 2 EGLIT, *supra* note 15, § 16.18A, at 16-42.2; *supra* notes 7-9 and accompanying text.

should be developed to evaluate the "voluntariness" of early retirement incentives.

III. Proving an ADEA Claim

A. The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA or the Act)[28] addresses the problem of age discrimination in the workplace. In enacting ADEA, Congress responded to a 1965 report by the Secretary of Labor[29] which found that discrimination against older people in the workplace was a significant problem that needed immediate federal legislation.[30]

Congress believed that ADEA would correct both societal and individual effects of unemployment among older workers.[31] On a societal level, Congress was concerned with the loss of services that older people contribute to the work force,[32] and the increasing public

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28. 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

29. *See* THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT: REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 3 (1965) [hereinafter THE OLDER AMERICAN WORKER]. During consideration of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6, Congress directed the Secretary of Labor to conduct a study to examine age discrimination in employment and to submit legislative recommendations. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (superseded by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 10, 86 Stat. 111).

30. *See* THE OLDER AMERICAN WORKER, *supra* note 29, at 3. President Johnson strongly supported enacting ADEA. In his Older American message of Jan. 23, 1967, recommending ADEA, the President stated that "[h]undreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination." President's Message to Congress on Older Americans, H.R. REP. No. 805, 90th Cong., 1st Sess. 2, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214 (Jan. 23, 1967) [hereinafter President's Message].

31. *See* Note, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 COLUM. L. REV. 1067, 1068 (1986).

32. In a 1977 report stressing the harm of early retirement on the economy, the Select Committee on Aging commented that "[e]ach year as thousands of people are encouraged or forced to retire, their skills, knowledge and wisdom are lost and their opportunities to instruct, teach, consult or advise, listen and reflect, as well as to work, are cut off." *See* SELECT COMMITTEE ON AGING, 95TH CONG., 1ST SESS., MANDATORY RETIREMENT: THE SOCIAL AND HUMAN COST OF ENFORCED IDLENESS 23 (Comm. Print 1977) (quoting R. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 65 (1975)) [hereinafter MANDATORY RETIREMENT]. Senator Javits, a primary supporter and framer of ADEA, stated that the main objective of the statute was to stop "the danger of [a] tragic waste of one of our most precious resources—the talent and experience accumulated by our older workers over the course of decades." S. REP. No. 723, 90th Cong., 1st Sess. 14 (1967) (individual views of Sen. Javits).

cost of supporting the retired.[33] From an individual perspective, Congress felt compelled by the emotional and financial hardship that may result from forced retirement.[34]

The objective of ADEA, as set forth in the Act, is: "(1) to promote employment of older persons based on their ability rather than age; (2) to prohibit arbitrary age discrimination in employment; [and] (3) to help employers and workers find ways of meeting problems arising from the impact of age on employment."[35] ADEA extends coverage to individuals age forty or older,[36] and prohibits employers[37] from discriminating on the basis of age while engaged

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33. The Select Committee on Aging warned that if unemployment of older persons continued, "we will not be able to afford, culturally, psychologically, or financially, to continue supporting large dependent populations without serious social changes." *See* MANDATORY RETIREMENT, *supra* note 32, at 23.

34. *See* 113 CONG. REC. 34,744 (1967) (statement of Rep. Kelly) (premature retirement among older workers imposes a "cruel sacrifice in happiness and well-being") (quoting President's Message, *supra* note 30).

35. 29 U.S.C. § 621(b) (1982) (congressional statement of findings and purpose) (numbers added).

36. 29 U.S.C. § 631(a) (1982). As first enacted, ADEA only protected persons between the ages of 40 and 65. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (codified as amended at 29 U.S.C. § 631(a) (1982 & Supp. IV 1986)). In 1978, the upper age limit was raised to age 70 for employees in the private sector. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 631(a) (1982 & Supp. IV 1986)). In 1986, the age cap was removed for private sector employees. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342 (to be codified at 29 U.S.C. § 631(a)). ADEA contains a number of exceptions to its nondiscrimination provisions. For instance, employers can involuntarily retire any employee who for two years prior to retirement, is employed in a bona fide executive or high policymaking position, and is entitled to an immediate nonforfeitable annual retirement benefit of at least $44,000. 29 U.S.C. § 631(c)(1) (Supp. IV 1986). ADEA also permits the forced retirement of tenured college faculty at age 70. 29 U.S.C. § 631(d) (1982). The statute also recognizes the rights of states, political subdivisions of states, and their agencies, instrumentalities or interstate agencies to retire firefighters or law enforcement officials who have reached retirement age under state or local law. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 3(a)(i)(1), 100 Stat. 3342, 3342 (1986) (amending 29 U.S.C. § 623). ADEA also recognizes an affirmative defense that allows employers to discharge an individual based upon age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (Supp. IV 1986). Notwithstanding the changes in ADEA, the Employee Retirement Income Security Act (ERISA) defines normal retirement as age 65. *See* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982).

