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## AGE DISCRIMINATION IN THE AIRLINE INDUSTRY: IS AGE A BONA FIDE OCCUPATIONAL QUALIFICATION FOR THE POSITION OF PILOT?

CHERYL HAMMOND RAPER

ONE HUNDRED and eighty-five surviving passengers of United Airline's Flight 232 should be thankful that the tragic crash in Sioux City, Iowa on July 19, 1989, did not occur two years later. Fifty-eight year old Alfred Haynes, the flight's captain, will be forced to retire in 1991 due to Federal Aviation Administration regulations.<sup>1</sup> Haynes is widely credited with saving the lives of these passengers because of his ability to remain calm in an extremely stressful situation. His confidence and nerves of steel were supplemented and strengthened by thirty-three years of flying experience.<sup>2</sup> Once he retires, a younger and potentially less experienced pilot will assume the captaincy position.

One has to wonder what would have happened to Flight

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<sup>1</sup> FAA Age Sixty Rule, 14 C.F.R. § 121.383(c) (1989); *see infra* notes 100-109 and accompanying text for a discussion of the FAA Age Sixty Rule.

<sup>2</sup> The Dallas Morning News, July 26, 1989, at 10A, col. 1; *see also* The Dallas Morning News, July 21, 1989, at 1A, col. 1. Although the total number of years a person has been piloting is a relevant safety consideration, the amount of time a pilot has spent flying a particular model of airplane will obviously also affect his ability to competently fly that model. Thus, flying experience involves not only total amount of flying time but also total amount of flying time in a particular model of airplane. As a result, at least one airline has decided not to schedule a pilot as captain unless he has had at least 100 hours of flying experience on the particular type of plane that he will be captaining. *See Low Time Crews*, THE SAFETY MIND: DELTA MEC SAFETY NEWSLETTER, Third Quarter 1989, at 4 (newsletter from Delta's Central Air Safety Committee notifying the airline's pilots of the change in scheduling requirements).

232's survivors had a pilot without Haynes' experience been in control of the airplane. The fate of Continental Flight 1713, which crashed on takeoff after an inexperienced crew decided to depart amidst a heavy snow and ice storm, is just one example of the tragedies that can result from a lack of experience.<sup>3</sup> Many lives were lost, including those of Flight 1713's pilots, due to an error in judgment which might have been alleviated if the pilots had more piloting experience before being promoted to the head cockpit positions.<sup>4</sup> Experience comes with time, however, and unfortunately people age over time. As a result of FAA regulations and the stereotypical infirmities that come with age, many airlines systematically discriminate against older pilots when making employment decisions, with the frequent result that a relatively inexperienced pilot is promoted to captain.

This comment will discuss the effect of age discrimination in the selection and retention of airline pilots. The first section will begin by addressing the background of age discrimination and its effect on both the particular victim and society as a whole.<sup>5</sup> This section will also discuss the Age Discrimination in Employment Act,<sup>6</sup> which embodies Congress' response to the mounting concern about age discrimination.<sup>7</sup> The second section contains a discussion of the Bona Fide Occupational Qualification exception to the Act's general prohibition against age dis-

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<sup>3</sup> Kantrowitz, Cohn, Junkin, Gibney & Carroll, *Too Green to Fly?*, NEWSWEEK, Nov. 30, 1987, at 32.

<sup>4</sup> *Id.* at 32-33. Both pilots had just recently been promoted to their positions. *Id.* at 32. The captain had only 165 flight hours as a DC-9 co-pilot before his promotion. *Id.* The co-pilot had only 36 1/2 hours as a jet pilot before the fatal crash. *Id.*

<sup>5</sup> See *infra* notes 11-27 and accompanying text for a discussion of age discrimination and its effects.

<sup>6</sup> Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982 & Supp. V 1987) [hereinafter ADEA]. The ADEA includes a broad prohibition of discrimination on the basis of age in employment, labor organizations, and employment agencies. *Id.* § 623.

<sup>7</sup> See *infra* notes 28-47 and accompanying text for a discussion of Congress' enactment of the ADEA.

crimination.<sup>8</sup> The last section will address the particular

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<sup>8</sup> ADEA, *supra* note 6, § 623(a)-(c), (f). Section 623 includes, in part, the following provisions:

- (a) Employer practices — 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 chapter.
- (b) Employment agency practices — 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) Labor organization practices — 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 to refer 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.
- (f) Lawful practices . . . — It shall *not* be unlawful for an employer, employment agency, or labor organization —
  - (1) to take any action otherwise prohibited under subsection (a), (b), or (c) . . . 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, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;
  - (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 chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individ-

concerns of the airline industry in adopting its age-related hiring policies,<sup>9</sup> and the judiciary's reactions to the implementation of these policies.<sup>10</sup>

## I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

### A. Background

Age discrimination can take many forms and affect a wide variety of persons. After all, everyone has an "age." Consequently, age discrimination can actually mean discrimination against anyone because of his or her particular age, regardless of whether they are young or old.<sup>11</sup> This article, however, will be limited to a discussion of age discrimination in situations where a worker has been considered too old for employment, rather than too young.

This type of age discrimination in the work place can obviously have a crippling effect on both the individual employee and the national economy, especially when it is experienced in the form of mandatory retirement.<sup>12</sup> Forcing a productive employee to retire usually results in a drastic and unwanted change in lifestyle. The legal dilemma concerns the extent to which such discrimination

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ual specified by section 631(a) of this title because of the age of such individual; or

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

*Id.* (emphasis added); see *infra* notes 48-86 for a discussion of the bona fide occupational qualification (BFOQ).

<sup>9</sup> See *infra* notes 88-109 and accompanying text for a discussion of the unique aspects of the airline industry that affect the BFOQ determination.

<sup>10</sup> See *infra* notes 110-156 and accompanying text for a discussion of judicial treatment of the airlines' attempts to use the BFOQ defense as a justification for age discrimination.

<sup>11</sup> L. FRIEDMAN, *YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT* 5 (1984). Friedman notes that age discrimination can mean "discrimination against *anybody* because of age, regardless of what that age might be — 12, 40, 80 or 100." *Id.* It is historically hard to find any defined political movements encouraging laws on age discrimination. *Id.* Despite this, the elderly have fairly recently become an identifiable interest group and, consequently, there is an increasingly prevalent relationship between this group and the developing law on age discrimination. *Id.* at 6.

