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IMPROVING THE AGE DISCRIMINATION LAW

A WORKING PAPER

PREPARED FOR USE BY THE

SPECIAL COMMITTEE ON AGING
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PREFACE

An opportunity to strengthen the Age Discrimination in Employment Act exists, and it should be seized in the very near future.

Amendments which would have improved ADEA considerably were offered within recent months and nearly gained enactment.[1]

Passed in the Senate as part of the Fair Labor Standards Amendments of 1973, the ADEA provisions were deleted in conference because of procedural issues.

Another vehicle for advancing such amendments, however, may soon become available.[2]

In anticipation of that likelihood, the Senate Special Committee on Aging is presenting this working paper to provide information that should be helpful in making the case for an improved ADEA.

Moreover, the working paper provides useful perspective on discrimination against those Americans who are denied work opportunities simply because they are regarded as too old.

Why is such an assumption so often made? Simply because so many persons in this Nation—and others—are victims of misinformation or their own prejudices.

They believe, without benefit of facts, that skills or abilities decline after a certain age. They are quick to assume that older employees should be removed "to make way for the young." They fail to understand the vital need for experienced workers and executives in almost any work setting and their contributions to the economy.

Clearly, no employee should remain in a position if he or she cannot meet its demands and the law recognizes this fact.

But equally clearly, no employee should be forced to quit or retire early simply because of reaching a certain age.

Such judgments should be made on the basis of facts, not blanket assumptions.

ADEA was enacted, not only to enforce the law, but to provide the facts that would help change attitudes. Much more remains to be done in the way of education, and improving ADEA generally.

This working paper discusses suggestions for strengthening ADEA, as well as recent court decisions and other developments that make such a summary especially timely.

The Senate Committee on Aging is grateful to the National Council on the Aging for making available the full transcript of a management seminar held earlier this year for intensive examination of ADEA. The committee is also fortunate in that Elizabeth M. Heidbreder, who

[1] The Senate Committee on Labor and Public Welfare included an amendment in S. 1861 (the Fair Labor Standards Amendments of 1973) which would have extended the coverage of ADEA to Federal, State, and local government employees and increased the authorization from $3 million to $5 million. In addition, a floor amendment by Senator Frank Church extended coverage to employers with 20 or more employees, instead of the current limit of 25 or more. These amendments, which were based upon bills introduced by Senator Bentsen (S. 635) and Senator Church (S. 1810), were passed by the Senate but deleted in conference committee because of the House germaneness rule.

[2] Representative John H. Dent, chairman of the General Labor Subcommittee of the House Education and Labor Committee, has indicated his willingness to hold hearings promptly on pending House legislation which parallels the provisions incorporated in S. 1861.

had worked with NCOA at the time of the seminar, has since joined the committee staff. In preparing this document, she drew from her impressive experience as economist, former staff person at the Social Security Administration, and as editor of a periodical dealing with industrial gerontology.

To anyone not already familiar with the widespread impact of aging throughout our society, this working paper will once again make the point that problems relating to growing older do not necessarily begin at age 65. Each American should be concerned about age discrimination, whether young, middle-aged, or beyond.

FRANK CHURCH, *Chairman,*
Special Committee on Aging.

JENNINGS RANDOLPH, *Chairman,*
Subcommittee on Employment and Retirement Incomes.

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PART ONE

INTRODUCTION

"I believe strongly that functional capacity and not chronological age ought to be the most important factor as to whether or not the individual can do a job safely. This determination must be made repeatedly throughout the employee's employment experience. The human variances involved are myriad; there is no way to generalize as to the physical capability and physiological makeup of an individual. Nor is there a way to project how an individual will be affected by the aging process."

JAMES B. PARSONS,
U.S. District Judge,
February 5, 1973.

Officially, age discrimination in employment is against the law in the United States.

A statute enacted in 1967 bars employers from denying job opportunities or dismissing employees 40 to 64 years old solely because of age.

Congress acted to bar age bias because a compelling case had been made—at hearings and in special studies—about the devastating damage done by discrimination to workers and, less directly, to the economy.

Talent and experience, Congress was told, were being wasted simply because of prejudice against men and women who, in the view of employers, had had too many birthdays.

Want ads blatantly set age limits for new applications. Many an executive, left jobless by a business shutdown or reorganization, was told in job interviews that he or she was "overqualified." Others found themselves suddenly separated from employment just a few years, or less, before pension eligibility was to begin.

Progress since 1967 under the Age Discrimination in Employment Act (ADEA) has been slow.

But within recent months interest in ADEA has increased markedly.

Two landmark court actions, described later in this section, have caused employers and others to look at ADEA with deeper respect and concern. Stepped-up enforcement can now be expected. The intent of Congress now seems more certain of fulfillment.

While interest in ADEA is relatively high, the Senate Committee on Aging is presenting this Working Paper. It is intended to:

—Discuss recent developments which have focused interest on ADEA;

—Present a brief summary of the history of the legislation and its implementation; and
—Discuss suggestions for additional improvements in the law in the very near future.

I. THE COURT DECISIONS

Earlier this year, Judge James B. Parsons found for the plaintiff, the Secretary of Labor, in its suit against Greyhound Lines, Inc. for violations of the Age Discrimination in Employment Act. The Greyhound case had been the first one filed under the *bona fide* occupational qualification exception of ADEA. Greyhound had refused to hire drivers over age 35, claiming that the age limitation policy was necessary for the safety of the public. The judge determined that this policy had not been shown by Greyhound to be necessary to the normal and safe operation of its business.[1]

In another court, a 1972 judgment awarded 29 former employees of Pan-American Airways, Inc. damages totalling $250,000 to be paid in larger pensions. The suit and judgment resulted from a complaint that Pan-American violated the provisions of ADEA in laying off, retiring, or assigning to inactive status certain employees. These employees were all over age 59 and most were engineers.

These court actions[2] reflect increasing activity in the enforcement of the act which protects the employment rights of some 18.5 million older workers. Before 1970, there were only 10 court cases filed; the total has since risen to more than 180. In 1969, there were 1,031 complaints received by the U.S. Department of Labor from individuals who felt themselves discriminated against because of age. In fiscal 1972, there were 1,862 for an increase of over 80 percent for the three-year period.

II. WHERE ADEA STANDS TODAY

Welcome as the Greyhound and Pan-American decisions may be, they do not guarantee the success of ADEA. Age discrimination is an elusive and sometimes confusing force in the present social and economic scene.

An excellent opportunity for an intensive examination of where ADEA stands occurred in February 1973 at a Management Seminar on the Age Discrimination in Employment Act sponsored by the National Council on the Aging. Participants included personnel directors and other executives from many large corporations, together with State and Federal officials concerned about ADEA. The fact that the conference attracted a large number of distinguished participants was one more sign of rising interest in ADEA.

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[1] Text of the judge's opinion appears in appendix 2, p. 24.

[2] Additional perspective on the importance of the *Greyhound* case was provided by the National Council on the Aging on September 18 when that organization presented its 1973 Ollie A. Randall Award to Mr. Gilbert Drucker, the Department of Labor attorney who prepared the case. The full text of the NCOA citation may be found in Appendix 4, p. 33.

Senator Edward M. Kennedy, keynote speaker, summed up the challenge to the conference and to ADEA:

> . . . passing legislation, particularly in the area of discrimination, does not assure its disappearance. And today, five years later, the picture that one finds is not bright.
>
> Older workers still are the last to be hired and the first to be fired.
>
> Today, 867,000 persons over 45 are out of work—a 45% jump in the past four years. And those between 55 and 64 have been out of work the longest, an average of four to five months.
>
> What does that mean to the individual? It means savings wiped out. It means health insurance gone. It means a sense of self-worth damaged perhaps beyond repair.
>
> Some are lost to the labor force forever. But they are not drop-outs. Society has pushed them out.

After describing the magnitude of the problem, the Senator cited figures which showed that the Department of Labor had only 69 Labor Department positions specifically budgeted for ADEA. And the 1,000 Labor compliance officers devoted only an estimated 10 percent of their time overseeing some 685,000 establishments covered under the Act.

Senator Kennedy also called for closer attention to one of the deep-rooted issues related to ADEA:

> Finally, we must examine the entire field of involuntary retirement. Congress, five years ago, in the ADEA, charged the Secretary of Labor with studying this matter. But we are still waiting for that report. Hopefully, it will be completed soon and will form the basis for a complete re-examination of our retirement policies. For there are indications that they may need major adjustment.
>
> The Social Security Administration in 1970 found that half the men subject to compulsory retirement received a 60 percent cut in their previous income upon retirement. And what is equally disturbing, more than half of those forced into retirement said they did not want to quit working. I believe that no man who wants to work and is able to do the job should be shoved onto the fringes of society. Yet that is what our compulsory retirement policies seem to be doing. Clearly, they need to be changed.

The Labor Department Approach

Participants at the NCOA conference heard Department of Labor representatives give a lengthy accounting of present ADEA enforcement.

Heavy emphasis was placed upon voluntary compliance, since the statute specifically requires that—before legal proceedings can be instituted—attempts must be made to eliminate discriminatory practices through informal methods of conference, conciliation, and persuasion.

Only after such attempts have failed may the Secretary of Labor bring court action. In the case of an individual who wishes to bring such action, he or she must give the Secretary at least 60 days notice of intent to sue.

The Department also investigates firms to see whether they are in compliance with ADEA. More than 6,000 establishments were investigated in 1972 and 36 percent were found in violation of one or more statutory provisions. So far the discrimination practice disclosed most often is illegal advertising. However, a significant number of violations have been found in refusal to hire, discharge because of age, and the existence of promotional bars to workers in the 40 to 64 age category.

Conciliation Actions

A number of cases were cited to illustrate the successful settlement of complaints:

- A railroad set a 35-year age limit on its locomotive firemen. Conciliation eventually resulted in some 1,300 additional job opportunities for older workers.
- A cigar factory opened more than 300 jobs to older workers and revised its job application form by adding reference to the Act's requirements.
- A 59-year old couple applied to the district manager of a chain store for work in one of the stores which was customarily managed by a husband and wife team. The district manager replied that the résumé merited consideration, but it was company policy not to hire employees over 55 for this position. Officials at the home office denied this policy but couldn't give any reason why the couple had not been hired. The end result was that a high official of the company offered them a job and they were also given a check for $2,800 in damages.
- An employee complained of a company policy which denied overtime work to employees over 60. When interviewed by a compliance officer, the company president admitted that the job was not over-taxing and the five employees involved could perform the work. He agreed to comply and pay back wages for the lost overtime work.

Help-Wanted Ads and Employment Agencies

Shortly after ADEA became effective, regional offices of the Department of Labor contacted newspapers with regard to the prohibition of age preference, limitation or specification in advertisements relating to employment. As a result, some newspapers printed notices about the law at the head of their "help wanted" columns as a public service. Others promised to decline any such advertising. A little over a year ago, more than 125,000 employment advertisements in 141 newspapers in 91 cities were reviewed by the Department of Labor. Fewer than one percent of the ads specified age limits; about two percent *implied* age limits.

Private employment agencies were also contacted, and these agencies were surprised to learn that they were not protected from compliance with the law just because they were acting in accordance with the employer's request. Incidentally, the Department found that some of the largest companies in the nation had placed discriminatory job offers, according to the agencies' records.