37. ADEA defines employer as any "person engaged in an industry affecting commerce who has [20] or more employees for each working day in each of [20] or more calendar weeks in the current or preceding calendar year." 29 U.S.C.

in a spectrum of actions and decisions, including: "(1) hiring; (2) discharges; (3) decisions regarding compensation, terms, conditions and privileges of employment; (4) job classifications; (5) job referrals; and (6) exclusion from union membership."[38]

Mandatory retirement is specifically forbidden by a 1978 amendment to section 4(f)(2) of ADEA.[39] This section as originally enacted allowed an exception to the Act's general prohibition against age discrimination by making it lawful "to observe the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act."[40] The Supreme Court interpreted this exception as permitting mandatory retirement under the terms of a pension plan.[41] Congress thereafter amended this section by adding that no "employee benefit plan shall require or permit the involuntary retirement" of protected individuals.[42] The purpose behind section 4(f)(2) is to encourage the hiring of older workers by not requiring employers to give older workers the same benefits as their younger counterparts.[43]

B. The *McDonnell Douglas* Test

A complainant may prove an ADEA claim either through direct or circumstantial evidence.[44] When proving age discrimination cir-

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§ 630(b) (1982). The term "employer" also includes any agent of such person, in addition to states, political subdivisions of states, their agencies and instrumentalities, and all interstate agencies. *Id.*

38. 2 EGLIT, *supra* note 15, § 16.01, at 16-5 (1987) (quoting 29 U.S.C. § 623(a)-(c) (1982)) (numbers added).

39. Age Discrimination in Employment Act, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978) (codified at 29 U.S.C. § 623(f)(2) (1982)).

40. Age Discrimination in Employment Act, Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602, 603 (1967) (codified as amended at 29 U.S.C. § 623(f)(2) (1982)).

41. *See* United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) (holding that retirement pursuant to a bona fide plan is valid if adopted before the passage of ADEA); *see also id.* at 207-08 (White, J., concurring) (holding that "[ADEA] does not prohibit involuntary retirements pursuant to bona fide plans"); Zinger v. Blanchette, 549 F.2d 901, 910 (3d Cir. 1977) (holding that involuntary retirement is valid if it is pursuant to a bona fide plan that is not a subterfuge to evade the purposes of ADEA), *cert. denied*, 434 U.S. 1008 (1978); Brennan v. Taft Broadcasting Co., 500 F.2d 212, 215 (5th Cir. 1974) (court concluded that a plan could not be a subterfuge within the meaning of § 4(f)(2) if it was operative before the effective date of ADEA).

42. 29 U.S.C. § 623(f)(2) (1982).

43. *See* S. REP. No. 493, 95th Cong., 2d Sess. 1, 9 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 512.

44. *See* Kier v. Commercial Union Ins. Cos., 808 F.2d 1254, 1257 (7th Cir.), *cert. denied*, 107 S. Ct. 1955 (1987); Dale v. Chicago Tribune Co., 797 F.2d 458, 462 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987).

cumstantially, the order and allocation of proof is governed by the test set forth in *McDonnell Douglas Corp. v. Green*.[45] In *McDonnell Douglas*, the plaintiff alleged racial discrimination because of the defendant's refusal to hire him,[46] in violation of title VII of the Civil Rights Act of 1964 (Title VII).[47] In addressing the critical issue of proof, the Court designed a prima facie test based on the assumption that if certain acts are otherwise unexplained, there is a strong presumption that the action complained of is based on consideration of impermissible factors.[48] In order to establish a prima facie case, the Court held that the plaintiff has the burden of showing that: (1) he belongs to a racial minority; (2) he applied and was qualified for an available position; (3) he was rejected despite his qualifications; and (4) after his rejection, the position remained available, and the employer continued to seek applicants with the complainant's qualifications.[49] Once the plaintiff establishes a prima facie case, the burden of proof shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge.[50] If the employer meets this burden, the plaintiff must show that the employer's articulated reason is a mere pretext for discrimination.[51] At all times, the plaintiff bears the ultimate burden of proving that race was a determining factor in the employer's decision.[52]

The *McDonnell Douglas* formula is a flexible rule[53] that is applied by virtually all of the circuits when resolving ADEA claims.[54] In

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45. 411 U.S. 792 (1973).

46. *Id.* at 796.

47. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 265 (codified at 42 U.S.C. § 2000e-2(a)(1) (1982)) (Title VII). For a discussion of the similarities between ADEA and Title VII, see *infra* notes 127-31 and accompanying text.

48. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

49. *McDonnell Douglas*, 411 U.S. at 802.

50. *Id.*

51. *Id.* at 804.

52. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

53. *See Burdine*, 450 U.S. at 253 n.6; *McDonnell Douglas*, 411 U.S. at 802 n.13 ("facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations").