<sup>12</sup> See generally *id.* at 73-79 for a discussion of mandatory retirement, which many scholars feel is the essence of age discrimination.

will be tolerated. In making this decision, an examination of the various effects of age discrimination on the employee and society is helpful.

Age discrimination in employment generally places the greatest burden on the recipient of the discrimination.<sup>13</sup> The individual worker who is victimized by discriminatory practices often suffers losses in both his economic and social status.<sup>14</sup> In addition, the victim of age discrimination may incur psychological and health costs as a result of his forced leisure.<sup>15</sup> These losses are necessarily exacerbated when a person who was fired because of his increasing age

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<sup>13</sup> See 113 CONG. REC. 34,743-44 (1967). During Congressional debates over the ADEA, supporters of the Act emphasized President Johnson's conclusion that "the greater loss [from arbitrary age discrimination] is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families." *Id.* at 34,744. But see C. EDELMAN & I. SIEGLER, *FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW: SLOWING DOWN THE GOLD WATCH* (1978). Edelman and Siegler note that although arbitrary age discrimination engenders many problems, not all persons who are forced to retire feel burdened. *Id.* at 1. In attempting to draft laws prohibiting age discrimination, these persons should be considered

because any solution to the problem of age discrimination in employment which prevents or discourages the withdrawal of such persons from the regular labor force at an appropriate time must be assiduously avoided if the solution to one problem is not to create another one both for persons [who are not burdened by job severance] and for those others who would enter into or advance within the labor force upon the retirees' withdrawal.

*Id.* Consequently, the authors seem to indicate that age discrimination is not an inherently burdensome concept, but becomes burdensome only in the manner in which it has generally been practiced by employers.

<sup>14</sup> PRACTISING LAW INSTITUTE, *LAW OF THE ELDERLY* 169 (1977) (noting that age discrimination results in the displaced worker experiencing "losses in income, status, and social orientation").

<sup>15</sup> *Id.* at 170 (concluding that "forced leisure is, for many, an unsatisfactory replacement for meaningful employment"); see also *Barsky v. Board of Regents*, 347 U.S. 442 (1954). In *Barsky*, Justice Douglas stressed the general importance of the right to employment for the individual:

The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

*Id.* at 472 (dissenting opinion).

cannot find alternative employment. The problem is especially troubling when new employment is refused solely on the basis of age.

Although the individual worker generally feels the drastic effects of age discrimination directly,<sup>16</sup> society as a whole also becomes burdened.<sup>17</sup> As a result of the displacement of these workers, society loses the benefits of potentially productive citizens and instead is forced to make expenditures for programs designed to support them.<sup>18</sup> This is especially disconcerting because the group affected by this type of discrimination is steadily growing, both in "absolute numbers and as a percentage of the total population."<sup>19</sup> Even if one ignores society's desire to protect the victims' social and physical well-be-

<sup>16</sup> See *supra* note 13 and accompanying text.

<sup>17</sup> In the Congressional debates on the ADEA it was noted that on January 23, 1967, in a Special Message to the Congress Proposing Programs for Older Americans, President Johnson stated that:

Today more than three-quarters of a billion dollars in unemployment insurance is paid each year to workers who are 45 or over . . . In 1965, the Secretary of Labor reported to the Congress and the President that approximately half of all private job openings were barred to applicants over 55; a quarter were closed to applicants over 45.

In economic terms, this is a serious — and senseless — loss to a nation on the move.

113 CONG. REC. 34,744 (1967). Additionally, in urging Congress to adopt amendments to the ADEA that would make it applicable to federal and state employers, President Nixon stated that "discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the National [sic] the contribution they could make if they were working." H.R. REP. NO. 913, 93d Cong., 2d Sess. 40, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 2811, 2849.

<sup>18</sup> PRACTISING LAW INSTITUTE, *supra* note 14, at 170-71 (footnotes omitted).

<sup>19</sup> C. EDELMAN & I. SIEGLER, *supra* note 13, at 11. Additionally, the third chapter of this book contains some enlightening information about the historically increasing numbers in the elderly population:

In 1776, the population of the United States was approximately 2.5 million, life expectancy at birth was 38-39 years and the number of individuals aged 65 and older was 50,000 or about 2 percent of the total. By 1900 there were 3 million older people or about 4 percent of the total population and in mid-1975 there were 22.4 million older people or about 10 percent of the total . . . [L]ife expectancy, calculated for individuals born in 1974 is 68.9 years for men and 72.4 years for women. . . . This gain in life expectancy has been accomplished by advances in medical care, primarily at the younger ages by reductions in infant mortality. It has been estimated that the

ing, increased growth of the elderly population and continued age discrimination could have a staggering effect on social security, unemployment, and welfare programs.<sup>20</sup> Permitting age discrimination to go unchecked could result in massive increases in the amount of expenditures necessary to fulfill the perceived goals of these programs. Consequently, the effects of age discrimination are not only felt by the individual victim, but must also be endured by society in general.

Recognizing the extensive effects of age discrimination and the various burdens it caused, Congress began to consider the need for regulation in this area.<sup>21</sup> While considering legislation that ultimately became Title VII of the Civil Rights Act of 1964,<sup>22</sup> Congress discussed the possibility of prohibiting age discrimination.<sup>23</sup> For various reasons, however, Congress decided not to include such a prohibition in the 1964 Civil Rights Act.<sup>24</sup> Instead, the

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average life expectancy would naturally peak somewhere around 90 years of age.

*Id.* at 11-12 (footnotes omitted).

<sup>20</sup> See PRACTISING LAW INSTITUTE, *supra* note 14, at 171 (quoting *Hearings on the Economics of Aging Before the Subcommittee on Employment & Retirement Incomes of the Senate Special Committee on Aging*, 91st Cong., 1st Sess. 1317 (1969)), indicating that supporting those unemployed due to age discrimination leads to extensive increases in both public and private expenditures. Public expenditures are increased in the areas of government programs for the elderly, poor, and unemployed. *Id.* Private expenditures are generally increased in the areas of private pensions and contributions from the family. *Id.*

<sup>21</sup> See C. EDELMAN & I. SIEGLER, *supra* note 13, at 69-71 (discussing Congress' progression toward regulating the area of age discrimination); see also J. KRAUSKOPF, *ADVOCACY FOR THE AGING* 223 (1983) (noting that Congress passed the ADEA "[i]n response to the problems of unemployment and premature forced retirement of the older worker").