Litigation

One of the disadvantages of ADEA is that it does not have as much dramatic appeal as the other statutes on race and sex. There are no situations similar to the race cases where there has been absolutely no employment of a minority group. Nor is there anything analagous to the equal pay sex discrimination cases where a company may have 5,000 women on the production line doing the same work as the men and being paid less.

Nevertheless, the Department of Labor has filed 140 suits and roughly 60 have already been settled—either by court decisions or by some form of payment and satisfactory settlement.[3] Of the 60, only 6 have gone against the government.

So far the record has been encouraging, but there has been only one appellate court decision; and this is where the legal principles are established. Several appeals are coming up and some very significant rulings are expected.

In the one appellate decision which has been made, the Federal Government had brought suit against a bank claiming that a 47 year-old woman had been turned down for a teller's job because of her age. The company maintained that the fact that she was overweight, rather than her age, was the reason for not hiring her, and the Trial Court accepted that argument.

The Court of Appeals, however, listened to this case which involved only one woman and a 22-page appendix was included in its decision explaining why the bank should have hired her. It is obvious that the courts are not taking the Age Discrimination Act lightly.

Business Managers View ADEA

Age discrimination is, according to a number of managers participating in the NCOA seminar, a fact of corporate life. Frank P. Doyle[4] stated that ADEA has been only superficially enforced and age discrimination is the only form of discrimination that enjoys widespread social approval within corporate life. As he pointed out:

> No one ever said racial discrimination was a good idea. No one ever said religious discrimination was a good idea. But how many times have you seen a manager praised and promoted because he headed an organization that was filled with young tigers; old lions just don't seem to boost you up the corporate ladder.
>
> How many annual reports, some of them quite recent—they are getting a little less frequent—where it is proudly stated that the average age in the top management has come down from 58 to 46. I don't think I have ever seen an annual report that proudly proclaims a boost in the average age of management.
>
> What we are doing, and what we have done, is to create an environment where in fact young is better than old and represents an underlying corporate value. I think that fact alone makes this particular field and this legislation quite a bit different from any of the discrimination legislation that preceded it.

[3] As of February 1973.

[4] Mr. Doyle is president, Frank P. Doyle Associates, Inc., and former senior vice president of industrial relations for Pan American Airways.

Other managers commented on some built-in personnel practices that clearly discriminate. In the recruiting and hiring functions, for example, problems arise because it is a common practice to use new personnel in interviewing and screening. Many times the interviewer will automatically discriminate because of age if there is an opening that stipulates two to four years experience. If the applicant has, say, fifteen years of experience, he or she is judged not qualified for the two to four years stipulation is taken as gospel.In other cases people have specific experience valuable to the company with an opening, but the inexperienced interviewer is unable to make a translation from the applicant's experience to the language in the personnel request.

A job description can exert a subtle form of discrimination by setting qualifications of education that are completely appropriate for the young employee and completely irrelevant for someone with 30 years experience. Testing and pre-employment physicals are other areas where subtle forms of discrimination may exist in personnel offices.

Utilizing Older Workers

Some corporations, on the other hand, make a conscious effort to avoid discrimination and utilize older workers. One company official at the NCOA seminar gave the following examples:

- An old foundry was closed and the nearly one hundred employees averaged 50 years of age. The company offered them work in an electronic assembly area where operations were expanding. A one-week program of non-production training on wiring and assembling and soldering was offered. The biggest stumbling block was the eye-sight of some of the employees, but otherwise relatively few failed to meet the requirements even after 30 years in a foundry, where nimble fingers were hardly required.
- A regional service manager over 50 had his job eliminated. Rather than lay him off, and since fifteen years ago he had been an accountant, the position of assistant comptroller for field operations was created. Now his combined knowledge of auditing and field operations is giving the company effective management control and measurable dollar savings.
- The job of a 55-year old marketing manager with 33 years of service was eliminated. Early retirement could have been the answer but with his experience and an electrical engineering degree it seemed a shame to lose him. Instead he was made manager of industrial safety and government relations. Overnight the company's safety record dramatically improved going down from 14 accidental injuries in the year before to 0 this year.

The Early Retirement Trap

The manager in the preceding case was not forced to take early retirement when his job was abolished. This is not usually the case, particularly when a company is in a period of retrenchment. Then early retirement is looked upon as a way to spare the jobs of younger people and as a way to save money by replacing higher salaried

personnel with less expensive employees. The mere eligibility for a retirement benefit can be a factor in the decision of who is to stay and who is to go.

In many cases, participants in the seminar emphasized early retirement has been accepted by companies as a means of easing out low producers on a selective basis. As it becomes more and more general, it becomes more and more expensive. It is, in fact, economic suicide for the companies. And for employees, it is becoming the vehicle for unwanted, early withdrawal from the work force.

A Summing-Up

The NCOA conference was closed by Senator Jacob K. Javits who called for increased enforcement of the law and for a real review of the Department of Labor's money and manpower for investigatory functions. He added that the Department could also do a great deal more in the area of enforcement in attacking age discrimination under the Contract Compliance Program which forbids discriminatory activities by government contractors. There is a separate executive order which forbids discrimination, but it apparently is not enforced and is not even under the jurisdiction of the Office of Federal Contract Compliance.

Senator Javits also pointed out that as Americans live longer, and as compulsory retirement spreads, we must make some judgments about its advantages and disadvantages. After all, compulsory retirement is "age discrimination in a particularly virulent form" and it wastes the talents of millions of older American workers. However, we must also be mindful of the advantages of compulsory retirement. It, for example, permits more rapid advancement of younger workers and facilitates adaptation to technological change.

Assessing progress on the employment problems of older workers, the Senator said that we are beginning to move in a meaningful direction but emphasized the word "beginning".

PART TWO

HISTORY AND SCOPE OF THE LAW

Despite increased emphasis on the enforcement of ADEA, the NCOA conference this year indicates that much remains to be done to eliminate age discrimination on-the-job. To help determine whether further legislation is required, a summary of the ADEA legislative history follows.

I. THE BEGINNINGS

Although bills on age discrimination had been introduced in the Congress in the 1950s, it was not until 1964 that any action was taken. In that year, Executive Order 11141 made it public policy to ban age discrimination in employment under Federal contracts. A provision was also included in the Civil Rights Act of 1964 to require the Secretary of Labor to study the problem and report his findings and conclusions.

Since 20 States and Puerto Rico had age discrimination laws at the time of the study, the experience of these States was an important part of the findings and subsequent legislation. Among the report's findings were that coverage of the various laws typically included employers, employment agencies and labor organizations; most laws covered all private employment agencies; nine States exempted employers with a small number of employees; ages covered generally ranged from 40–65.

It was found that strong State laws, when actively administered, reduce arbitrary discrimination against middle-aged and older people, enabling them to be considered more frequently for vacant positions. In States where there were lack of funds and personnel, the administration of the law was handicapped. A few State laws were virtually inoperative and amounted to little more than a declaration of policy.

State officials generally favored the enactment of a Federal law which would:

- Put the weight of the Federal Government behind a policy of hiring on the basis of ability instead of age.
- Encourage other States to pass such laws.
- Strengthen existing programs by providing uniform basic standards for coverage and enforcement where State laws are weak.
- Reduce problems arising in interstate recruitment by employers not subject to such laws in their home States and facilitate interstate placements by the public Employment Service.
- Possibly provide assistance, including financial aid, to strengthen research, education, and administration of State laws.[1]

In order to determine employment practices in States without age discrimination laws, the United States Employment Service conducted

[1] 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: Research Materials June 1965 p. 111.

a survey of over 500 employers in five cities in States without such laws. The survey found:

> Only 8.6 percent of all new workers hired by surveyed establishments during 1964 were 45 years of age and over—less than one-third this age group's proportion among the unemployed: In fact, one out of five employers failed to hire a single new worker who had reached his 45th birthday, and half reported that less than 5 percent of all new workers hired were in this age group. . . . Opportunities for employment of older workers were, as might be expected, best in establishments with an affirmative policy of hiring without regard to age. Only one out of six had such a policy, however.[2]

Another area covered by the Department of Labor's research was the characteristics of older workers and their effect on employability.

The results of much previous research were summed up as follows: ". . . the leading studies on various aspects of the effects of aging document the conclusion that chronological age alone is a poor indicator of working ability. Health, mental and physical capacities, work attitudes, and job performance are individual traits at any age. Indeed, measures of traits in different age groups usually show many of the older workers to be superior to the average for the younger group and many of the younger ones inferior to the average for the older group." [3]

II. LABOR DEPARTMENT RECOMMENDATIONS

As a result of the study, the Secretary concluded that age discrimination did exist with serious consequences both to the economy and the individual. He estimated "a million man-years of productive time are unused each year because of unemployment of workers over 45; and vastly greater numbers are lost because of forced, compulsory, or automatic retirement." [4]

The consequences of discrimination for individuals are not only unemployment but "widespread uncertainty concerning the role of vigorous older persons in our society and in personal frustrations and anxieties. While the opportunity to retire with some income has meant leisure and escape from routine for a great many, it has also created new uncertainties, particularly where *opportunity* to retire has been converted into *forced* retirement, and where there is no opportunity for satisfying occupation." [5]

The Secretary recommended four courses of action:

1. Action to eliminate arbitrary age discrimination in employment.
2. Action to adjust institutional arrangements which work to the disadvantage of older workers.
3. Action to increase the availability of work for older workers.
4. Action to enlarge educational concepts and institutions to meet the needs and opportunities of older age.

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[2] Ibid., p. 3.
[3] Ibid. p. 81.
[4] 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. June 1965 p. 18. (Both the research materials and the report have the same title.)
[5] Ibid. p. 19.

In discussing the first course of action, the Secretary commented:

> There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. The use of these age limits continues despite years of effort to reduce this type of discrimination through studies, information and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations.
>
> **The possibility of new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren.**[6]

III. THE LEGISLATION

The President outlined his recommendations on age discrimination in his Message on Older Americans submitted to Congress January 23, 1967. Legislation to prohibit age discrimination in employment was submitted on February 3, 1967 and ADEA became law December 15, 1967 (Public Law 90–202).

As enacted, the law protects individuals at least 40 years of age but less than 65 years of age. It prohibits discrimination in employment because of age in hiring, job retention, compensation, promotions, and other conditions and privileges of employment. Employers and labor organizations with 25 or more employees or members are covered as are employment agencies serving covered employers. Federal, state, and local employees were not covered.

Administration

The original version of the legislation called for agency type enforcement, with hearings before the Secretary of Labor and then an appeal to the U.S. courts of appeals. As finally passed, the bill incorporated enforcement provisions of the Fair Labor Standards Act, which cover minimum wage and overtime rules, in order to utilize the existing investigative and enforcement machinery of the Wage and Hour Division of the Department of Labor. A precedent for such a move had been made by using the same machinery for the equal pay amendment prohibiting discrimination in wage rates because of sex.