54. *See* Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982); Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982); Johnson v. Lehman, 679 F.2d 918 (D.C. Cir. 1982); Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981); Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981); Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980); Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Schwager v. Sun Oil Co., 591

employee discharge cases, the test has been modified because it was formulated in conjunction with an action for refusal to hire. In applying the modified test, the plaintiff must show that he: (1) was within the protected age group;[55] (2) was qualified to do the job; and (3) was discharged.[56]

Modification of the fourth part of the *McDonnell Douglas* test to fit employee discharge cases has generated considerable variation and confusion, with the courts emphasizing many different requirements. One line of cases requires that the discharged employee be replaced.[57] Within this category the majority insist that the replacement be younger than the plaintiff.[58] Some courts demand that the complainant be replaced by someone outside the protected age group.[59] Still other courts merely require that the discharged employee be replaced, regardless of the replacement's age.[60]

Another line of cases reveals that if the plaintiff is unable to establish that he was replaced, the court will permit the plaintiff to demonstrate that his position remained open while his employer continued to search for employees with similar qualifications.[61] A few courts find it sufficient to show that the complainant was terminated while younger employees possessing similar skills and doing like work were retained.[62]

In large scale reduction in work-force cases,[63] most courts eliminate the fourth prong of the *McDonnell Douglas* test.[64] The rationale is

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F.2d 58 (10th Cir. 1979); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977). *But see* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982) (refusing to apply *McDonnell Douglas* to ADEA claims automatically).

55. The protected age group includes individuals 40 and older. *See supra* note 36 and accompanying text.

56. *See, e.g.*, Kier v. Commercial Union Ins. Cos., 808 F.2d 1254, 1257 (7th Cir.), *cert. denied*, 107 S. Ct. 1955 (1987); Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339, 342 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); McCorstin v. United States Steel Corp., 621 F.2d 749, 752 (5th Cir.), *reh'g denied*, 627 F.2d 239 (1980); *Loeb*, 600 F.2d at 1014; *Schwager*, 591 F.2d at 61.

57. *See infra* notes 58-60 and accompanying text.

58. *See, e.g.*, *Coburn*, 711 F.2d at 342; *Schwager*, 591 F.2d at 61.

59. *See, e.g.*, *McCorstin*, 621 F.2d at 752.

60. *See, e.g.*, *Kier*, 808 F.2d at 1257; *Loeb*, 600 F.2d at 1014.

61. *See, e.g.*, *Kephart*, 630 F.2d at 1222; Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978).

62. *See, e.g.*, Pirone v. Home Ins. Co., 559 F. Supp. 306, 309-10 (S.D.N.Y.), *aff'd*, 742 F.2d 1430 (2d Cir. 1983); Kahn v. Pepsi Cola Bottling Group, 547 F. Supp. 736, 739 (E.D.N.Y. 1982).

63. A reduction in work force is when an employer terminates employees in order to reduce his staff, and does not replace the discharged workers. *See* Smith v. Farah Mfg. Co., 650 F.2d 64, 67 (5th Cir. 1981).

64. *See generally* 2 EGLIT, *supra* note 15, § 17.61, at 17-196 to -198 (1987).

simply that in this context the number of jobs are drastically reduced and employees are generally not replaced.[65]

C. Constructive Discharge

The third prong of the modified *McDonnell Douglas* test requires that the employee be discharged.[66] While this point is generally not disputed, proving discharge becomes problematic in cases alleging involuntary retirement. The plaintiff is not actually discharged but claims that he is being coerced into early retirement. In such cases, proving constructive discharge rather than actual discharge is an acceptable way to establish the discharge element in the plaintiff's prima facie case.[67]

Traditionally, constructive discharge has been found to exist when an employer deliberately makes an employee's working conditions so intolerable that a "reasonable person"[68] would feel compelled to resign.[69] Unlike a typical constructive discharge case, the claim in an involuntary retirement action is not that the employer imposed intolerable working conditions, but rather that the employer offered an early retirement incentive in an unreasonable and coercive manner. A more recent and appropriate definition of constructive discharge in this context is that a reasonable person in the employee's position would feel compelled to accept the early retirement incentive.[70] Proof that an early retirement incentive is involuntarily accepted is sufficient to establish constructive discharge.[71]

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65. *Id.*

66. *See supra* note 56 and accompanying text.

67. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 206-07 (5th Cir. 1986); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 49 (6th Cir. 1985); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1254-55 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

68. "Reasonable person" is an objective standard uniformly recognized by all circuits. *Bristow*, 770 F.2d at 1255. The test is "whether a 'reasonable person' in the employee's position would have felt compelled to resign." *Id.*

69. *Guthrie*, 803 F.2d at 207; Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986); *Williams*, 770 F.2d at 49; *Bristow*, 770 F.2d at 1255; Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981).

70. *See* Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1484 (N.D. Ill. 1987); Amicus Curiae Brief of the Equal Employment Opportunity Commission at 17, Paolillo v. Dresser Indus., Inc., 821 F.2d 81 (2d Cir. 1987) [hereinafter EEOC Amicus Curiae Brief].

71. *See* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982) (plaintiff was unable to establish constructive discharge because employee's decision to retire early was voluntary); Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978) (same); *see also* Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 62 n.3 (S.D.N.Y. 1981); 2 EGLIT, *supra* note 15, § 17.59, at 17-192 (1987).

IV. The Problem of Evaluating "Voluntariness" in Early Retirement Incentives

A. Cases Involving Early Retirement Incentives: *Paolillo* and *Henn*

Despite the increasing use of early retirement incentives,[72] the standards for evaluating whether retirement is voluntary remain unclear.[73] ADEA and its legislative history are silent on this issue.[74] While many courts recognize the validity of such incentives,[75] they fail to offer concise guidelines for resolving the question of voluntariness.[76]

Recently, the Equal Employment Opportunity Commission (EEOC)[77] suggested a number of factors that it believes to be significant in determining whether an open-window plan is being coercively administered. These factors require the employer to:

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72. *See supra* note 9 and accompanying text.