<sup>22</sup> 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. V 1987). Title VII generally concerns discrimination in employment based on "race, color, religion, sex, or national origin." *Id.* § 2000e-2.

<sup>23</sup> See C. EDELMAN & I. SIEGLER, *supra* note 13, at 69 (noting that the suggestion was made to include age discrimination as prohibited conduct in the Civil Rights Act of 1964); see also J. KALET, *AGE DISCRIMINATION IN EMPLOYMENT LAW* 1 (1986) (noting that efforts were made to include age as a protected class under Title VII of the Civil Rights Act).

<sup>24</sup> See C. EDELMAN & I. SIEGLER, *supra* note 13, at 69 ("the proposal [to prohibit age discrimination in the 1964 Civil Rights Act] was rejected in an effort to assure passage without delay of a statute covering the other types of discrimination, par-



Civil Rights Act included a request by Congress for the Secretary of Labor to make a report on age discrimination in employment and to include recommendations for legislation to prevent arbitrary age discrimination in employment.<sup>25</sup> The report that followed noted that many employers persistently set arbitrary age limits in their hiring practices that had no relation to the ability or skill necessary to perform the particular job available.<sup>26</sup> The Secretary of Labor concluded that "elimination of arbitrary age limits in employment will proceed much more rapidly if the federal government declares clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age."<sup>27</sup> Thus, the Secretary of Labor paved the way for Congress to legislate in the area of age discrimination in employment.

### B. *Analysis of the Age Discrimination in Employment Act*

The Age Discrimination in Employment Act (ADEA)<sup>28</sup> represented Congress' response to the report made by the Secretary of Labor and the increasing concerns that were articulated concerning the subject of age discrimina-

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ticularly racial discrimination"); L. FRIEDMAN, *supra* note 11, at 14 (although the "cause was good, 'the timing [was] bad'").

<sup>25</sup> 42 U.S.C. § 2000e-14 (1982). The Secretary of Labor was to make recommendations for legislation to prevent arbitrary age discrimination which he believed were advisable. *Prevention of Discrimination Because of Age*, 89th Cong., 2d Sess., reprinted in 80 Stat. 845 (1966); see also J. KALET, *supra* note 23, at 1 (indicating that the inclusion of this request of the Secretary of Labor to make a report on age discrimination was a compromise between those Congressmen who had wanted a prohibition of age discrimination included in the 1964 Civil Rights Act and those who did not want such a provision in that particular piece of legislation).

<sup>26</sup> C. EDELMAN & I. SIEGLER, *supra* note 13, at 70 (citing REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, *The Older American Worker — Age Discrimination in Employment* (June 1965)). The report noted that 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." *Id.*

<sup>27</sup> See *id.* For a discussion of the Secretary of Labor's findings, see Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 383-84 (1976).

<sup>28</sup> ADEA, *supra* note 6, §§ 621-634; see also *supra* note 8 and accompanying text for the text of some of the ADEA's provisions.

tion in employment.<sup>29</sup> Based on an extensive set of Congressional findings on the harmful effects of arbitrary age discrimination in employment,<sup>30</sup> the Act stated that its purpose was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers to find ways of meeting problems arising from the impact of age on employment."<sup>31</sup> In interpreting the ADEA, courts have emphasized that it is a remedial statute which prohibits a subtle form of discrimination and have consequently relied on the Act's humanitarian purposes in concluding that Congress intended it to be given a broad scope.<sup>32</sup>

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<sup>29</sup> See *supra* notes 17 & 25-27 and accompanying text for the concerns expressed about age discrimination; see also *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107, 109 (1st Cir. 1978) (noting that "[t]he insidious effects of being barred at the door of the employment market were recognized as undermining one's self-esteem in a work-oriented society," and that Congress enacted the ADEA based on this realization).

<sup>30</sup> ADEA, *supra* note 6, § 621(a). This section states the Congressional findings 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.

*Id.*

<sup>31</sup> *Id.* § 621(b); see also *Polstorff v. Fletcher*, 452 F. Supp. 17, 23 (N.D. Ala. 1978) (in which the court stated that "the purpose of the ADEA was to alleviate serious economic and psychological suffering of persons within this age range, caused by unreasonable prejudice and job discrimination").

<sup>32</sup> *Hall v. United States*, 436 F. Supp. 505, 509 (D. Minn. 1977) (noting that "[t]he ADEA is a remedial statute which 'prohibits a particularly subtle form of discrimination, and the courts must be receptive to its purposes and accord it the intended scope'"); see also *Vazquez*, 579 F.2d at 109 (recognizing that "[i]n line

The ADEA combats the increasing and devastating problem of age discrimination by establishing broad prohibitions against discriminatory practices in the work place.<sup>33</sup> First, an employer cannot use age as a basis for discharging or refusing to hire someone, nor can he consider age as a factor in establishing or changing an employee's compensation and terms of employment.<sup>34</sup> Second, an employer is precluded from segregating or classifying his employees in any manner which would deprive them of employment opportunities merely because of the employee's age.<sup>35</sup> Finally, an employer is prohibited from reducing an employee's wages in an attempt to comply with the Act.<sup>36</sup> As defined by the Act, an employer includes anyone in an industry affecting commerce who has at least twenty employees per working day in each of twenty or more weeks of the present or immediately past calendar year.<sup>37</sup> The word "employer" also encompasses any agent of such a person, a state or political subdivision thereof, or any agency or instrumentality of a state and any interstate agency.<sup>38</sup>

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with the broad humanitarian goals of the statute, liberal construction should be favored," and that "[a]ny interpretation should strive to further a substantial goal of the Act"); *Surrisi v. Conwed Corp.*, 510 F.2d 1088, 1090 (8th Cir. 1975) (stating that the ADEA is a remedial statute to be given broad scope); *Gazder v. Air India*, 574 F. Supp. 134, 136 (S.D.N.Y. 1983) (in interpreting the ADEA, courts must seek to effectuate and not interfere with the Act's humanitarian goals).

<sup>33</sup> ADEA, *supra* note 6, § 623(a)-(c); see *supra* note 8 for the entire text of these provisions.