Ages Covered

The determination of the covered age group (40–65) did not occur without considerable debate as to the minimum and maximum ages chosen. The original administration bill had the limits 45–65 with additional authority given to the Secretary to adjust the limits up or down. At hearings conducted by the Labor Subcommittee of the Senate Committee on Labor and Public Welfare, airline stewardesses testified that they were forced to give up jobs as early as age 32. The Senate Committee gave serious consideration to this testimony but finally

[6] Ibid. p. 21.

adopted the House approved minimum age of 40 "because the discrimination usually appears at that age." [7]

In response to a question at the hearings on the upward adjustment authority, Secretary of Labor Wirtz had called this authority ". . . desirable to protect those workers above 65 who want and need work which they are fully capable of performing and also to foster manpower utilization." [8] Subsequently, the authority to adjust covered age limits up or down was removed from the legislation, but the Secretary of Labor was directed to make a special study of the problem and report back in six months.

The results of the special study were reported in a letter to the President of the Senate dated Nov. 27, 1968 (see appendix 5, p. 36). In the letter, the Secretary of Labor reported that the stewardess problem was "unique" and "well on the way to solution". With respect to the upper age limit of 65, the Secretary concluded that the problem really centered around compulsory retirement which was to be the subject of a special report to the Congress. The Secretary, therefore, did not recommend any change in the age limit, but suggested that they be restudied further after more administrative experience with the law.

Exceptions

Certain exceptions are allowed to the prohibitions in the law:

- Where age is a *bona fide* occupational requirement reasonably necessary to the particular business. The occupation of jet pilot was given as an example of the type of occupation which might have a required age limit.
- Where differentiation is based on reasonable factors other than age. Testing might show that certain factors such as speed varies among individuals. Then this factor rather than age should be considered.
- To discharge or discipline an individual for good cause.
- To comply with the terms of any *bona fide* seniority system or employee benefit plan such as a pension, retirement or insurance plan which is not a subterfuge to evade the purposes of this act, except that no employee benefit plan shall excuse the failure to hire an individual.

This exception was added as an amendment and was explained in the Senate debate. Senator Yarborough stated:

> . . . it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years and a 55-year-old would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in the pension plan . . .[9]

[7] Senate Debate, Nov. 6, 1967, Congressional Record, p. 31253.
[8] U.S. Senate. Committee on Labor and Public Welfare. Age Discrimination in Employment. Hearings before the Subcommittee on Labor. Mar. 15, 16, 17, 1967. p. 48.
[9] Senate Debate op. cit. p. 31255.

IV. PROBLEM AREAS

Despite the fact that there has been progress in eliminating discriminatory employment practices because of age, it is an undeniable fact that such practices still exist.

Enforcement

The investigations and enforcement provisions of ADEA followed those of the Fair Labor Standards Act and are administered in the Wage and Hour Division, Employment Standards Administration of the Department of Labor, which also enforces the FLSA provisions.

Enforcement of ADEA is a small part of the activities of the Division which also cover minimum wage and overtime laws and equal pay. The following tabulation of expenditures and positions for the entire Division and for ADEA shows the relatively small role of ADEA. In both staff and expenditures, the enforcement of ADEA represents less than five percent of the total.

Wage and Hour Division

[Dollar amounts in thousands]

	Total		ADEA	
	Expenditures	Positions	Expenditures	Positions
Fiscal year:				
1969	$25,803	2,035	$500	46
1970	27,400	1,750	530	46
1971	25,831	1,572	1,450	74
1972	28,990	1,615	1,362	69
1973 (estimate)	30,922	1,624	1,441	69
1974 (requested)	28,347	1,461	1,451	69

In fiscal 1969 there were only 46 positions allotted to the new nationwide program launched against age discrimination. Although $3 million was authorized to be appropriated, only $500,000 of this sum was utilized. Today, five years later, there are only 69 positions for fiscal 1974 and less than $1.5 million budgeted. In the regions, furthermore, there are no specific individuals assigned to ADEA. Instead, the man hours authorized by the budgeted positions are allocated among the compliance officers working on ADEA cases.

If we compare the amount of damages due employees under ADEA and under the Equal Pay Act—which prohibits sex discrimination in employment—we can only conclude that ADEA has had much less impact. The number of employees due damages under age discrimination in fiscal 1973 was 1,031 compared to 29,618 under the sex discrimination statute. The dollar amounts were less than $2 million compared to over $18 million, and the latter figure does not include approximately $7½ million paid by the American Telephone and Telegraph Company to over 3,000 employees.

One measure of the act's effectiveness is the number of employment advertisements which still specify that only young people need apply. At the ADEA conference the Labor Department cited a study which found that only one percent of the newspaper ads specified age limits and only two percent implied age limits. However, the fact that illegal advertising is still the major cause for both employers and advertising agencies to be found in noncompliance with the law suggests that much still remains to be done.

Incomplete Coverage

Today only about 50 percent of all workers aged 40–64 are protected under the provisions of the age discrimination law. Employers with less than 25 employees are exempt as well as Federal, State, and local government employees.

Thirteen million persons age 40–64 are estimated to be working in establishments with less than 25 employees and are not covered by ADEA. Some of these are covered by State laws, but others are not. The small business exemptions under State laws vary widely with some having no exemptions; others exempt employers of less than 25 employees or 12, or 8, or 4, or 3.

About 13 million persons are employed by governmental units at the various levels and about 5.5 million are estimated to be 40–64. Some State and local employees are covered by State laws. Federal employees are covered only by Executive Order 11141, February 13, 1964, which declares a public policy against discrimination on the basis of age. Those covered are Federal employees and persons employed by contractors and subcontractors engaged in the performance of Federal contracts.

While it is the *policy* of the Federal Government to oppose age discrimination, there is no mechanism to root it out. Those who may feel that they have been discriminated against have little recourse. And there is recurring evidence that age discrimination does exist. A report prepared for this Committee last year titled *Cancelled Careers: the Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees*,[10] found some evidence of such discrimination. It found that in certain instances older employees had been singled out for reduction-in-force action; that the emphasis on early retirement placed an unequal burden on middle-aged workers; and in certain training programs youth is emphasized in determining eligibility.

There is also evidence that, like the corporate world, government managers also create an environment where young is somehow better than old.

The Civil Service Commission, for example, in requesting legislation authorizing early optional retirement during reductions-in-force stated:

> Another benefit to be derived from the proposed legislation is that it will enhance the agency's future effectiveness in carrying out its mission by helping to retain younger employees. Nothing raises the average age of an organization

[10] U.S. Senate. Special Committee on Aging. *Cancelled Careers: the Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees.* A report to the Special Committee on Aging, 92d Cong. 2d Session, Committee Print, May 1972, 43 p.

more quickly than a substantial reduction in force in which the youngest employees with the lowest retention standing are separated and the oldest employees are retained.[11]

Age 65 Limit of ADEA

The fact that the law only covers persons below age 65 may reinforce the trend toward decreasing participation of men 65 and over in the labor force and increasing acceptance of 65 as the mandatory retirement age. In 1960, the participation rate for men 65 and over was 32.2 percent and by 1971 it had dropped to 24.6 percent. This rate is projected to drop even lower in the next decade to 22.0 in 1980.[12] Even if the participation rates of the younger men alone are considered, there is a declining trend. In 1967, the year ADEA was passed, the rate for men in the age group 65–69 was 43.4 percent. This had dropped to 39.4 by 1971.[13]

This trend, it may be argued, is not to be deplored since it merely is the result of an increasingly leisure-oriented society and increased Social Security and pension benefits. However, there are also facts to the contrary which show that many persons over age 65 do not receive any pensions to supplement Social Security benefits, want to continue working, and yet are ejected from the work force. This Committee in its hearings and correspondence receives evidence of many such cases, including instances where individuals feel that they have been discriminated against and then are shocked to find that the age discrimination law does not cover them.

And there is no question that many persons over age 65 are still quite capable of working. A recent study of 132,316 workers in New York State agencies found that workers over 65 are "about equal to" and sometimes "noticeably better" than younger workers in job performance. They are at least as punctual in reporting to work, have fewer on-the-job accidents and are less often absent from work because of illness, accidents or unexplained reasons. The mandatory retirement age in the State agencies is 70.[14]

Involuntary Retirement—Below Age 65

According to an Interpretative Bulletin published by the Wage and Hour Division this year, ADEA authorizes involuntary retirement irrespective of age, provided that such retirement is according to the terms of a *bona fide* retirement plan.[15]

This exception has proven difficult to administer because of the complexities involved in determining if an employee is being terminated because of age discrimination (and only incidentally is eligible for some retirement benefit) or if he or she is being retired early accord-

[11] U.S. Senate, Committee on Post Office and Civil Service. *To permit immediate Retirement of Certain Federal Employees*. 93d Cong. 1st Sess. Report No. 93-152, May 15, 1973, p. 5. The Congress subsequently passed legislation (H.R. 6077 and S. 1804) which implemented the recommendations of the Civil Service Commission. This proposal was later signed into law (P.L. 93-39) by President Nixon on June 12, 1973.

[12] U.S. Bureau of Labor Statistics, Special Labor Force Report No. 119. *Labor Force Projections to 1985*, as published in U.S. Bureau of the Census, *Statistical Abstract of the United States 1972*, Washington, U.S. Government Printing Office, 1972, p. 217.

[13] Jaffe, A. J. "The Retirement Dilemma", *Industrial Gerontology*. Summer 1972, p. 11.

[14] As reported in *Older Worker Specialist Newsletter*, Nov/Dec 1972, National Council on the Aging, Washington, D.C.

[15] U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Age Discrimination in Employment Act*. Interpretative Bulletin, Title 29, Part 860 of the Code of Federal Regulations (WH Publication 1296) Washington, U.S. Govt. Printing Office, 1973, p. 7. (See appendix 6, p. 38.

ing to the plan's stipulations. The problem is compounded by the wide variations in the provisions of pension plans. For example, some plans may have a provision that an employer may retire an employee as early as 45 or 50. This option is ordinarily not used, but in the event of a cutback in employment it may be used to get rid of older employees at reduced pension rates.

Early involuntary retirement is not a problem that is decreasing. Because of the recent economic recession and major reductions in employment in certain industries—such as the aerospace industry—there have been reports in the press concerning the increased use of early retirement (e.g. "The Gentle Boot," *The Wall Street Journal*, March 3, 1972).

The Department of Labor has also been receiving an increasing number of complaints concerning discriminatory involuntary early retirement. The Pan American case referred to earlier was judged in favor of those who were forced into early retirement, but this is only the tip of a large iceberg of complaints concerning involuntary retirement as a result of company retrenchment and mergers.

Section 5 of the Age Discrimination in Employment Act of 1967 directs the Secretary of Labor to study institutional and other arrangements giving rise to involuntary retirement and report his findings with appropriate legislative recommendations to the President and the Congress.

After more than five years, no such report has been made, although the Department of Labor reports that research has begun.

In general, there seems to be some confusion about the term "involuntary retirement" and what it means. The Interpretative Bulletin on ADEA refers to the study under its section entitled "Involuntary retirement before age 65" and yet compulsory and mandatory retirement at age 65 is discussed in reporting the activities in connection with the involuntary retirement study in the latest ADEA annual report.

Whatever arguments may be made about the scope of the study, the real issue concerns *early* involuntary retirement. The problem in enforcing ADEA is to determine when such a retirement is legitimately part of the pension program and when it is age discrimination. This problem is currently being approached on a case-by-case basis.