73. *See generally* 2 EGLIT, *supra* note 15, § 16.18B, at 16-42.4 to -42.7 (1987); Freund & Prager, *Is an Early Retirement Incentive a Benefit—Or a 'Gilded Shove'?*, Nat'l L.J., Sept. 14, 1987, at 28, col. 3.

74. 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985).

75. *See, e.g.*, Henn v. National Geographic Soc'y, 819 F.2d 824, 828 (7th Cir.) ("an offer of incentives to retire early is a benefit to the recipient, not a sign of discrimination"), *cert. denied*, 108 S. Ct. 454 (1987); Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339, 344 (D.C. Cir.) ("[e]arly retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary"), *cert. denied*, 464 U.S. 994 (1983); *Ackerman*, 670 F.2d at 71 (early retirement gives an employee an "opportunity to retire with dignity"); McCorstin v. United States Steel Corp., 621 F.2d 749, 755 (5th Cir.) ("early retirement is a laudable attempt to provide security for those unable or disinclined to continue to work to the mandatory or normal time for retirement"), *reh'g denied*, 627 F.2d 239 (1980). *But see* Kass, *supra* note 8, at 63 (arguing that early retirement incentives should be prohibited by ADEA because they foster ageist stereotypes and harm society as a whole).

76: *See infra* notes 103-19 and accompanying text.

77. As originally enacted, ADEA designated the Department of Labor as the agency responsible for the Act's administration and enforcement. Age Discrimination in Employment Act, Pub. L. No. 90-202, §§ 6-7, 81 Stat. 602, 604 (1969) (codified as amended at 29 U.S.C. §§ 625-626 (1982)). In 1978, President Carter issued an order transferring the administrative and enforcement authority of ADEA to the EEOC as of July 1, 1979. Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 3781, 43 Fed. Reg. 19,807 (May 9, 1979). The transfer was firmly established by specific legislation authorizing EEOC enforcement of ADEA. Ratification of Reorganization Plans as a Matter of Law, Pub. L. No. 98-532, 98 Stat. 2705, 2705 (1984) (codified at 5 U.S.C. §§ 901-912 (1982)). The EEOC has affirmitively established that voluntary early retirement is lawful. 29 C.F.R. § 1625.9(f) (1986).

(1) provide accurate information about the plan and related benefits;
(2) provide honest information about job prospects with the company to the best of its knowledge;
(3) allow sufficient time for the employee to make a considered decision; and
(4) assure employees that they are free to decline the offer.[78]

Two recent appellate court rulings involving claims of mandatory retirement focus on a number of these factors. In *Paolillo v. Dresser Industries, Inc.*,[79] the defendant-employer's Whitney Chain Division (Whitney Chain) offered open-window plans to all of its employees age sixty and older.[80] Three employees who accepted the early retirement package subsequently brought an ADEA action against the company, claiming that they were forced to retire because they were given insufficient time to consider the offer.[81] Two of the plaintiffs had six days from the date the option was announced to decide whether to accept or reject the offer,[82] while the third employee had only five days to decide.[83]

In assessing whether the plaintiffs' retirement was voluntary, the appellate court focused its attention on the issue of time. The court ruled that "employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice. The amount of time reasonably required . . . will vary depending on the circumstances of each case."[84]

The appellate court concluded that the district court had erred in holding that, as a matter of law, the plaintiffs had voluntarily accepted the plan.[85] In reaching this decision the appellate court considered that "the shortness of time given to [the plaintiffs] to make a decision, the reason for the compressed time period,[86] the length of service of [the plaintiffs] with Whitney Chain[87] and the apparent complexity of the options open to them certainly raise[d]

78. *See* EEOC Amicus Curiae Brief, *supra* note 70, at 20.
79. 821 F.2d 81 (2d Cir. 1987).
80. *Id.* at 83.
81. *Id.* at 84.
82. *Id.* at 83.
83. *Id.*
84. Paolillo v. Dresser Indus., Inc., 821 F.2d 81, 84 (2d Cir. 1987).
85. *Id.*
86. The defendant wanted time to assess the effect of the early retirement plan before the end of its fiscal year. *Id.*
87. At the time of the open-window offer, the three plaintiffs had been employed by the defendant for 31 years, 16 years and 15 years. *Id.*

a material issue as to whether [the plaintiffs] were given sufficient time to make a considered choice."[88] The court also noted that the plaintiffs' signed acknowledgment that their acceptance was voluntary did not establish that they had retired freely.[89]

In *Henn v. National Geographic Society*,[90] the defendant-employer offered all of its advertising salesmen over the age of fifty-five the option of early retirement.[91] The offer was open for over two months.[92] Twelve of the fifteen recipients accepted the offer.[93] Four of the twelve filed an ADEA suit against the company, claiming that their retirement was involuntary and resulted from undue pressure.[94] The court record indicates that the employees were under pressure to sell and were confronted with threats of unpleasant consequences if they did not increase their sales.[95] The court, however, opined that selling is a risky business with attendant pressures to produce.[96] The court found that while the offer may have presented the employees with a difficult choice, the facts did not merit a finding of constructive discharge in violation of ADEA.[97]