<sup>34</sup> ADEA, *supra* note 6, § 623(a)(1). This subsection makes it 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." *Id.*

<sup>35</sup> *Id.* § 623(a)(2). This subsection makes it unlawful for an employer "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." *Id.*

<sup>36</sup> *Id.* § 623(a)(3). This subsection states that it is unlawful for an employer "to reduce the wage rate of any employee in order to comply with this chapter." *Id.*

<sup>37</sup> *Id.* at § 630(b). This subsection provides that "employer means any person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.*

<sup>38</sup> *Id.*

The effects of the ADEA are not solely limited to employers. The Act also makes it unlawful for an employment agency to discriminate on the basis of age in accepting, classifying, or referring applicants for potential jobs.<sup>39</sup> Labor organizations are also affected by the Act in that it precludes them from segregating or excluding from membership any individual on the basis of his age.<sup>40</sup> The ADEA also makes it unlawful for a labor organization to cause an employer to discriminate against an individual on the basis of his age.<sup>41</sup>

As originally enacted, the ADEA prohibited these discriminatory practices against workers who were between the ages of forty and sixty-five years of age.<sup>42</sup> The Act was later amended to include an upper age limit of seventy years of age.<sup>43</sup> In 1986, however, the upper age limit was completely withdrawn, and the application of the Act's prohibitions is now limited to individuals who are at least forty years of age.<sup>44</sup>

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<sup>39</sup> *Id.* § 623(b). This subsection states that "[i]t 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." *Id.*

<sup>40</sup> *Id.* § 623(c)(1), (2). These subsections provide that it is 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 to refer 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[.]

*Id.*

<sup>41</sup> *Id.* § 623(c)(3). This subsection provides that it is unlawful for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." *Id.*

<sup>42</sup> Age Discrimination In Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602 (1967) (prior to 1978 and 1986 amendments).

<sup>43</sup> Age Discrimination In Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified at 29 U.S.C. § 631 (1982)).

<sup>44</sup> ADEA, *supra* note 6, § 631(a) (Supp. V 1987) (providing that "the prohibitions in this chapter . . . shall be limited to individuals who are at least 40 years of age").

A person who believes he has been discriminated against on the basis of his age can make out a prima facie case by showing "blatant and overt discriminatory acts by the employer."<sup>45</sup> The alleged victim may carry this burden by exhibiting (1) that he was within the statutorily protected age group; (2) that he is able and qualified to do the job; (3) that he was discharged or treated adversely; and (4) that the employer sought to replace him with a younger person or gave benefits to a younger person.<sup>46</sup> Once a prima facie case has been made, the employer has the burden either to justify the age discrimination or to show that the discharge or failure to hire was based on reasonable factors other than age.<sup>47</sup>

The ADEA evidences Congress' attempt to combat the

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<sup>45</sup> J. KRAUSKOPF, *supra* note 21, at 231.

<sup>46</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell* involved a situation in which a black civil rights activist had engaged in disruptive and illegal activity in protesting his discharge from employment. *Id.* at 794. The activist and others had stalled their cars on the main road leading to the employer's plant, blocking access to the plant during a shift change. *Id.* When the employer rejected his re-employment application, the activist filed a complaint with the EEOC, alleging a violation of Title VII. *Id.* at 796. The Court established that, in order to recover under the 1964 Civil Rights Act articulated in Title VII, the complainant has

the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802. The Court concluded that the activist had proved a prima facie case of discrimination, but that the employer had successfully overcome this showing by demonstrating that it had discharged the activist for his participation in unlawful conduct directed against the employer. *Id.* at 802-03. The Court remanded the case, however, to give the activist a fair opportunity to show that the employer's stated reason for rejecting his re-employment application was a pretext. *Id.* at 804. Many courts have applied the *McDonnell* prima facie test to age discrimination cases under the ADEA. See J. KRAUSKOPF, *supra* note 21, at 231; see *infra* notes 60-81 and accompanying text for a discussion of the manner in which Title VII proof requirements have been applied to age discrimination cases.

<sup>47</sup> *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975) (upon a prima facie showing of age discrimination by plaintiff, the burden of going forward with evidence shifts to the employer, but the burden of proving a case of age discrimination by a preponderance of the evidence remains with the plaintiff).

increasingly drastic effects of age discrimination on individual workers and society. The purposes and goals of the Act exhibit Congress' concern about increasing reports of the arbitrary displacement of competent and productive older workers. When enacting the ADEA, however, Congress did realize that, in some situations, age could be considered an important factor in hiring due to the particular characteristics of certain jobs. In these instances, an employer may be justified in refusing to hire a job applicant or firing a current employee because of his age. Thus, if age is an important factor in determining one's abilities as a pilot, then a pilot may have additional problems in obtaining recovery, despite his ability to demonstrate a *prima facie* case of age discrimination.

## II. THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION

### A. *Background*

Despite the drastic effects age discrimination has on society and individual victims, employers have often attempted to assert various justifications for firing or refusing to hire elderly employees.<sup>48</sup> Many employers consider older employees to be less efficient, more accident prone, and more inflexible and resistant to change than younger employees.<sup>49</sup> Despite the zealous advocacy of the employers' assertions, their attempted justifications usually lack any factual basis.<sup>50</sup>

Nevertheless, Congress created some exceptions to the general prohibition against age discrimination contained

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<sup>48</sup> See generally Kovarsky & Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 844-65 (1974) (including a list of reasons employers often give for discriminating on the basis of age and finding that these excuses are on the whole factually unsupportable).

<sup>49</sup> C. EDELMAN & I. SIEGLER, *supra* note 13, at 18-19. The authors conducted a study of older workers in the work place with specific emphasis on the areas in which employers generally attempted to justify age discrimination. They concluded that these alleged justifications were largely unfounded. *Id.*

<sup>50</sup> See *supra* notes 48-49 and accompanying text.

in the ADEA.<sup>51</sup> In doing this, Congress attempted to balance the ideals articulated in the Act with the practical realization that a person's age could be reasonably related to his ability to perform in certain positions.<sup>52</sup> Consequently, the Act states that it is not unlawful for an employer

to take any action otherwise prohibited . . . 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, or where such practices involve an employee in a work place in a foreign country, and compliance . . . would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such work place is located[.]<sup>53</sup>

Thus, an employer may discriminate on the basis of age where he can prove that age is a *bona fide occupational qualification* (BFOQ) reasonably necessary to the normal operation of the particular business.