PART THREE

ACTIONS NOW UNDER CONSIDERATION

It is encouraging to find that there has been increased activity under the age discrimination law, but it is apparent from a review of progress to date that a great deal remains to be done to wipe out this particularly insidious form of discrimination. Several recent proposals to improve ADEA merit early and serious congressional attention:

I. INCREASE ENFORCEMENT

The amount of money and man-years devoted to the enforcement of ADEA is amazingly small considering the nationwide scope of the act and the complexities of the law. The budget request for fiscal 1974 is less than half the authorized $3 million. Furthermore, ADEA enforcement activities within the Wage and Hour Division are vastly overshadowed by enforcement of the more traditional minimum wage and overtime laws.

The Senate Committee on Labor and Public Welfare included an amendment in S. 1861 (the Fair Labor Standards Amendments of 1973) which would increase the authorization from $3 million to $5 million. This measure—along with two other amendments to the Age Discrimination in Employment Act [1]—was deleted in conference committee because of the House germaneness rule. However, Representative John H. Dent, Chairman of the General Labor Subcommittee of the House Education and Labor Committee, has indicated his willingness to hold hearings promptly on pending House legislation which parallels the provisions incorporated in S. 1861. Because of the importance of adequate funding for the implementation of the Age Discrimination in Employment Act, it is recommended that the authorization be increased from $3 million to $5 million to help strengthen enforcement activities.

In addition, the Congress may decide that it will consider legislation taking the administration of ADEA out of the Wage and Hour Division unless additional resources are devoted to this program in budget requests. Administration was established in Wage and Hour in the interest of efficiency and economy, but a new enforcement agency may be required unless more emphasis is placed on age discrimination in budgetary requests.

II. EXTEND COVERAGE

Federal, State, and local government employees are not covered by ADEA and it is difficult to see why one set of rules should apply to private industry and varying standards to government. An amendment to the Fair Labor Standards Act of 1973 would have brought government employees under ADEA but was also eliminated in conference.

[1] The Age Discrimination in Employment Act Amendments to S. 1861 were based upon bills introduced by Senator Bentsen (S. 635) and Senator Church (S. 1810).

In addition, an amendment sponsored by Senator Frank Church extended coverage to employers with 20 or more employees, instead of the current limit of 25 or more. This measure would have brought another 1.3 million older workers within the scope of the act, as well as make coverage of the act more consistent with other labor laws which are broader in scope. The Equal Employment Opportunities legislation, for example, covers employers with 15 or more employees.

Despite the enactment of the age discrimination law, job bias for older workers is still a very real and serious problem today. One major cause is that gaps in coverage exist. For these reasons, it is urged that the law be extended, at the earliest possible date, to include (1) Federal, State, and local governmental employees, and (2) employers with 20 or more employees.

III. REEVALUATION OF AGE 65 UPPER LIMIT

In 1968, the Secretary of Labor suggested that the age limits be restudied after administrative experience with the law. Since the upper age limit of 65 has generated a considerable number of complaints from affected individuals during the more than than 5 years of experience under the law, a reevaluation appears in order. The Secretary of Labor could be asked to make such an evaluation and report to the Congress within 1 year. This study would not challenge all mandatory retirement pension provisions but would reexamine the upper age limit within the context of existing exceptions.

IV. INVOLUNTARY EARLY RETIREMENT

Perhaps because the mandate was so broad, a study of involuntary retirement authorized in the original law has never been completed. In the meantime, the volume of complaints on involuntary *early* retirement has been growing together with questions concerning the applicability of the *bona fide* pension exception created in section 4(f)(2). The Department of Labor has interpreted this section to authorize involuntary retirement irrespective of age provided that it is included in a retirement plan.

Because of this growing problem, the Secretary of Labor could be asked to prepare a report focusing on the following questions: (1) Should early involuntary retirement be continued as an exception? (2) If it is to be continued, under what circumstances? The latter could include factors such as age of retirement and amount of the reduced retirement benefit.

APPENDIX 1

Public Law 90–202; 90th Congress, S. 830; December 15, 1967

AN ACT TO PROHIBIT AGE DISCRIMINATION IN EMPLOYMENT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Age Discrimination in Employment Act of 1967".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

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

EDUCATION AND RESEARCH PROGRAM

SEC. 3. (a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills:

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12.

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PROHIBITION OF AGE DISCRIMINATION

SEC. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) 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; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

STUDY BY SECRETARY OF LABOR

SEC. 5. The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress.

ADMINISTRATION

SEC. 6. The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

NOTICES TO BE POSTED

SEC. 8. Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act.

RULES AND REGULATIONS

SEC. 9. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

CRIMINAL PENALTIES

SEC. 10. Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the

performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

DEFINITIONS

SEC. 11. For the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct com-

merce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

LIMITATION

SEC. 12. The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

ANNUAL REPORT

SEC. 13. The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

FEDERAL-STATE RELATIONSHIP

SEC. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

EFFECTIVE DATE

SEC. 15. This Act shall become effective one hundred and eighty days after enactment, except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provisions.

APPROPRIATIONS

SEC. 16. There are hereby authorized to be appropriated such sums, not in excess of $3,000,000 for any fiscal year, as may be necessary to carry out this Act.

Approved December 15, 1967.

LEGISLATIVE HISTORY

House Report No. 805 accompanying H.R. 13054 (Commission on Education and Labor).
Senate Report No. 723 (Committee on Labor and Public Welfare).
Congressional Record, Vol. 113 (1967):
November 6, Considered and passed Senate.
December 4, Considered and passed House, amended, in lieu of H.R. 13054.
December 5, Senate concurred in House amendment with amendments.
December 6, House concurred in Senate amendments.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(No. 69C2227)

JAMES J. HODGSON, SECRETARY OF LABOR, PLAINTIFF

v.

GREYHOUND LINES, INC., DEFENDANT

MEMORANDUM OPINION AND ORDER

The proceedings upon which the following opinion is rendered are based upon a Complaint filed by the Secretary of Labor of the United States Department of Labor, requesting the restraining of alleged violations of Sections 4(a)(1), 4(a)(2) and 4(c) of the Age Discrimination in Employment Act of 1967 and for such further relief as is deemed appropriate, including the restraint of any further refusal by defendant to employ persons denied employment in the past because of their ages.

During the course of trial, I have had the benefit of the testimony of eminent witnesses, the arguments of counsel, written memoranda and a multitude of exhibits. This is a case of great moment and my decision has come only after deep deliberation and study.

The issue, herein, is whether defendant's policy of refusing to consider applications of individuals between the ages of 40 and 65 for initial employment as bus drivers is a bona fide occupational qualification reasonably necessary to the normal operation of its business. Section 4(f)(1) of the Act states as follows:

"It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;"

The plaintiff alleges that the defendant has failed to meet its burden of proving that its age limitation policy for bus driver position is a bona fide occupational qualification reasonably necessary to the normal operation of its business.

The defendant has admitted that it does not consider applicants for the position of interstate bus drivers persons who are between the age of 40 to 65 years and contends that it is entitled to an exception because of Section (f)(1), *supra*, of the Act.

Defendant contends that if it were required to hire beginning interstate bus operators up to the age of 65 an unacceptable risk to the safety of its passengers and other members of the motoring public would ensue.

The defendant has offered the following arguments for its allegation.

"1. The defendant is required by law and by the nature of its business to exercise the highest degree of care, not only in the operation of its buses but in the hiring of bus drivers.

"2. Although individuals up to the age of 65 may be able to pass the required physical examination and be otherwise qualified, such physical examination is incapable of discovering the physical and sensory changes common to all man, [sic], caused by aging, that make an interstate bus operator less safe in the normal operation of the defendant's business.

"3. That the normal operation of the defendant's business requires that a beginning interstate bus operator serve from 10 to 20 years on the "extra board" which service requires the highest degree of physical ability and use of the senses.

"4. That its experience of over 40 years proves that an interstate bus driver is most safe after acquiring 16 years of interstate bus driving experience which experience could not be acquired by newly-employed drivers up to the age of 65 years."

Through the centuries volumes have been written on the subject of aging. It is a process that intrigues not only the scientific and philosophic mind but the less learned one as well. Aging is a phenomenon in which all humanity shares. The volumes that have been written are doubtless merely a fraction of what is yet to be studied. There will be inquiry and research as long as man exists for there will be the fascination with himself that leads to such study. For the moment, however, I must rely for my decision on that which exists in the realm of learning and on what I believe is both justiciable and correct under the existing law.

Defendant's policy of not considering applicants over the age of 35 has been in effect since approximately 1929. This is true regardless of an applicant's prior experience. At least two of defendant's officers, Mr. Forman and Mr. Gocke testified that they did not know why age 35 was originally selected nor why other ages were not selected. However, they and defendant's other witnesses vigorously support the age limitation policy and maintain that since the policy has produced results from a safety standpoint it has never been deemed necessary to change the rule. The National Association of Motor Bus Owners (hereinafter referred to as NAMBO) was granted leave to participate as *amicus curiae* for the plaintiff. In its trial brief it stated the issue at bar succinctly:

"It is submitted that the essence of the motor carriage of passengers is safety and that if the employment of drivers over age 35 would undermine that safety, the maximum age standard utilized by defendant is "reasonably necessary" within the meaning of the *bona fide* occupational qualification exception to the Act."

Thus the battle lines have been drawn. The plaintiff contends that the Age Discrimination in Employment Act of 1967 was enacted for the express purpose of "promoting employment of older persons based on their ability rather than age" and prohibiting "arbitrary age discrimination." *Hodgson* v. *First Federal Savings and Loan Ass'n. of Broward County, Fla.*, 455 F.2d 818, 820 (5th Cir. 1972). The defendant contends that it has established a "valid justification" for its hiring practices. *Hodgson* v. *First Federal*, *supra*, pg. 822.

"In discrimination cases the law with respect to burden of proof is well-settled. The plaintiff is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendant to justify the existence of any disparities. See e.g., *Noris* v. *Alabama*, 294 U.S. 587, 55 S. Ct. 579, 79 L.Ed. 1074 (1935); *Muniz* v. *Beto*, 434 F. 2d 697 (CA5, 1970); *Weeks* v. *Southern Bell Telephone and Telegraph Company*, 408 F. 2d 228 (CA5, 1969); *Gates* v. *Georgia-Pacific Corporation*, 326 F. Supp. 397 (D.C.D. Or. 1970). Once the plaintiff has made out his prima facie case we look to the defendant for an explanation since he is in a position to know whether he failed to hire a person for reasons which would exonerate him. *Hodgson* v. *First Fed. Sav. & L. Ass'n.*, *supra*, pg. 822.

I find that the plaintiff has made a *prima facie* case of refusal by the defendant to hire on the basis of age. Thus, it is incumbent upon me to carefully examine defendant's position and each of its contentions in order to arrive at a decision as to whether or not the defendant's reasons do indeed 'exonerate' it.

Defendant Greyhound Lines, Inc., is the nation's largest inter city bus carrier with 105,000 route miles within the continental United States. The defendant employs approximately 9,500 bus drivers all of whom must meet certain requirements that are set by the defendant in accordance with Federal Regulations, State Statutes and the defendant's own policies. The above mentioned requirements relate to an individual's character, age (minimum age is 24, maximum is 35), height, weight, education, health, driver training school and probationary period.