Although the plaintiffs were found to have voluntarily retired, the court did provide some guidance on the criteria to be considered when addressing the question of voluntariness. Such factors include whether "the person receive[d] information about what would happen in response to the choice, [and whether] the person [had] an opportunity to say no."[98] Unlike the court in *Paolillo*, the *Henn* court did not stress the importance of time when addressing the issue of voluntariness.[99] The court noted, however, that a "very short period to make a complex choice may show that the person could not digest the information necessary to the decision."[100] The court concluded that "[t]his would show that the offer of information was

88. *Id.*
89. *Id.*
90. 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).
91. *Id.* at 826.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 829-30.
96. Henn v. National Geographic Soc'y, 819 F.2d 824, 830 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).
97. *Id.*
98. *Id.* at 828.
99. *Id.* The court noted that "the need to make a decision in a short time, under pressure, is an unusual definition of 'involuntary.' " *Id.*
100. *Id.* at 828-29.

illusory and there was no informed choice."[101] The court suggested that giving the employee time to consult with his spouse and financial advisor should be sufficient.[102]

B. A Critical Examination of *Paolillo* and *Henn*

Neither the EEOC nor the cases offer clear criteria to evaluate whether a decision to retire pursuant to an early retirement incentive is truly voluntary.[103] The EEOC's guidelines are very general and the decisions in both *Paolillo* and *Henn* are tailored to the particular circumstances of each case, not lending themselves as a standard on which to decide other cases.[104] Nevertheless, the suggestions by the EEOC and the cases read together indicate that there are three main factors to weigh when assessing an early retirement incentive: (1) time;[105] (2) adequate disclosure of information;[106] and (3) the opportunity to decline the offer.[107]

1. What is Sufficient Time?

The *Paolillo* court based its decision on a finding that the plaintiffs had insufficient time to make a considered choice, yet the court failed to indicate what would have been an appropriate amount of time.[108] The *Henn* court, on the other hand, made it clear that brevity of time does not render a decision involuntary.[109] The *Henn* court acknowledged, however, that a very short period of time to decide may result in an illusory choice if the employee is unable to assess the information.[110] Thus, precise guidelines of an acceptable time-frame cannot be drawn from the cases.

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101. *Id.* at 829.

102. *Id.*

103. *See infra* notes 104-19 and accompanying text.

104. For a discussion of the EEOC's guidelines, see *supra* note 78 and accompanying text. For a discussion of *Paolillo* and *Henn*, see *supra* notes 79-102 and accompanying text.

105. For a discussion of the time factor, see *supra* notes 78, 84-88, 99-102 and accompanying text.

106. For a discussion of adequate disclosure, see *supra* notes 78, 98-101 and accompanying text.

107. For a discussion of the ability of an employee to refuse an early retirement incentive, see *supra* notes 78, 98 and accompanying text.

108. *See* Paolillo v. Dresser Indus., Inc., 821 F.2d 81, 84 (2d Cir. 1987).

109. *See* Henn v. National Geographic Soc'y, 819 F.2d 824, 828 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).

110. *Id.* at 828-29; *see also* Bodnar v. Synpol, Inc., 843 F.2d 190 (5th Cir. 1988). In *Bodnar*, the court found that the 15 days given to employees to decide

2. *Adequate Information*

Recognizing that an open-window plan requires a major decision by employees, the EEOC and the *Henn* court suggest that an employer has an obligation to provide employees with accurate information about the plan and related benefits.[111] Nevertheless, neither authority explains how an employer should channel this information to his employees.[112] Perhaps furnishing literature and a general explanation about the plan would be sufficient.[113] As an added safeguard, an employer could provide preretirement counseling to assist employees in understanding what can often be a complex plan.[114]

Adequate disclosure becomes even more problematic regarding an employer's duty to assess honestly an employee's future job prospects with the company. It is difficult to imagine how an employer can remain objective in advising the individual he has targeted for dismissal.[115] Furthermore, since the employee's status depends upon the company's success, the employer is left in a difficult position. The employer must give the employee an accurate assessment of the company's future, but it is unclear just how much the employer is required to divulge. Moreover, the disclosure of private financial records and future business plans could damage the company.

3. *Ability to Decline the Offer*

Evidence that some people in the group who are eligible to retire decline the offer may tend to show that the plan is not coercive.[116] While this may be probative on the issue of voluntariness, the test remains whether a reasonable person, and not an eligible employee, would feel compelled to retire.[117] Moreover, in a large scale reduction in work-force case, an employee's freedom of choice is seriously

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whether to accept or reject an early retirement offer did not render their decision involuntary. The court cautioned that it would closely scrutinize any plan that was offered on a shorter schedule, but noted that a struggling business must often pursue a quick and decisive course of action in order to stem losses. *Id.* at 193-94.

111. *See supra* notes 78, 98-101 and accompanying text.

112. *See* Henn v. National Geographic Soc'y, 819 F.2d 190 (5th Cir. 1988); EEOC Amicus Curiae Brief, *supra* note 70.

113. *See, e.g.*, *Paolillo*, 821 F.2d at 83.

114. In a survey of 100 businesses that offered early retirement incentives, 75% of the employers provided preretirement counseling to eligible employees. *See* Towers Survey, *supra* note 15, at 277.