This may be a rather difficult task, however, as courts

<sup>51</sup> ADEA, *supra* note 6, § 623(f) (1985); see also C. EDELMAN & I. SIEGLER, *supra* note 13, at 97 (in a section devoted to lawful practices under the ADEA, the authors note that the "ADEA recognizes that not all refusals to hire or terminations of older persons represent instances of age discrimination in employment").

<sup>52</sup> *Hodgson v. Tamiami Trail Tours, Inc.*, 4 Empl. Prac. Dec. (CCH) ¶ 7795, 4 Fair Empl. Prac. Cas. (BNA) 728, 730 (S.D. Fla. 1972) (concluding that "Congress has sought to temper the ideals embodied in the Act with the practical knowledge that differentiation based on age is reasonably necessary to the normal operation of some particular business[es] or to specific positions within some businesses"), *aff'd*, 531 F.2d 224 (5th Cir. 1976).

<sup>53</sup> ADEA, *supra* note 6, § 623(f)(1) (emphasis added). The ADEA also makes it lawful for an employer

- (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 [the Act], except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or
- (3) to discharge or otherwise discipline an individual for good cause.

*Id.* § 623(f)(2), (3).

have repeatedly held that the goals of the Act and the serious ramifications of abuse require that the BFOQ exception be narrowly interpreted.<sup>54</sup> This is especially true considering the fact that both the Department of Labor and the Equal Employment Opportunity Commission, the two federal agencies that have been responsible for enforcement of the ADEA, consistently advocate an extremely narrow interpretation of the BFOQ defense.<sup>55</sup> An additional problem with the BFOQ exception is that the Act does not articulate any criteria to evaluate in determining what is reasonably necessary to the normal operation of the particular business.<sup>56</sup> This has naturally meant that the subject has remained open to judicial interpretation on a case-by-case basis.<sup>57</sup>

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<sup>54</sup> See *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (noting that the recommendations of the Secretary of Labor and EEOC, both of whom have consistently advocated a narrow interpretation of the BFOQ, should be followed); *EEOC v. Boeing Co.*, 843 F.2d 1213, 1217 n.4 (9th Cir.) (the court concluded that "[b]ecause the BFOQ defense substitutes a blanket rule for individual evaluation, it is 'an extremely narrow exception' to the statute's general principles"), *cert. denied*, 109 S. Ct. 222 (1988); *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 991 (5th Cir. 1984) (citation omitted) (the "BFOQ defense is regarded as a narrow exception to the general prohibition against age discrimination), *cert. denied*, 472 U.S. 1027 (1985); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir.) (citations omitted) ("courts have consistently held that the BFOQ exception to the ADEA is to be interpreted narrowly . . ."), *cert. denied*, 464 U.S. 992 (1983); *EEOC v. Pennsylvania Liquor Control Bd.*, 565 F. Supp. 520, 522 (E.D. Pa. 1983) (citing *Orzel*, 697 F.2d at 748) (the goals of the ADEA "counsel against an expansive interpretation of the BFOQ defense").

<sup>55</sup> See 29 C.F.R. § 1625.6 (1988) (the Department of Labor states that the BFOQ exception "will have a limited scope and application"); see also *Orzel*, 697 F.2d at 748. The court noted that:

both the Department of Labor, the federal agency originally entrusted with the enforcement of the ADEA, and the Equal Employment Opportunity Commission, to whom enforcement responsibilities were transferred in 1979, have consistently advocated an extremely narrow interpretation of the BFOQ defense. Such an interpretation by the agencies charged with enforcement of the ADEA is, of course, entitled to considerable weight.

*Id.* (citations omitted).

<sup>56</sup> PRACTISING LAW INSTITUTE, *supra* note 14, at 192 n.124.

<sup>57</sup> See *Western Airlines*, 472 U.S. at 411 (noting that "[t]he diverse employment situations in various industries . . . forced Congress to adopt a 'case-by-case basis . . . as the underlying rule in administration of the legislation'"); *Boeing*, 843 F.2d at 1216-17 n.4 (an "[i]ndividualized case-by-case evaluation of each employee is the underlying principle of administration under [the] ADEA").



## B. Application

The BFOQ exception is an affirmative defense to a claim of age discrimination, and as such, the employer has the burden of proving that it is applicable.<sup>58</sup> Because of the lack of guidelines contained in the Act itself for determining when a certain age may be reasonably necessary for a particular business, it was unclear exactly what the employer must prove. Consequently, many courts have dealt with this question in detail.<sup>59</sup>

### 1. Standard Borrowed from Title VII Discrimination Cases

In determining the requirements for establishing a BFOQ defense, courts have often relied by analogy on tests articulated in discrimination cases falling under

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<sup>58</sup> See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122-25 (1985) (recognizing that the BFOQ is a defense to an age discrimination claim, but holding that the employer had not shown that it was applicable); *Monroe v. United Airlines, Inc.*, 736 F.2d 394, 400 (7th Cir. 1984) (holding that the airline employer had the burden of proving the BFOQ affirmative defense), *cert. denied*, 470 U.S. 1004 (1985); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 753 (7th Cir.) (requiring that the employer show the requirements of a BFOQ defense), *cert. denied*, 464 U.S. 992 (1983); *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981) ("to justify a refusal to hire under the BFOQ exception contained in the Age Discrimination in Employment Act, the burden is on the employer . . ."); see also 29 C.F.R. § 1625.6(b) (1988). Section 1625.6(b) of Title 29 of the Code of Federal Regulations states that:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

*Id.*

<sup>59</sup> See generally *Mahoney v. Trabucco*, 738 F.2d 35, 38-39, 42 (1st Cir.) (holding that an employer must establish that age is a BFOQ for the well recognized occupation within a particular business and not just for the particular business itself), *cert. denied*, 469 U.S. 1036 (1984); *Orzel*, 697 F.2d at 753 (employer must satisfy a two-pronged test in order to establish a BFOQ defense to an age discrimination claim); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 844 (6th Cir. 1982) (when an employer is trying to establish a BFOQ on the basis of "the safety of the persons other than the one claiming discrimination, a particular inquiry into the effect of aging on the ability to perform safely is called for"); *EEOC v. Pennsylvania Liquor Control Bd.*, 565 F. Supp. 520, 522 (E.D. Pa. 1982) (citation omitted) (to "successfully invoke the BFOQ defense, an employer must demonstrate that the challenged policy is related to the duties of the particular job").