The purpose of the health examination is to detect the presence of any physical or mental defect that would affect the applicant's ability safely to operate a motor vehicle. Included in the instructions from the Department of Transportation and the defendant that the examining physicians receive is the following:

"The examining physician should be aware of the vigorous physical demands and mental and emotional responsibilities placed on the driver of a commercial motor vehicle. In the interest of public safety the examining physician is required to certify that the driver does not have any physical, mental, or organic defect of such a nature as to affect the driver's ability to operate safely a commercial motor vehicle. * * * History of certain defects may be cause

for rejection or indicate the need for making certain laboratory tests or a further, and more stringent, examination. * * * (Pltf. ex. 6 pg. 1; pltf. ex. 7)."

It is axiomatic that common carriers are held to an extremely high degree of care. Thus, it is the defendant's obligation to exercise the highest degree of care possible in all aspects of its business including, of course, the hiring of bus drivers.

When successfully completed the aforementioned qualifications and requirements merely constitute an entry into defendant's organization. Greyhound bus drivers must continue to meet standards set by the defendant in accordance with Federal Regulations.

Those standards include a low accident rate, safe drinking habits, good health, good driver attitude and courtesy to customers (Pltf. ex. 1 req. 27). Each driver's reaction time is checked periodically as is his driving ability under all weather conditions. A physical examination is required by Federal Regulations at two-year intervals up to age 50 and annually thereafter until age 65. (Pltf. ex.'s. 1 and 2 req. 28).

Thus, it may be seen, a fortiori, that defendant does exercise a high degree of care in the hiring of its bus drivers.

Defendant's next contention is that the required physical examination "is incapable of discovering those physical and sensory changes common to all men" that would cause an interstate bus driver to be less safe while in the operation of defendant's business. This premise is not as easily dealt with as was defendant's first contention. The expert testimony tendered at trial and in exhibits differs greatly and so I feel constrained to review certain portions of that material.

Defendant's witness, Dr. Harold Brandaleone, a physician specializing in internal medicine and a medical consultant to bus and trucking companies, testified that he did not believe a man past 40 should be employed in a new job of driving an inter city bus. (tr. 352). Dr. Brandaleone testified that in general after a certain age, usually about 40, degenerative changes occur in the individual such as arteriosclerotic changes in the blood vessels, the heart, the blood vessels in the brain, the kidneys, the lungs, his lower extremities and his visual capacity or sensory changes including a decrease in his ability to see at night (tr. 351; 318). In response to questions concerning physical examinations Dr. Brandaleone testified as follows:

"Well, physical examination can find many of them but there are many things that cannot be detected by physical examination, or even those that may be detected at a periodic examination that could occur every year or every two years in the interim, and this is the thing that concerns me.

"An individual, as he becomes older, can develop any one of these disabilities or infirmities that would make him an unsafe driver, and unless he had been having a physical examination to have these things detected, they would go undetected." (tr. 340).

Further in the testimony the witness testified that the undetectable effects of aging in persons over age 40 are equally as likely to occur in defendant's present bus drivers over age 40 yet he did not consider them unsafe nor did he recommend that defendant retire its drivers at age 40. (tr. 384; 394).

Plaintiff's witness, Dr. Abraham J. Mirkin, a physician and surgeon and the first president of the American Association of Automotive Medicine, testified that defendant's policy of excluding bus driver applicants solely due to chronological age is not based on medical statistics or medical facts since chronological age is not of itself a measurement of an individual's physiological capabilities nor an impairing factor in the ability to drive safely. (tr. 739–40; 749–52; 759; 760). Dr. Mirkin stated the following in relation to physical examinations.

* * *. I feel that although a physical examination for a driver candidate is an important part of the screening process, it is by no means the only factor nor, in my judgment, the most important factor, in determining whether a driver will be good or will not be good.

"I think a physical examination such as DOT gives or such as the average good internist gives, will screen out certain coarse and gross physical and pathological states and that is all; it will not of itself determine whether an individual is going to be a good driver.

"But all the other things we have to do, investigate the background of an individual, his relationship to police, his relationship to the motor vehicle administrator's office, his relationship to the welfare department, his relationship to Alcoholics Anonymous, his relationship to his indebtedness and his financial control, all of these factors * * *" (tr. 760–61).

Professor Ross A. McFarland, Ph. D., a physiological psychologist and specialist in the field of aging was tendered as a witness by the plaintiff. Dr. McFarland testified that chronological age is not a reliable index of a person's physical or psychological condition and cannot be a basis to determine the ability of a person to drive. (tr. 1832; 1834; 1854). He emphasized that chronological age is not an accurate index of a person's physical condition, (tr. 1816; 1819), and stated that many physiological and emotional alterations which result from the aging process are not necessarily a cause for driver limitation or impairment. (tr. 1834).

Dr. McFarland testified as follows:

> " * * * I think the Greyhound data would show very little evidence that accidents have occurred because of physical defects. I think their medical screening is good and that they would pick up the physically ill or the markedly physically defective person, that would come out.
>
> "There is very little evidence that medical conditions cause many accidents in public transportation. In fact, there are very few * * * there is less evidence that heart disease and advanced illness cause automobile accidents. I have had two physician friends die recently and they have drawn up to the side of the road. They have become aware of their illness and they are not apt to have the sudden and acute heart failure while driving.
>
> "This rarely, if ever, occurs in the bus or truck industry * * * " (tr. 1836).

Later in the trial in response to cross-examination, Dr. McFarland stated the following:

> " * * * I am saying that the physical examinations are poor and do not test functional ability, and I want a man judged on the basis of his functional ability, his capacity to do the work, and whenever you employ a man, you immediately put him through all of the functional tests of driving." (tr. 1914).

In an article [1] Dr. McFarland wrote:

> "Research has not yet furnished definitive answers to many questions of minimal physical standards for driving and of medical fitness to drive safely. There is great diversity in the requirements of the various states in this connection and in the prevailing professional opinions and practices. Thus far there have only been a few objective studies to establish cut-off points on an experimental basis, and to provide criteria to aid in advising persons with certain physical conditions or the safety of driving." pg. 78.

On page 75 of the same article the author made the following statement:

> "The role of the medical profession in appraising fitness to drive an automobile has been based on clinical judgment and experience, rather than on experimental data involving the application of broader principles.
>
> " * * * The use of clinical judgment may be effective in extreme cases, but limited information has been developed for minimum standards relating to physical and mental fitness. Furthermore, until very recently, no empirical findings have been reported which indicate that persons suffering from any diseases, with the exception of alcoholism, have higher accident rates than persons free from disease."

Dr. McFarland goes on to write of a series of studies begun in 1963 in California in which accident rates per mile were compared for drivers known to the California Department of Motor Vehicles to have medical defects and drivers known not to have medical defects. The drivers with organic medical conditions fell into three categories; those with epilepsy, diabetes and cardio-vascular diseases. However, I should like to note that a thorough medical examination including the use of an electroencephalograph, and electrocardiogram and other diagnostic tests would immediately make any of these illnesses apparent.

Thus, having read and listened to the various witnesses and drawn upon my own experience and knowledge I find one common thread throughout: there is no agreement as to the reliability of the proper weight that ought be placed on physical examinations. I find, that a physical examination is no more valid a test of driving ability for a 25 year old than for a 45 year old. Therefore, I cannot utilize defendant's second reason as a criterion for deciding that a man of 25 would, merely by virtue of being 25, be a safer driver than the man of 45. I cannot state with definitive certainty that such physical examinations as are given would be capable or incapable of discovering the physical and sensory changes common to all men nor that those changes are necessarily caused only by the aging process

[1] *Psychological and Behavioral Aspects of Automobile Accidents.* Reprinted from Traffic Safety Research Review, Volume 12, Number 3, pages 71-80, September 1968.

nor that such changes in and of themselves make an interstate bus operator less safe in the normal operation of defendant's business.

The third argument tendered by defendant in defense of its policy concerns itself with the "extra board" system. Within Greyhound's organization there are two general classifications of drivers; those who perform "regular runs" and those who perform "extra board". A regular run is one which is performed regularly and is a scheduled service between two given points. On the other hand, "extra board" runs vary and are performed on the basis of passenger demand and consist of special operations, tours, charters and extra sections of regular runs if there is a call for more than one bus on a regular run. Extra board drivers do not have scheduled routes and work off of the board on a first in, first out basis. On the average an extra board driver is called to perform about four driving runs in a seven day period. (pltf, ex, 29, pp. 43, 55).

Extra board work and regular runs are assigned on the basis of seniority. A driver may go from a regular run to the extra board and back to a regular run (tr. 1176–77) or if he has the necessary seniority, a driver may select a regular run in the winter months which are not as busy as the summer months and then work the extra board in the summer in order to make more money. (tr. 1417–19; 1433).

Neither regular run drivers nor extra board drivers are permitted to drive more than ten hours and cannot be on duty, including driving, for more than fifteen hours, without at least eight consecutive hours off. (pltf. ex. 29, pp. 33–4; Fed. Reg. pltf. ex. 4, 5A, 5B).

It is defendant's strong contention that the rigors of the extra board are such as to necessitate the imposition of an age limitation. Defendant asserts that persons between the ages of 40 and 65 simply do not have the stamina for the irregular work schedule of the extra board. Five of defendant's drivers appeared as witnesses and each testified that being an extra board driver is demanding and physically exhausting work.

However, after listening to the testimony concerning extra board vis a vis regular run driving, I am not convinced that the irregular hours and possible adverse driving condition are any more difficult for those applicants over 40 years of age than for those under 40. I cannot accede to a contention which flatly states that all applicants over 40 are inflexible, unadaptable and untrainable and, in effect, that is what I am called upon to do. The defendant has not tendered the necessary statistical evidence to allow for such a finding. The defendant's policy is not based on personal experience or observations of new applicants age 40 or over.

> "Speculation cannot supply the place of proof."
> *Galloway* v. *U.S.*, 319 U.S. 372, 395; *Moore* v. *Chesapeake Ry. Co.*, 340 U.S. 573, 578.

In *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), plaintiff's application for the position of switchman was refused consideration solely because of her sex. The court held in refusing to accept defendant's contention that the job was too strenuous for women:

> "We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

The question thus arises as to whether or not Greyhound has established a "factual basis" for its belief that applicants between the ages of 40 and 65 would be unable to perform safely the duties of an extra board driver. I find it has not established such a basis. It is true as the plaintiff has asserted that the defendant is in a position to obtain the pertinent objective data simply by comparing the accident records of its extra board drivers who are over 39 years of age with the accident records of its extra board drivers who are under that age. (pltf, post tr. brief, pg. 34). Nor has the defendant compared the relationship between age and applicant failures at the training stages. (tr. 491). It is also true as plaintiff states that the defendant instead combined its statistics for extra board drivers and regular run drivers. These statistics actually show that its drivers over age 40 have a better safety record than those under 40. (deft. exs. 7, 8). Thus it may be assumed that the better safety record of Greyhound drivers over age 40 applies to those on the extra board as well as those on the regular runs.

There is no requirement that older drivers may not bid for extra board work (tr. 546) and there are drivers, as in Indianapolis, Indiana who after 20 years on the extra board still do not hold regular runs. (tr. 1283-4). Plaintiff submits and I agree that such practices belie any claim that the extra board work is so 'rigorous' that a 40 year old age limit is necessary.