115. *See* Kass, *supra* note 8, at 80-81.

116. *Id.* at 82-83; *see id.* at 80-81.

117. *See supra* notes 68-70 and accompanying text.

hampered when the alternative is most probably a layoff or discharge.[118] In this context, the employee may perceive the offer not as a choice, but rather as mandatory.[119]

V. A Proposal for Application of the "Knowing and Voluntary" Standard Taken From Release Cases

A. Analogy Between Releases and Early Retirement Incentives

A common device used by employers to settle disputes and avert potential controversies is to obtain from employees a release of their right to bring an ADEA claim.[120] In order for a release to be valid, it must be entered into "knowingly and voluntarily."[121] This "knowing and voluntary" standard used in release cases serves as an appropriate model on which to evaluate the voluntariness of early retirement incentives.[122]

The adoption of a "knowing and voluntary" standard to early retirement offers is justified because of the similarities between releases and early retirement incentives. Both releases and early retirement incentives share a common definition. In a release, the right to bring an ADEA claim is waived for valuable consideration.[123]

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118. *See* Kass, *supra* note 8, at 81.

119. *See id.* Some courts have indicated that an early retirement incentive may be involuntary if the plan is presented as a take-it-or-leave-it proposal. *See* Bodnar v. Synpol, Inc., 843 F.2d 190, 193-94 (5th Cir. 1988); *Henn*, 819 F.2d at 828; Herbert v. Mohawk Rubber Co., 47 Fair Empl. Prac. Cas. (BNA) 152, 157 (Mass. Dist. Ct. 1988).

120. Silberman & Bolick, *The EEOC's Proposed Rule on Releases of Claims Under the ADEA*, 37 LAB. L.J. 195 (1986) [hereinafter Silberman & Bolick].

121. *See* Valenti v. International Mill Serv., Inc., 45 Fair Empl. Prac. Cas. (BNA) 1054, 1057 (3d Cir. 1987) (subsequent appeal dismissed after parties settled, *see* Coventry v. United States Steel Corp., Daily Lab. Rep. (BNA) No. 169, at D-3 n.4 (Aug. 31, 1988)); EEOC v. Cosmair, Inc., L'oreal Hair Care Div., 821 F.2d 1085, 1091 (5th Cir. 1987); Lancaster v. Buerkle Buick Honda, 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987); Cirillo v. Arco Chem. Co., No. 87-4026 (E.D. Pa. Dec. 10, 1987) (LEXIS, Genfed library, Courts file); Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1486 (N.D. Ill. 1987); EEOC v. United States Steel Corp., 583 F. Supp. 1357, 1361 (W.D. Pa. 1984); Roper v. GTE Communication Systems Corp., No. 84 C 10898 (N.D. Ill. Aug. 8, 1986) (LEXIS, Genfed library, Courts file); DiMartino v. City of Hartford, 636 F. Supp. 1241, 1248 (D. Conn. 1986); Sullivan v. Boron Oil Co., Daily Lab. Rep. (BNA) No. 202, at D-1 (Oct. 21, 1987); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (supporting in dicta the proposition that an employee can waive a claim under Title VII if his consent is knowing and voluntary).

122. *See infra* notes 123-57 and accompanying text.

123. *See* Silberman & Bolick, *supra* note 120, at 195.

Likewise, early retirement incentives require an employee to forgo his livelihood before obtaining any benefits.[124] In addition, the propriety of releases and early retirement incentives hinges on their voluntary nature. Releases must be knowing and voluntary,[125] and early retirement incentives can only be knowingly and voluntarily accepted.[126]

Finally, ADEA and ADEA release cases have a close connection to title VII of the Civil Rights Act of 1964 (Title VII).[127] ADEA and Title VII share the same aim of eliminating discrimination from the workplace.[128] The prohibitions of ADEA were even derived *in haec verba* from Title VII.[129] Given the similar purposes and substantive rights between both statutes, it is not unusual for the courts to draw from Title VII case law when resolving a problem under ADEA.[130] For example, the standard for waiving ADEA claims is taken from Title VII release cases.[131] In light of the similarities between releases and early retirement incentives, it would be appropriate for the legislature or courts to borrow the "knowing and voluntary" standard found in release cases and extend it to the analogous situation of early retirement incentives.

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124. *See supra* note 10 and accompanying text.

125. *See supra* note 121 and accompanying text.

126. *See supra* note 39 and accompanying text.

127. *See infra* notes 128-31 and accompanying text.

128. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Lorillard v. Pons, 434 U.S. 575, 584 (1978).

129. *See Lorillard*, 434 U.S. at 584. In *Lorillard*, the Court stated the following:

> Title VII with respect to race, color, religion, sex, or national origin, and the ADEA with respect to age make it unlawful for an employer 'to fail or refuse to hire or to discharge any individual,' or otherwise to 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,' on any of those bases.

Id. at 584 n.12 (quoting 42 U.S.C. § 2000e-2(a)(1) (1982) and 29 U.S.C. § 623(a)(1) (1982)).

130. *See* 2 EGLIT, *supra* note 15, § 16.02, at 16-12 to -13.