prohibitions of the Civil Rights Act in Title VII.<sup>60</sup> *Hodgson v. Greyhound Lines, Inc.*<sup>61</sup> involved an interstate bus company engaged in a practice of refusing to hire new drivers who were thirty-five years of age or older.<sup>62</sup> Greyhound asserted that age was a BFOQ because hiring new drivers over the age of thirty-five did not give the company enough time to train them properly, and incomplete training combined with the degeneration of abilities that occurs with age would seriously affect passenger safety.<sup>63</sup>

In reversing the decision of the district court that the BFOQ defense was not applicable,<sup>64</sup> the Seventh Circuit adopted the test set forth in *Diaz v. Pan American World Airways, Inc.*,<sup>65</sup> a Title VII action.<sup>66</sup> The Seventh Circuit concluded in *Greyhound* that:

Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate, however, a *minimal increase in risk of harm* for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.<sup>67</sup>

(emphasis added) The court believed that Greyhound had met this burden by establishing that the essence of its

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<sup>60</sup> 42 U.S.C. §§ 2000e to 2000e-12 (1982 & Supp. V 1987). The Civil Rights Act of 1964 deals, in part, with employment discrimination on the basis of "race, color, religion, sex, or national origin". *Id.* § 2000e-2(a); see *supra* notes 23-25 and accompanying text for a discussion regarding the decision not to include age discrimination among the types of discrimination prohibited in the 1964 Civil Rights Act.

<sup>61</sup> 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

<sup>62</sup> *Id.* at 860.

<sup>63</sup> *Id.* at 863.

<sup>64</sup> The district court decision is reported at 354 F. Supp. 230 (N.D. Ill. 1973).

<sup>65</sup> 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). The court in *Diaz* interpreted the ADEA's language requiring that a BFOQ be "reasonably necessary to the normal operation of that particular business" to mean that, in order to be eligible for using the defense, an employer must show that the essence of the business operation would be undermined by hiring persons within the class protected by the statute. *Id.* at 388.

<sup>66</sup> *Greyhound*, 499 F.2d at 862.

<sup>67</sup> *Id.* at 863 (emphasis added).

operations—the safe transportation of passengers—would be undermined by hiring people over the age of thirty-five.<sup>68</sup>

*Usery v. Tamiami Trail Tours, Inc.*<sup>69</sup> presented the Fifth Circuit with similar facts, and although it agreed with the Seventh Circuit's decision on the merits in *Greyhound*, it disagreed with that court's articulation of the appropriate test to be used in establishing a BFOQ defense.<sup>70</sup> The Fifth Circuit concluded that, in addition to demonstrating that the *Diaz* "essence of operations" test was met, an employer attempting to invoke the BFOQ defense must also demonstrate that a second test, articulated in *Weeks v. Southern Bell Telephone & Telegraph Co.*,<sup>71</sup> was satisfied.<sup>72</sup> The *Weeks* case established that an employer must show either that it had a reasonable cause for believing that all or substantially all of the members of the affected class would be unable to perform the job safely or effectively, or that it would be impossible or highly impractical to deal with the class members on an individual basis.<sup>73</sup>

The Seventh Circuit had concluded in *Greyhound* that the *Weeks* and *Diaz* tests were inconsistent.<sup>74</sup> The Fifth Circuit, however, rejected any inconsistency and stated that the *Diaz* test was merely an affirmation and elaboration of the *Weeks* rationale.<sup>75</sup> According to the Fifth Cir-

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<sup>68</sup> *Id.* at 865. This decision has been criticized because it "frustrates congressional intent, as expressed in the enactment of the ADEA, by permitting arbitrary and unreasonable age discrimination through an overly broad application of the BFOQ exception." C. EDELMAN & I. SIEGLER, *supra* note 13, at 104 n.98 (quoting XVI B.C. INDUS. & COM. L. REV. 688, 691 (1975)).

<sup>69</sup> 531 F.2d 224 (5th Cir. 1976).

<sup>70</sup> *Id.* at 235.

<sup>71</sup> 408 F.2d 228 (5th Cir. 1969).

<sup>72</sup> *Usery*, 531 F.2d at 235-37. The *Usery* court went on to apply both tests. *Id.*

<sup>73</sup> *Weeks*, 408 F.2d at 235 & n.7. For a discussion on the requirements of and the differences between the *Weeks* and *Diaz* tests, see Tuohy v. Ford Motor Co., 675 F.2d 842, 844 (6th Cir. 1982).

<sup>74</sup> *Greyhound*, 499 F.2d at 861-62.

<sup>75</sup> *Usery*, 531 F.2d at 235 & n.27. In rejecting the notion that the *Diaz* and *Weeks* tests were inconsistent, the Fifth Circuit noted that:

[T]he *Diaz* requirement of a correlation between the job description and the essence of the business operation is a condition precedent to the application of *Weeks'* BFOQ exception to the ban on hiring dis-

cuit, the application of the BFOQ exception test articulated in *Weeks* must be preceded by a *Diaz* determination that a correlation exists between the job description and the essence of the business' operations.<sup>76</sup> Thus, the Fifth Circuit concluded that the court in *Greyhound* had misinterpreted, albeit harmlessly, the appropriate test for establishing a BFOQ defense by failing to recognize the *Weeks* aspect of the test.

Despite this conclusion, the Seventh Circuit later interpreted the *Greyhound* decision as supporting the two-pronged test used in *Usery* for establishing a BFOQ defense.<sup>77</sup> In *Orzel v. City of Wauwatosa Fire Department*,<sup>78</sup> the court stated that *Greyhound* was consistent "with the approach taken by virtually every other circuit that has addressed the scope of the BFOQ exception."<sup>79</sup> The court concluded that this approach meant that:

[I]n order to prevail on a BFOQ defense, an employer must show that the challenged age qualification is reasonably related to the "essential operation" of its business, and must demonstrate *either* that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, or that it is impossible or impracticable to determine job fitness on an individualized basis.<sup>80</sup>

This approach, originally developed by the Fifth Circuit and followed by other courts, has also been adopted by

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crimination. As such, *Diaz* affirms and elaborates on the *Weeks* rationale . . . . [*Diaz*] represented an evolution of *Weeks* to cover attempts by employers to discriminate on the basis of job descriptions not related to the essence of the employer's business.

*Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 753 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; see also *Mahoney v. Trabucco*, 738 F.2d 35, 37 (1st Cir.) (adopting the standard enunciated in *Orzel*), *cert. denied*, 469 U.S. 1036 (1984); *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981) (in order to establish a BFOQ defense the employer must meet a two-pronged test).