Defendant's fourth argument for continuation of its policy is that an interstate bus driver is most safe after acquiring 16 years of interstate bus driving experience and such experience could not be acquired by newly-employed drivers between age 40 and 65. Numerous charts tendered by the defendant as evidence purported to show statistics which would support defendant's contention. For instance, during 1968–71 drivers between the ages of 24–40 had the highest number of accidents per driver, whereas drivers 41–60 had about the same low accident experience (the drivers between 56–60 showed a slight increase in accidents over the safest age group of 51 55 but substantially below the age group 24–40). Defendant also purported to show that during the same period drivers with up to 5 years' experience had higher accident rates than those with more than 5 years' experience. Defendant asserted that the safest period for drivers occurs from 11 to 25 years after initial employment and that this safe period would be lost if applicants were hired after age 40. (Deft. exs. 7, 8).

Dr. John Eberhardt, a research psychologist with the National Highway Traffic Safety Administration, United States Department of Transportation, stated that he had tested the significance of the points on defendant's exhibits 7 and 8 and had found that the alleged "upswings" for the age group 56 60 and for the group with 26–30 years of experience were not significantly different from chance and were insignificant. (tr. 1754–55).

It is most important to note that exhibits 7 and 8 do not take into consideration the number of miles driven by drivers in each age group. (tr. 624). Defendant has stated that older drivers usually hold regular runs. Defendant's exhibit 5 is a chart showing that the average regular run driver drives more than twice as many miles monthly than does the average extra board driver. Since there is no way to know how many miles were driven per driver in each age and experience group in defendant's exhibits 7 and 8 it is not possible to duly compare accidents per mile driven in relation to the age of the driver. In other words, the question is unanswered as to whether a person over age 40 is less safe than one under 40 per mile driven.

One might even conjecture that it is not the fact of experience so much as the maturity of the individual that allows for the safety record of those with 11–25 years of experience. Defendant has admitted that certain causes of accidents, such as emotional immaturity and lack of stability are found more frequently in those under age 35. (tr. 1187). However, we are not in the realm of conjecture and I find that defendant has not satisfactorily proved that the safety record of those drivers with 16 years of interstate bus driving experience is due to the fact that these individuals were hired before reaching the age of 40.

Nor has defendant impressed me with a cogent reason for its refusal to hire drivers over the age of 40 even though those drivers have had other interstate bus driving experience including driving extra board runs for other companies. Defendant contends that applicants over the age of 40 cannot be "untrained" if they have had prior experience and that

> "it has been our experience that it is easier to take someone who has never driven a large vehicle and teach him to drive it than to take someone who has learned to drive a large vehicle some place else and then teach him to drive the way we want and expect him to drive our large vehicle." (tr. 645).

Yet, all five of defendant's driver-witnesses had previous commercial driving experience driving buses or large trucks before being employed by Greyhound. (tr. 1290–1; 1296–1300; 1342; 1385; 1440).

It is, I believe, inconsistent to maintain that those who have driven large vehicles and are under age 40 are able to be "untrained" whereas those over age 40 cannot be "untrained". Defendant has offered no evidence that would satisfactorily prove such a contention.

Unable to find merit in defendant's four arguments for its age limitation policy I should, at this juncture, like to mention a number of other factors, that I have also borne in mind in reaching my final decision.

During certain peak periods the defendant leases equipment and drivers from other bus companies and during those periods the drivers become part of defendant's operations. Such drivers, however, are not subjected to defendant's screening

process and they are permitted to drive regardless of the age at which they were hired. (Pltf. ex. 29, pp. 55–9; tr. 1475). However, if any of these drivers over age 40 were to seek permanent employment with the defendant they would not be considered due to the age limitation policy for hiring.

Defendant, in addition to the above mentioned leasing arrangements, operates regular through service in which its buses travel through territory in which it has no operational authority. In other words, although Greyhound passengers start and end their trip with a Greyhound driver another driver (not one employed by Greyhound) will drive that part of the journey through the territory in which Greyhound does not have operational authority. Once again, defendant does not screen these drivers nor is it aware of whether or not they were hired prior to age 40. (tr. 1471–5; 1127–8; 1185.

Defendant employs certain seasonal drivers known within the industry as "school teacher drivers" who are generally teachers on vacation and are only employed during defendant's peak seasons. Each year defendant recalls and rehires these drivers as new employees up to age 50. Thus, it may be seen that defendant's age limitation policy is not applied although these drivers must meet all the qualifications required of other drivers.

It should be noted that since 1923 when defendant's policy was formulated, there have been a great many changes within and without the motor bus industry that have had great impact on that industry. There has been a significant improvement in the technology of motor buses. For instance, all buses are diesel powered today and far easier to manipulate than in 1928. The roads of this nation are vastly improved over conditions of forty-five years ago. The safety practices and programs and in-depth training by interstate bus companies are far more sophisticated than in 1928. I have placed great weight upon the fact that defendant's officers admitted that they do not know why age 35 was originally chosen as a cutoff date for hiring new bus drivers; defendant has admitted that the age limitation policy was not based upon any "surveys, inquiries, research studies, statistical studies or any other study to our knowledge." (tr. 564–5).

The following exchange between counsel for plaintiff and Mr. Forman, an officer of defendant, serves to buttress my decision that the defendant's policy is not founded on the "factual basis" for its belief that "all or substantially all (members of the protected class) would be unable to perform safely and efficiently the duties of the job involved" that is required under *Weeks, supra,* pg. 235.

> Q. "Is that right, you have in fact no personal experience in initially employing anyone 40 or over as a Greyhound driver?"
>
> A. "That is correct."
>
> Q. "Then you in fact cannot state, based on your own personal knowledge, that the consideration in employment of otherwise qualified individuals 40 or over for initial employment as a bus driver with Greyhound would adversely affect safety, isn't that right?"
>
> A. "You have to take into consideration the problem of the extra board, the rigors that it demands and what this man's life style will be at that time. Good basic common sense tells us that to begin his career as a Greyhound bus driver over age 40, go through the portion of his apprenticeship, when he has the highest number of accidents, and about the time he is getting to his stride the aging process catches up with him and he is right back into the upswing again without having a flattening out." (tr. 1195–6).

I must disagree. "Good basic common sense" does not suffice as "objective data" to satisfy the "factual basis" of the *Weeks* decision. Nor has defendant had any experience with applicants above age 40 so that it could factually state that such drivers would have the highest number of accidents during their apprenticeship.

Defendant need not hire all applicants; the rigid requirements and qualifications now in effect for those applicants under age 40 will continue to be in effect.

Employers are required to "consider" individuals on the basis of what they can contribute, not on the basis of chronological age (113 Cong. Daily Rec. 34744). If ever there were an opportunity for "individual consideration" surely this is one for through its screening process defendant has ample opportunity to exclude those individuals it finds unsuitable for interstate bus driving.

Safety is the foremost concern involved herein not only for defendant but for plaintiff and this Court as well, but I cannot accept the contention that persons over 40 cannot become safe bus drivers. I believe strongly that functional capacity and not chronological age ought to be the most important factor as to whether or not an individual can do a job safely. This determination must be made repeatedly

throughout the employee's employment experience. The human variances involved are myriad; there is no way to generalize as to the physical capability and physiological makeup of an individual. Nor is there a way to project how an individual will be affected by the aging process.

I thereby conclude that the data prepared by the defendant and the evidence it has presented has not met the burden of demonstrating that its policy of age limitation is reasonably necessary to the normal and safe operation of its business nor that age is a bona fide occupational qualification within the meaning of the Act. Therefore, it is adjudged, ordered and decreed that judgment for the plaintiff and against the defendant be and the same hereby is entered.

ENTER:

JAMES B. PARSONS,
United States District Judge.

Dated: February 5, 1973.

APPENDIX 3

U.S. DEPARTMENT OF LABOR,
OFFICE OF INFORMATION,
Washington, D.C., October 17, 1972.

For release: Immediate.
USDL: 72-705.

OVER $250,000 DUE 29 WORKERS UNDER AGE DISCRIMINATION COURT ACTION

Twenty-nine former employees of Pan-American Airways, Inc., have been awarded damages of $250,000 in a suit under the Age Discrimination in Employment Act (ADEA) in U.S. District Court in Miami.

The suit resulted from a complaint filed with the U.S. Department of Labor alleging that Pan-American violated the provisions of the ADEA in laying off, retiring and assigning to inactive status because of age, many employees between 40 and 65. When conciliation efforts proved unsuccessful, the Department filed suit.

The judgment, signed yesterday by U.S. District Judge Joe Eaton, binds Pan-American, its successors and assigns, to the payment and to certain other conditions relating to pensions of several workers named in the suit. Individual damages due under the action range from $1,035 to $13,525.

Under the terms of the judgment, 15 former employees will begin receiving larger pensions this year. The increases, retroactive to June 1, 1972, total $4,410 annually. Individual increases range from $90 to $518 per year, according to the stipulation.

In addition, 11 former employees, who have not yet reached retirement age, will continue to receive monthly payments from Pan-American until reaching retirement age, when they too will be paid increased pensions. Individual increases will range from $305 to $505 annually. The total annual increase will be $4,148.

The action involves only former Pan-American workers who were employed at Miami International Airport.

Pan-American stipulated that it will establish a master group annuity to assure the pension supplement for those ex-employees named in the action who have not yet reached retirement age.

The stipulation provides: "This action shall be dismissed with prejudice to the individuals named in * * * Exhibit 'A', and to all other employees of defendant who were laid off, demoted, retired or placed on an inactive status on or before July 1, 1970, but without prejudice to the rights of the plaintiff or any other person to bring any action provided by the Act where the alleged violation of the Act occurred after July 1, 1970."

Henry A. Heuttner, regional director of the U.S. Department of Labor in Atlanta, said that to the best of his knowledge, the settlement is the largest ever to be paid by a single firm under the provisions of the ADEA.

"Certainly, it is the first time that future pension rights have been increased under the law," he said.

Pan-American was also taxed with court costs of the action.

The Age Discrimination in Employment Act protects persons between the ages of 40 and 65 from discrimination based on age in such areas of employment as hiring, discharge, leave, compensation and promotion.

APPENDIX 4

CITATION PRESENTED TO MR. GILBERT L. DRUCKER

Meeting in Chicago for its annual conference, the National Council on the Aging awarded on September 18 its 1973 Ollie A. Randall Award to Mr. Gilbert Drucker, the Department of Labor attorney who prepared and presented the case of *Secretary of Labor* v. *Greyhound Lines, Inc.*, a case involving age discrimination in employment. Dr. Inabel Lindsay, who presented the award, said that it is presented to a person who has acted to change a situation or situations for the benefit of older people. She gave this description of the work of the awards committee and the reasons for its decision:

More than 40 nominations were submitted out of which 26, after careful preliminary screening, were given serious and prolonged consideration. Six of these were nominated because of national or regional achievement and 20 were nominated for local achievement at the State, county, or municipal level. These nominations suggest that the Council is reaching the grassroots leadership in services to the aging.

On a geographic basis, 14 States and the District of Columbia were represented. In addition, 8 nominees were identified as volunteers and 18 were employed in a professional capacity. We sincerely hope that in the future there will be an increase in the number of volunteers.

In view of this gratifying response, the committee might address itself to refining the criteria to reflect the work status—whether retired or employed, and give consideration in the future to the age factor.

The Selection Committee found it difficult to reach a consensus because of the many and varied achievements reported. I am therefore glad to inform you that starting in 1974, three awards will be conferred—for achievement at the National, State, and local levels.