131. *See* DiMartino v. City of Hartford, 636 F. Supp. 1241, 1245-48 (D. Conn. 1986); EEOC Notice of Final Rule, 52 Fed. Reg. 32,293, 32,294 (Aug. 27, 1987) (to be codified at 29 C.F.R. § 1627(c)(1)-(3)) [hereinafter EEOC Notice of Final Rule]. This EEOC regulation which authorizes unsupervised waivers under ADEA has been suspended by Congress by an amendment to the Budget Reconciliation Act of 1987. The amendment provides that the rule regarding unsupervised waivers shall not have effect during fiscal year 1988, and that no funds may be expended by the Commission to effectuate this regulation. Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987); *see also* Silberman & Bolick, *supra* note 120, at 198.

B. The "Knowing and Voluntary" Standard

1. An Explanation of the "Knowing and Voluntary" Standard

a. Knowing

The "knowing" component has been defined as a "meeting of the minds"[132]—the releasor must genuinely intend to waive his claims.[133] Applying this element to the context of an early retirement incentive, an employee must also truly intend to retire.[134] Factors that are used to determine if a release is "knowing" include: (1) an agreement in writing that is clear and unambiguous;[135] (2) whether an employee consults or is encouraged to meet with an attorney;[136] (3) whether the employee participates in negotiations concerning the terms and conditions of the release;[137] (4) whether the employer explains and the employee understands the language and consequences of the release;[138] (5) the employment position,[139] business experience[140] and

132. Silberman & Bolick, *supra* note 120, at 201.

133. *Id.*

134. *See supra* note 39 and accompanying text.

135. *See* Sullivan v. Boron Oil Co., Daily Lab. Rep. (BNA) No. 202, at D-1 (Oct. 21, 1987); Lancaster v. Buerkle Buick Honda, 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987); Cirillo v. Arco Chem. Co., No. 87-4026 (E.D. Pa. Dec. 10, 1987) (LEXIS, Genfed library, Courts file); Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1486 (N.D. Ill. 1986); Roper v. GTE Communications Systems Corp., No. 84 C 10898 (N.D. Ill. Aug. 8, 1986) (LEXIS, Genfed library, Courts file); DiMartino v. City of Hartford, 636 F. Supp. 1241, 1248 (D. Conn. 1986); Oglesby v. Coca-Cola Bottling Co., 620 F. Supp. 1336, 1341-43 (N.D. Ill. 1985); Bernstein v. Consolidated Foods Corp., 622 F. Supp. 1096, 1105-06 (N.D. Ill. 1984); EEOC v. United States Steel Corp., 583 F. Supp. 1357, 1360 (W.D. Pa. 1984); Silberman & Bolick, *supra* note 120, at 202; EEOC Notice of Final Rule, *supra* note 131, at 32,294.

136. *See Sullivan*, Daily Lab. Rep. (BNA) No. 202, at D-1; *Cirillo*, No. 87-4026 (LEXIS, Genfed library, Courts file); *DiMartino*, 636 F. Supp. at 1248; *Oglesby*, 620 F. Supp. at 1343; *United States Steel Corp.*, 583 F. Supp. at 1360; Silberman & Bolick, *supra* note 120, at 202; EEOC Notice of Final Rule, *supra* note 131, at 32,294.

137. *See* Valenti v. International Mill Serv., Inc., 45 Fair Empl. Prac. Cas. (BNA) at 1054, 1057 (3d Cir. 1987); *Sullivan*, Daily Lab. Rep. (BNA) No. 202, at D-1; *Lancaster*, 809 F.2d at 541; *Cirillo*, No. 87-4026 (LEXIS, Genfed library, Courts file); *Anderson*, 650 F. Supp. at 1486; *DiMartino*, 636 F. Supp. at 1248; *United States Steel Corp.*, 583 F. Supp. at 1360.

138. *See Sullivan*, Daily Lab. Rep. (BNA) No. 202, at D-1; *Cirillo*, No. 87-4026 (LEXIS, Genfed library, Courts file); *United States Steel Corp.*, 583 F. Supp. at 1360.

139. *See Lancaster*, 809 F.2d at 541; Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 (6th Cir.), *cert. denied*, 107 S. Ct. 178 (1986); *Cirillo*, No. 87-4026 (LEXIS, Genfed library, Courts file).

140. *See* Lancaster v. Buerkle Buick Honda, 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987); *Runyan*, 787 F.2d at 1044; Roper v. GTE Communications Systems Corp., No. 84 C 10898 (N.D. Ill. Aug. 8, 1986) (LEXIS, Genfed library, Courts file).

educational background of the employee;[141] and (6) the existence of fraud or misrepresentation.[142]

The factors used to evaluate the "knowing" prong in release cases can help reduce the adequate disclosure problem of providing employees with accurate and comprehensible information about the early retirement incentive.[143] While the EEOC and the *Henn* court recognized the necessity of employees receiving sufficient information about the plan, both authorities failed to suggest a mechanism for providing such information to the employees.[144] Requiring the offer to be written in plain english will assist the employees in understanding the terms of the plan.[145] Moreover, experience has shown that an agreement is more likely to be adhered to when both parties have participated in the negotiation process.[146] As a final check, an attorney can review the offer to ensure that it is fair, and that the employees understand the terms of the offer.[147]

b. Voluntary

To meet the "voluntary" requirement the release must not be the result of coercion.[148] Relevant to a determination of voluntariness is whether the releasor has adequate time to make an educated decision.[149] While the courts have not specified what is a reasonable

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141. *See Runyan*, 787 F.2d at 1044; Cirillo v. Arco Chem. Co., No. 87-4026 (E.D. Pa. Dec. 10, 1987) (LEXIS, Genfed library, Courts file).