<sup>80</sup> *Orzel*, 697 F.2d at 753 (footnote omitted).

the Supreme Court in *Western Airlines, Inc. v. Criswell*.<sup>81</sup> Thus, the standard for establishing a BFOQ defense to a claim of age discrimination has been determined.

## 2. *Additional Factors in Establishing a BFOQ*

Courts consider a variety of additional factors when evaluating whether a particular employer has met the standard adapted from the Title VII decisions. Many courts have held that the applicability of the BFOQ defense depends not only on the employer's essence of operations but also on his ability to show that the age policy is "related to the duties of the *particular* job."<sup>82</sup> In fulfilling this requirement, the employer "may not rely upon 'stereo-typical notions or hunches;' rather, it must adduce an 'empirical justification' for its age limit."<sup>83</sup> Thus, the mere allegation that safety concerns are part of the essence of the employer's operations is insufficient to justify discrimination based on age. The employer must also show that age requirements for certain jobs are necessary because of the particular duties of that job.

Additionally, Congress intended that the validity of a BFOQ defense turn on specific factual findings, preferably by a jury.<sup>84</sup> Consequently, it appears that the availability of a BFOQ defense will necessarily depend on the particular facts in each case. Courts have also generally held that economic considerations cannot be the basis for a BFOQ defense because "precisely those considerations

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<sup>81</sup> See *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 416-17 (1985). The Department of Labor also adopted this approach as establishing the employers burden of proof under a BFOQ defense. See 29 C.F.R. § 1625.6 (1988).

<sup>82</sup> *EEOC v. Pennsylvania Liquor Control Bd.*, 565 F. Supp. 520, 522 (E.D. Pa. 1983) (citations omitted) (emphasis added); see also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) ("[e]very court to consider the issue has assumed that the 'particular business' to which the statute refers is the job from which protected individual is excluded").

<sup>83</sup> *Pennsylvania Liquor Control Bd.*, 565 F. Supp. at 522 (quoting *Beck v. Borough of Mannham*, 505 F. Supp. 973, 975 (E.D. Pa. 1981)).

<sup>84</sup> *EEOC v. Boeing Co.*, 843 F.2d 1213, 1216 (9th Cir.), cert. denied, 109 S. Ct. 222 (1988).

were among the targets of the Act.”<sup>85</sup> The fact that it may be more economical to employ younger workers is therefore not a valid justification for age discrimination.<sup>86</sup>

An employer who wishes to defend himself against a claim of age discrimination must meet the two-pronged test that the Fifth Circuit in *Usery* adapted from the *Weeks* and *Diaz* Title VII decisions. Because of the broad goals of the ADEA and the courts’ reluctance to impede these goals by giving the BFOQ an expansive interpretation, this will definitely be a strenuous burden for the employer. The airline industry is one employer that has been rather successful in meeting this burden.

### III. THE BONA FIDE OCCUPATIONAL QUALIFICATION IN THE AIRLINE INDUSTRY

#### A. *Special Considerations of the Airline Industry*

The airline industry is a unique employer, serving unique needs. Unlike many employers, thousands of innocent and trusting people depend on airlines every day for safe and efficient transportation. These people assume that flying is a safe form of travel, and the airline industry’s continued success is dependent on its passengers’ assumptions about safety in the skies. If passengers begin to question the safety of air travel, they might choose another means of transportation. Consequently, like the bus company in *Greyhound*,<sup>87</sup> safety is a primary concern for airlines.

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<sup>85</sup> *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981). *But see Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 n.6 (D.C. Cir. 1981) (in which the court stated that “an economic benefit which is merely incidental or collateral to an otherwise perfectly valid BFOQ is not sufficient reason to declare the same legally invalid”), *cert. denied*, 456 U.S. 915 (1982).

<sup>86</sup> *See supra* notes 48-49 and accompanying text for a discussion of employers’ alleged justifications for age discrimination, most of which have been criticized as unfounded. This may be especially true of the commonly held belief that older workers are less productive than younger employees.

<sup>87</sup> *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *see supra* notes 61-68 and accompanying text for a discussion of *Greyhound*.

1. *The Impact of the Safety Factor on an Airline's Claim That the BFOQ Defense Is Applicable*

Congress recognized the importance of safety considerations in the airline industry and mandated that airlines operate with the highest possible degree of care.<sup>88</sup> With the burgeoning amount of air traffic and the possibility of a proportionate increase in air disasters, it is no wonder that safety concerns continue to be of the utmost importance.<sup>89</sup> Because of the large number of persons currently engaging in air travel and the extensive losses likely to be incurred in the event of a mishap, airlines should take great care to ensure passenger safety. Since the airlines probably have the best ability to determine how to operate at the safest level, at least one court has concluded that great deference should be given to an airline's determination of the safest possible standards for operation.<sup>90</sup>

In establishing the BFOQ defense, Congress implicitly recognized that, in some instances, safety concerns might weigh heavily in favor of age discrimination, despite the drastic results of such discrimination.<sup>91</sup> Consequently, if

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<sup>88</sup> 49 U.S.C. § 1421(b) (Supp. V 1987). This mandate is set forth in the Federal Aviation Act which states that "[i]n prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . ." *Id.*

<sup>89</sup> See *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). The District of Columbia Circuit concluded that "the airline industry is one in which safety is of the utmost importance," and the "staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact." *Id.*

<sup>90</sup> *Id.* The court decided that:

[I]n our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*. . . . This is in accord with American's view that "safe" is not sufficient. Rather, the "safest" possible air transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.

*Id.*

<sup>91</sup> See *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976) (in which the court stated that the "greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving").

the essence of the business' normal operations involved public safety, and if the employer's age requirement furthered these goals, then a BFOQ might be established.<sup>92</sup> Additionally, the Department of Labor has promulgated certain regulations regarding the applicability of the BFOQ defense<sup>93</sup> which recognize that:

[A] BFOQ defense permits federal statutory and regulatory compulsory retirement provisions imposed to protect public safety without reference to the individual's ability to perform the job. [Thus,] the government body responsible for interpreting the ADEA recognizes that a BFOQ defense does not have to relate solely to the employee's age and ability to perform the job assigned.<sup>94</sup>

Public safety, therefore, has been recognized as a valid employer concern which could justify, in appropriate circumstances, the application of the BFOQ defense to a claim of age discrimination.