As a matter of policy, all recommendations of Board and staff were excluded. However, the Council may want to consider an award for meritorious service for people who fall in this category.

As I stated previously, it was a difficult task to reach a decision, but the factors that influenced the unanimous decision of the Committee not only showed a demonstrated achievement on behalf of the aging, but indicate significant implications for wide-reaching improvement in the conditions of the elderly. The recipient chosen has demonstrated extraordinary achievement with regard to these qualities. A Federal employee from the legal profession, he devoted time and effort far beyond the call of duty in preparing and presenting the case of *Secretary of Labor* v. *Greyhound Lines, Inc.*—a case involving age discrimination in employment.

I would like to take the privilege of quoting segments from the sponsor's application regarding the work of the recipient.

"The Age Discrimination in Employment Act—which prohibits discrimination in employment based on age against persons between 40 and 65 years of age—became effective on June 12, 1968.

"Though there was much voluntary compliance by large segments of the business community, the intercity bus industry, led by Greyhound Lines, Inc. (which employs 10,000 drivers), refused to alter its policy of denying consideration to applicants for the bus driver position over 35 years of age, contending that such persons were unfit both physically and emotionally to cope with the rigorous demands of the position, and that age was a bona fide occupational qualification for the bus driver position.

"The recipient of the Ollie A. Randall Award evaluated the facts and the law and, failing to gain voluntary compliance with the act, recommended that legal action be taken to require Greyhound to consider busdriver applicants between 40 and 65 years of age. Suit was filed in September 1969, the first such suit filed in the United States.

"During the succeeding 2½ years, the recipient steered the litigation through lengthy depositions, motions, briefs, and numerous other legal hurdles. The work in the case, involving the preparation of hundreds of documents, became more than a full-time job supplemented by discussions with coworkers on into the night. Throughout this time, the recipient did more than what was called for, pursuing legal theories, anticipating defenses, contacting expert witnesses, anticipating and researching various medical theories, and, in general, striving for complete and total preparation in an area which had no legal precedents.

"On February 5, 1973, the U.S. district judge held that Greyhound must abandon its 45-year practice of excluding persons over age 40 for initial employment as busdrivers. In his opinion, the judge states:

" 'I cannot accede to a contention which flatly states that all applicants over 40 are inflexible, unadaptable, and untrainable.

" 'Employers are required to consider individuals on the basis of what they can contribute, not on the basis of chronological age.

" 'I believe strongly that functional capacity and not chronological age ought to be the most important factor as to whether or not an individual can do a job safely. The human variances involved are myriad; there is no way to generalize as to the physical capability and physiological makeup of an individual.'

"While the case is now on appeal, its importance should be clear: Greyhound was ordered to consider applicants for its 10,000 bus driver positions on the basis of what they can contribute as individuals, rather than chronological age. As the first favorable court decision construing the 'bona fide occupational qualification' exception in the act, employers nationwide will have to deal with the Greyhound decision before arbitrarily imposing age limitations in employment."

Because of his perserverance, imagination, and tireless efforts to reach this landmark decision which, the committee feels, could have an impact on hiring practices as significant as the impact of the 1954 Supreme Court decision on school desegregation, the National Council on the Aging takes special pride and pleasure in presenting this award to Mr. Gilbert Drucker.

ACCEPTANCE SPEECH BY GILBERT DRUCKER FOR 1973 OLLIE A. RANDALL AWARD

Miss Randall, Honored Guests, Ladies and Gentlemen:

It is with the deepest sense of humility that I accept the 1973 Ollie A. Randall Award. You indeed have bestowed upon me an honor I will treasure all my life.

In life very few individuals have been given the opportunity to help their fellow human beings. In preparing and trying the Greyhound case I, with other members of the Department of Labor were given the opportunity to help, not only the older American but, I believe, older persons possibly throughout the world.

I would like to express my appreciation to Mr. Herman Grant, the Regional Solicitor of the United States Department of Labor, Mr. Richard Schubert, the present Under Secretary of Labor and former Solicitor of Labor, Mr. Laurence Silberman, the former Under Secretary of Labor and Solicitor of Labor, and Mr. William J. Kilberg, the present Solicitor of Labor, for giving me that opportunity. I also would, on behalf of the Department of Labor, like to take this opportunity to express our deepest appreciation to Mr. Norman Sprague and his staff for the great technical assistance given to us in the preparation and trial of the Greyhound case. The Greyhound case represented the first real opportunity for a court to decide whether the productive and useful capacity of the older American should be judged on his chronological age along or whether instead, he should be judged on his individual capacity as a human being.

In preparing this case for trial I was constantly reminded of the words of Congresswoman Dwyer who, in urging the passage by Congress of the Age Discrimination in Employment Act, perhaps has best described the need for the law when she stated:

> * * * Men and women who, through no fault of their own, find themselves out of work and over 40 have been the neglected people of our time. They have been victims of the myth that holds they are too settled, too hard to retrain, and have too little time left to make valuable contributions to new employers. The facts are otherwise.

I also constantly kept in mind these words that appeared in the Report of the Secretary of Labor to Congress under the Civil Rights Act in 1965, entitled "The Older American Worker—Age Discrimination in Employment."

> * * * After the older worker's long years of service, the psychological shock of unemployment is often severe. His age, which has generally given him advantages on the job, suddenly becomes an economic disadvantage. * * * As the unemployment period lengthens, his self-confidence wanes; this often affects his employability. A person who has become depressed or bitter tends to lose aggressiveness and interest in his surroundings and may require rehabilitation before he can be reemployed. Inherent in the loss of economic status through unemployment, and the humilitating experience of unsuccessfully looking for work, are many social and psychological problems which in themselves tend to prolong unemployment. In addition, employers are likely to conclude, simply on the basis of length of unemployment, that there must be something wrong with the worker and hesitate to hire him. Eventually, he may stop applying for work, despite his great need for means of support for himself and his family.

It is my belief that in the Greyhound case, the courts have been presented with the necessary evidence to measure the worth of an individual not by how many years he or she happened to be on earth, but by his or her individual capability and capacity, for each of us is an individual, unique, human being.

If in doing so I have succeeded in contributing to advancing the cause of the aging by enabling the older person to live a more dignified, healthy, and productive life, I indeed have been honored. Thank you.

APPENDIX 5

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, D.C., November 27, 1968.

Hon. HUBERT H. HUMPHREY,
President of the Senate, Washington, D.C.

DEAR MR. PRESIDENT: I have the honor to present herewith my recommendation with respect to the appropriateness of the lower and upper age limits incorporated in the Age Discrimination in Employment Act of 1967 (P.L. 90-202).

This Act includes a requirement (Section 3(b)) that the Secretary of Labor shall recommend to the Congress not later than 6 months after the effective date of the Act (June 12, 1968) any measures he may deem desirable to change the lower or upper age limits set forth in section 12. Section 12 provides that "The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 65 years of age."

The legislative history indicates that the impetus for the study of the 40 to 65-year age limits provided under the Age Discrimination in Employment Act was brought about at least in part by the interest in the case of airline stewardesses. Some airlines had been requiring their stewardesses upon reaching a certain age, usually 32 to 35, to either transfer to ground jobs or resign. The stewardesses claimed and were able to support the claim that this requirement was unrelated to their abilities to perform their jobs. The House Committee report states:

> "The case presented by the stewardesses reveals an apparent gross and arbitrary employment distinction based on age alone. It deserves mention again, that the only reason the committee bill does not specifically address this discrimination is in the interest of the major objective of the bill. In lieu of such provision, the committee added section 3(b), however, and expects the Secretary—pursuant to the subsection—to undertake study in this area, making whatever recommendations he deems appropriate." (House Report No. 805, October 23, 1967, p. 7.)

Additionally the Senate floor debate indicates that the report should include a determination as to whether this was a unique problem and to make recommendations for a solution. (Congressional Record, November 6, 1967, p. 31253.)

Intensive research in current literature and checks with agencies involved in discrimination problems have not disclosed any other occupational groups in which present practice results in age discrimination involving groups of workers under 40 years of age. The general counsel of the EEOC has informed us that the Commission has had no other experience with problems of age discrimination below the age of 40. It is our judgment, therefore, that the stewardess problem is unique.

The stewardess problem appears to be well on the way to solution through the issuance of a decision by the EEOC in the case of June Dodd vs. American Airlines, Inc. (issued August 8, 1968) and through modifications of collective bargaining agreements as they affect the employment of stewardesses. The EEOC decision in the case cited above held that the company had violated Title VII of the Civil Rights Act when it terminated the employment of a stewardess because of her age. The agreement reached on August 11, between the Transport Workers Union and American Airlines, permits the airline to continue to offer stewardesses the opportunity to transfer to ground jobs, at higher base rates, or retirement with increased severance pay upon reaching age 32. However, the stewardesses now have the additional option of continuing to fly, if they so choose.

With respect to the currently applicable 40-year lower age limit, I believe the rationale for this lower age limit, as described in the House Committee Report is very persuasive:

> "Section 12 limits the prohibitions in the act to persons who are at least 40, but less than 65 years of age. The committee altered the lower age limit from 45 in the original bill to 40, in that testimony indicated this to be the

age at which age discrimination in employment becomes evident. It is also the lower age limit found in most State statutes bearing on this subject. The committee declined to further lower the age limitation, notwithstanding the highly effective and persuasive presentations made by witnesses representing airline stewardesses—some of whom are not permitted to continue as stewardesses after age 32. Although the committee recognized the significance of the problem, it was felt a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers." (House Report No. 805, October 23, 1967, p. 6.)

With respect to the upper age limit of 65, many of the problems encountered appear to be related to compulsory retirement. The ADEA requires that a study be made of institutional and other arrangements giving rise to involuntary retirement. This study is now under way and will form the basis of a separate report to the Congress.

Questions have also been raised with respect to the legality of imposing upper age limits below age 65 when a safety factor is involved. This problem had been raised, at the time the legislation was enacted, with respect to rules set by regulatory agencies for public safety. Since the Act became effective, a question was raised with respect to regulations of the Federal Aviation Administration which do not permit airline pilots to engage in carrier operations, as pilots, after they reach age 60. The Department of Labor has taken the position that Federal regulatory requirements which provide for compulsory retirement without reference to an individual's actual physical condition will be recognized as constituting a bona fide occupational qualification when such conditions or qualifications are clearly imposed for the safety and convenience of the public and therefore not a violation of the spirit or letter of the ADEA.

Consideration was also given to the desirability of eliminating age limits. Of the 26 States and Puerto Rico which have laws relating to age discrimination, five set no age limits—Alaska, Hawaii, Illinois, Nebraska, and Maine. An examination of the legislative history makes clear, however, that the Federal statute was designed to do more than just bar discrimination because of age. It was designed to make clear that the hiring and promotion of the older worker must be based on ability and not on age. As Congressman Carl Perkins, Chairman of the House Committee on Education and Labor, stated:

"H.R. 13054, a bill to bar arbitrary discrimination in employment based on age, in fact is more than a bill to bar age discrimination. It is a bill to promote employment of middle aged and older persons based on their ability. We do not undertake to tackle the whole problem of age discrimination in employment in this bill, but we feel that we strike at the heart of the situation, that is, attacking discriminatory practices between ages 40 and 65 where discrimination is most prevalent. In this bill we require a clear and unequivocal statement of public policy supported by an extensive research and educational effort and backed up by civil enforcement procedures." (Congressional Record, December 4, 1967, P. H16164.)