142. *See* Silberman & Bolick, *supra* note 120, at 202; *see also* Coventry v. United States Steel Corp., Daily Lab. Rep. (BNA) No. 169, at D-5 to -8 (Aug. 31, 1988) (court judges the validity of a waiver by employing a "totality of the circumstances" test which takes into consideration the circumstances surrounding the particular individual who has executed the release).

143. For a discussion of the adequate disclosure problem, see *supra* notes 111-15 and accompanying text.

144. *See* Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987); EEOC Amicus Curiae Brief, *supra* note 70.

145. *See supra* note 135 and accompanying text.

146. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 92 (1985).

147. *See supra* note 136. Although application of these factors may provide a conduit to channel information about early retirement incentives to an employee, they do not address the problem of how employers may objectively appraise an employee of his future job prospects with a company.

148. *See* Note, *Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor Standards Act Criteria to Rest*, 55 GEO. WASH. L. REV. 382, 406 (1987) [hereinafter *Waivers*].

149. *See* Cirillo v. Arco Chem. Co., No. 87-4026 (E.D. Pa. Dec. 10, 1987) (LEXIS, Genfed library, Courts file); Silberman & Bolick, *supra* note 120, at 202; EEOC Notice of Final Rule, *supra* note 131, at 32,294.

time period,[150] the factors articulated in *Paolillo* present a helpful starting point when considering what is sufficient time.[151]

Evidence of duress is another indication that a release is involuntary.[152] Invalidating a release on the grounds of duress protects an employee from any contractual defects stemming from possible overreaching or an unfair bargaining position on the part of the employer.[153]

An employer may even consider including a "change of mind" provision in the offer permitting the employee to rescind his acceptance after a specified time.[154] While this is no guarantee that an employee's choice is voluntary, it provides an added safeguard that can help protect against a coerced decision.

2. *Application of the "Knowing and Voluntary" Standard to Early Retirement Incentives*

The "knowing and voluntary" test found in release cases should supplant *Paolillo* and *Henn* as the proper standard for evaluating the voluntariness of early retirement incentives. The criteria set forth in *Paolillo* and *Henn* are too narrowly drawn to the particular facts of each case, and therefore does not adequately serve as an appropriate model on which to decide other cases.[155] The release cases, however, are supported by a well-developed body of case law that has established concrete and workable factors to determine whether a release is "knowing and voluntary."[156] The application of these factors to ADEA claims of coerced retirement will import certainty

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150. *See, e.g., Cirillo,* No. 87-4026 (LEXIS, Genfed library, Courts file).

151. The court in *Paolillo* considered the following factors when determining whether the employees had sufficient time to make a voluntary decision: "(1) [t]he shortness of time given to [the employees] to make a decision; (2) the reason for the compressed time period; (3) the length of service of [the employees] with [their employer]; and (4) the apparent complexity of the options open to [the employees]." Paolillo v. Dresser Indus., Inc., 821 F.2d 81, 84 (2d Cir. 1987) (numbers added).

152. *See* Roper v. GTE Communications Systems Corp., No. 84 C 10898 (N.D. Ill. Aug. 8, 1986) (LEXIS, Genfed library, Courts file); DiMartino v. City of Hartford, 636 F. Supp. 1241, 1250 (D. Conn. 1986); Oglesby v. Coca-Cola Bottling Co., 620 F. Supp. 1336, 1343 (N.D. Ill. 1985).

153. *See* Goff v. Kroger Co., 47 Fair Empl. Prac. Cas. (BNA) 462, 465 (S.D. Ohio 1988); *Waivers, supra* note 148, at 407-08.

154. *See* McLanahan, *The Mechanics of Handling Employee Terminations: Suggestions for Drafting Releases and Related Problems,* 6 LEGAL NOTES & VIEWPOINTS Q. 1, 6 (1986).

155. For a discussion of the criteria set forth in *Paolillo* and *Henn* to evaluate the voluntariness of early retirement incentives, see *supra* notes 79-102 and accompanying text.

156. *See supra* notes 135-53 and accompanying text.

and continuity into this area of the law. The courts will have a definite set of guidelines to draw upon when analyzing the voluntary nature of an early retirement plan,[157] and employers will be able to incorporate these factors into their early retirement incentives to minimize the risk of offering a coercive plan.

VI. Conclusion

Employers need clear legislative or judicial standards to follow when drafting an open-window offer. If guidelines are not provided, employers run the risk of a lawsuit every time they offer an early retirement incentive. Likewise, employees must be protected against forced retirement. Thus far the legislature has wholly neglected this issue, and the few attempts by the courts to deal with the problem have been inadequate. In light of the similarities between releases and early retirement incentives, the "knowing and voluntary" standard used in release cases serves as an appropriate model to evaluate the voluntariness of early retirement incentives.

Lisa E. Meyer

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157. *See id.*