The age limits presently included in the statute encompass approximately half of all persons 25 years of age or older and almost three-fifths of the labor force 25 years of age or older. Any broadening of the age span might limit the effectiveness of the statute in promoting the interests of the older worker. Changes in the age limits would therefore seem to be inappropriate.

This new law has only been in effect for 6 months. After the statute has been operative for a longer period, the age limits will be reexamined in the light of administrative experience.

Sincerely,

WILLARD WIRTZ,
Secretary of Labor.

Identical letter sent to Honorable John W. McCormack.

APPENDIX 6

INTERPRETATIVE BULLETIN

TITLE 29, PART 860 OF THE CODE OF FEDERAL REGULATIONS

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

[This Publication Conforms to the Code of Federal Regulations as of April 1, 1970, the Date This Reprint Was Authorized.]

UNITED STATES DEPARTMENT OF LABOR
WAGE AND LABOR STANDARDS ADMINISTRATION

WAGE AND HOUR DIVISION

WASHINGTON, D.C. 20210

WH Publication 1293

PART 860—AGE DISCRIMINATION IN EMPLOYMENT ACT

SEC.

AUTHORITY: The provisions of this part are issued under 81 Stat. 602; 29 U.S.C. 620, 5 U.S.C. 301, Secretary's Order No. 10–68, and Secretary's Order No. 11–68.

SOURCE: The provisions of this Part 860 appear at 33 F.R. 9172, June 21, 1968, unless otherwise noted.

§ 860.1 Purpose of this part.

This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published

to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

§ 860.20 Geographical scope of coverage.

The prohibitions in section 4 of the Act are considered to apply only to performance of the described discriminatory acts in places over which the United States has sovereignty, territorial jurisdiction, or legislative control. These include principally the geographical areas set forth in the definition of the term "State" in section 11(i). There, the term State is defined to include "a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act." Activities within such geographical areas which are discriminatory against protected individuals or employees are within the scope of the Act even though the activities are related to employment outside of such geographical areas.

[34 F.R. 322, January 9, 1969]

§ 860.30 Definitions.

Considering the purpose of the proviso to section 7(c) of the Act as indicated in the reports of both the Senate and House Committees (see S. Rept. No. 723, 90th Cong., 1st Sess., and H. Rept. No. 805, 90th Cong., 1st Sess.) it was clearly the intent of Congress that the term "employee" in that proviso should apply to any person who has a right to bring an action under the Act, including an applicant for employment.

[34 F.R. 9708, June 21, 1969]

§ 860.50 "Compensation, terms, conditions, or privileges of employment.***"

(a) Section 4(a)(1) of the Act specifies that it is unlawful for an employer "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;"

(b) The term "compensation" includes all types and methods of remuneration paid to or on behalf of or received by an employee for his employment.

(c) The phrase "terms, conditions, or privileges of employment" encompasses a wide and varied range of job-related factors including, but not limited to, job security, advancement, status, and benefits. The following are examples of some of the more common terms, conditions, or privileges of employment: The many and varied employee advantages generally regarded as being within the phrase "fringe benefits," promotion, demotion or other disciplinary action, hours of work (including overtime), leave policy (including sick leave, vacation, holidays), career development programs, and seniority or merit systems (which govern such conditions as transfer, assignment, job retention, layoff and recall). An employer will be deemed to have violated the Act if he discriminates against any individual within its protection because of age with respect to any terms, conditions, or privileges of employment, such as the above, unless a statutory exception applies.

33 F.R. 12227, August 30, 1968]

§ 860.75 Wage rate reduction prohibited.

Section 4(a)(3) of the Act provides that where an age-based wage differential is paid in violation of the statute, the employer cannot correct the violation by reducing the wage rate of any employee. Thus, for example, in a situation where it has been determined that an employer has violated the Act by paying a 62-year-old employee a prohibited wage differential of 50 cents an hour less than he is paying a 30-year-old worker, in order to achieve compliance with the Act he must raise the wage rate of the older employee to equal that of the younger worker. Furthermore, the employer's obligation to comply with the statute cannot be avoided by transferring either the older or the younger employee to other work since the transfer itself would appear discriminatory under the particular facts and circumstances.

[34 F.R. 322, January 9, 1969]

§ 860.91 Discrimination within the age bracket of 40–65.

(a) Although section 4 of the Act broadly makes unlawful various types of age discrimination by employers, employment agencies, and labor organizations, section 12 limits this protection to individuals who are at least 40 years of age but less than 65 years of age. Thus, for example, it is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age to an individual 30 years old over another individual who is within the 40–65 age bracket limitation of section 12. Similarly, an employer will have violated the Act, in situations where it applies, when one individual within the age bracket of 40–65 is given job preference in hiring, assignment, promotion of any other term, condition, or privilege of employment, on the basis of age, over another individual within the same age bracket.

(b) Thus, if two men apply for employment to which the Act applies, and one is 42 and the other 52, the personnel officer or employer may not lawfully turn down either one on the basis of his age; he must make his decision on the basis of other factors, such as the capabilities and experience of the two individuals. The Act, however, does not restrain age discrimination between two individuals 25 and 35 years of age.

§ 860.92 Help wanted notices or advertisements.

(a) Section 4(e) of the Act prohibits "an employer, labor organization, or employment agency" from using printed or published notices or advertisements indicating any preference, limitation, specification, or discrimination, based on age.

(b) When help wanted notices or advertisements contain terms and phrases such as "age 25 to 35," "young," "boy," "girl," "college student," "recent college graduate," or others of a similar nature, such a term or phrase discriminates against the employment of older persons and will be considered in violation of the Act. Such specifications as "age 40 to 50," "age over 50," or "age over 65" are also considered to be prohibited. Where such specifications as "retired person" or "supplement your pension" are intended and applied so as to discriminate against others within the protected group, they too are regarded as prohibited, unless one of the exceptions applies.

[34 F.R. 9708, June 21, 1969]

(c) However, help wanted notices or advertisements which include a term or phrase such as "college graduate," or other educational requirement, or specify a minimum age less than 40, such as "not under 18," or "not under 21," are not prohibited by the statute.

(d) The use of the phrase "state age" in help wanted notices or advertisements is not, in itself, a violation of the statute. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate a discrimination based on age, employment notices or advertisements which include the phrase "state age," or any similar term, will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the statute.

(e) There is no provision in the statute which prohibits an individual seeking employment through advertising from specifying his own age.

§ 860.95 Job applications.

(a) The term "job applications," within the meaning of the recordkeeping regulations under the Act (Part 850 of this chapter), refers to all inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant's background. It relates not only to preemployment inquiries but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the statute. As in the case with help wanted notices or advertisements (see § 860.92), a request on the part of an employer, employment agency, or labor organization for information such as "Date of Birth" or "State Age" on an employment application form is not, in itself, a violation of the Age Discrimination in Employment Act of 1967. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate a discrimination based on age, employment application forms which request such information in the above, or any similar phrase, will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the statute. That the purpose is not one proscribed by the statute should be made known to the appli-

cant, as by a reference on the application form to the statutory prohibition in language to the following effect: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 65 years of age."

[33 F.R. 12227, August 30, 1968]

(b) An employer may limit the active period of consideration of an application so long as he treats all applicants alike regardless of age. Thus, for example, if the employer customarily retains employment applications in an active status for a period of 60 days, he will be in compliance with the Act if he so retains those of individuals in the 40 to 65 age group for an equal period of consideration as those of younger persons. Further, there is no objection to the employer advising all applicants of the above practice by means of a legend on his application forms as long as this does not suggest any limitation based on age. If it develops, however, that such a legend is used as a device to avoid consideration of the applications of older persons, or otherwise discriminate against them because of age, there would then appear to be a violation of the Act. It should be noted that this position in no way alters the recordkeeping requirements of the Act which are set forth in Part 850 of this chapter.

[34 F.R. 9708, June 21, 1969]

§ 860.102 Bona fide occupational qualifications.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *"

(b) Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

(c) The following are illustrations of possible bona fide occupational qualifications.

(d) Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public. This exception would apply, for example, to airline pilots within the jurisdiction of the Federal Aviation Agency. Federal Aviation Agency regulations do not permit airline pilots to engage in carrier operations, as pilots, after they reach age 60.

(e) A bona fide occupational qualification will also be recognized in certain special, individual occupational circumstances, e.g., actors required for youthful or elderly characterizations or roles, and persons used to advertise or promote the sale of products designed for, and directed to appeal exclusively to, either youthful or elderly consumers.

§ 860.103 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege or employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age:

(1)(i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: *Provided, however,* That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

§ 860.104 Differentiations based on reasonable factors other than age—Additional examples.

(a) *Employment of Social Security recipients.* (1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job,

because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) *Employee testing.* The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40–65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

[34 F.R. 322, January 9, 1969]

(c) *Refusal to hire relatives of current employees.* There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 F.R. 9709, June 21, 1969]

§ 860.105 Bona fide seniority systems.

Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of this Act * * *"

(a) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers. In this regard it should be noted that a bona fide seniority system may operate, for example, on an occupational, departmental, plant, or company wide unit basis.

(b) Seniority systems not only distinguish between employees on the basis of their length of service, they normally afford greater rights to those who have the longer service. Therefore, adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act. Furthermore, a seniority system which has the effect of perpetuating discrimination which may have existed on the basis of age prior to the effective date of the Act will not be recognized as "bona fide."

(c) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will also be regarded as lacking the necessary bona fides to qualify for the exception.

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under Title VII of the Civil Rights Act of 1964, where that Act otherwise applies. Neither will such systems be regarded as "bona fide" within the meaning of section 4(f)(2) of the Age Discrimination in Employment Act of 1967.

[33 F.R. 12227, August 30, 1968]

§ 860.106 Bona fide apprenticeship programs.

Age limitations for entry into bona fide apprenticeship programs were not intended to be affected by the Act. Entry into most apprenticeship programs has traditionally been limited to youths under specified ages. This is in recognition of

the fact that apprenticeship is an extension of the educational process to prepare young men and women for skilled employment. Accordingly, the prohibitions contained in the Act will not be applied to bona fide apprenticeship programs which meet the standards specified in §§ 521.2 and 521.3 of this chapter.

[34 F.R. 323, January 9, 1969]

§ 860.110 Involuntary retirement before age 65.

(a) Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." 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). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.

(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress.

[34 F.R. 9709, June 21, 1969]

§ 860.120 Costs and benefits under employee benefit plans.

(a) Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. 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 worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

(b) Profit-sharing plans: Not all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision and a profit-sharing plan as such would not appear to be within its terms. However, where it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The "bona fides" of such plans will be considered on the basis of all the particular facts and circumstances.

(c) Forfeiture clauses in retirement programs: Clauses in retirement programs which state that litigation or participation in any manner in a formal proceeding by an employee will result in the forfeiture of his rights are unlawful insofar as they may be applied to those who seek redress under the Act. This is by reason of section 4(d) which provides that it "shall be unlawful for an employer to discriminate against any of his employees * * * because such individual * * * has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act."

[34 F.R. 9709, June 21, 1969]