The Supreme Court has held that the two-pronged test used by employers in establishing a BFOQ defense must also be met by employers attempting to justify age discrimination because of safety concerns.<sup>95</sup> The Equal Em-

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For a discussion on the effects of age discrimination in employment, see *supra* notes 13-20 and accompanying text.

<sup>92</sup> See *Usery*, 531 F.2d at 235 (an employer's burden may be met if it establishes that some members of the otherwise protected class "possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class").

<sup>93</sup> 29 C.F.R. § 1625 (1988). Section 1625 notes that "[i]f the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." *Id.* § 1625.6(b).

<sup>94</sup> *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 993 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

<sup>95</sup> *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 416-17 (1985). The Supreme Court stated that:

Every Court of Appeals that has confronted a BFOQ defense based on safety considerations has analyzed the problem consistently with the [*Usery*] standard. An EEOC regulation embraces the same criteria. Considering the narrow language of the BFOQ exception, the parallel treatment of such questions under Title VII, and the uniform application of the standard by the federal courts, the EEOC, and Congress, we conclude that this two-part inquiry properly iden-



ployment Opportunity Commission (EEOC) also has concluded that this two-part test adequately accounts for justifications of age discrimination based on public safety.<sup>96</sup> Thus, mere allegations that a particular age requirement furthers public safety will not lessen the burden an employer must meet.<sup>97</sup> Consequently, an airline employer will have to satisfy the test originally applied in *Usery* in order to establish a BFOQ based on safety concerns.

The airline's burden of proof does not end upon satisfying the two-pronged test, however. The EEOC followed Congress' lead and also concluded that, in addition to meeting that test, the employer concerned with public safety must prove that the challenged practice furthers that goal and that no acceptable, less discriminatory alternative exists to equally advance safety.<sup>98</sup> Additionally, due to the constant advances in medical science that could allow for individual testing of older employees, the mere fact that age was determined to be a "public safety based" BFOQ in the past does not mean that it will continue to be a BFOQ in the future.<sup>99</sup> Thus, the airlines' employment practices will have to continue to evolve with the increasing ability to test pilots individually for age-related safety hazards.

## 2. *The Federal Aviation Administration's Age Sixty Rule*

The airline industry is unique in that the Federal Avia-

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tifies the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety.

*Id.*

<sup>96</sup> 29 C.F.R. § 1625.6 (1988); 46 Fed. Reg. 47,727 (1981).

<sup>97</sup> *Western Airlines*, 472 U.S. at 416-17.

<sup>98</sup> *EEOC v. Pennsylvania Liquor Control Bd.*, 565 F. Supp. 520, 523 (E.D. Pa. 1983) (quoting 29 C.F.R. § 1625.6 with approval); *see supra* note 93 for the partial text of 29 C.F.R. § 1625.

<sup>99</sup> *Monroe v. United Airlines, Inc.*, 736 F.2d 394, 405 (7th Cir. 1984) (in which the court concluded that "a once-valid BFOQ may lose its justification with advances in medical science" and the mere fact that age "may have been a BFOQ in 1978 does not place it beyond challenge now"), *cert. denied*, 470 U.S. 1004 (1985).

tion Administration (FAA) has promulgated a regulation which effectively requires mandatory retirement for pilots of large commercial aircraft.<sup>100</sup> This regulation, commonly called the "FAA Age Sixty Rule," provides that:

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.<sup>101</sup>

The FAA has justified this provision on the basis that the physical and psychological consequences of aging, and the inability to gauge with accuracy the effects aging will have on a particular individual, necessitate a policy of across the board age discrimination in the interests of public safety.<sup>102</sup>

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<sup>100</sup> FAA Age Sixty Rule, 14 C.F.R. § 121.383(c) (1989). This provision generally requires pilots to retire at the age of sixty. *Id.* The rules set forth in Section 121 govern the following:

(1) Each air carrier engaging in interstate or overseas air transportation under a certificate of public convenience and necessity or other appropriate economic authority issued by the CAB. (2) Each air carrier engaging in foreign air transportation under a certificate of public convenience and necessity or other appropriate economic authority issued by the CAB. (3) Each air carrier covered by paragraph . . . (1) or (2) of this section when engaging in charter flights or other special service operations. (4) Each supplemental air carrier when it engages in the carriage of persons or property in air commerce for compensation or hire. (5) Each commercial operator when it engages in the carriage of persons or property in air commerce for compensation or hire — (i) With large aircraft other than airplanes; or (ii) As a common carrier solely between places entirely within any state of the United States, with airplanes having a seating capacity of more than 30 passengers or a maximum payload capacity of more than 7,500 pounds. (6) Each air carrier when it engages in all-cargo air service under a certificate issued by the CAB under section 418 of the Federal Aviation Act of 1958.

*Id.* § 121.1(a).

<sup>101</sup> *Id.* § 121.383(c) (1989).

<sup>102</sup> See 49 Fed. Reg. 14,695 (1984) (codified at 14 C.F.R. § 121) (noting that "incapacitating medical events" and "adverse psychological, emotional, and physical changes" occur as a result of the aging process, and the "inability to detect or predict with precision an individual's risk of sudden or subtle incapacitation, in the face of known age-related risks, counsels against relaxation of the rule"); see also *Aman v. FAA*, 856 F.2d 946, 948 (7th Cir. 1988) (the court noted that in

The FAA regulation appears to concretely establish that age is a BFOQ for pilots in the airline industry. The courts, however, generally have not considered the FAA regulation as conclusive evidence of a BFOQ.<sup>103</sup> Consequently, although the FAA regulation can certainly be considered by a court in determining whether an employer is justified in discriminating on the basis of age due to safety considerations, it does not automatically establish such a defense.

The FAA Age Sixty Rule certainly does have an impact on an airline's hiring and retention policies. Although the Rule does not explicitly mandate retirement, it implicitly requires that air carrier pilots wishing to continue piloting after the age of sixty meet certain medical requirements and limit their piloting to non-carrier positions or accept a demotion in cockpit position.<sup>104</sup> In promulgating the rule, the FAA was concerned with the increased medical problems associated with aging and the tragic effects that would result from a medical emergency occurring during flight.<sup>105</sup>

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defending the Age Sixty Rule at its inception, "the FAA cited concerns about sudden incapacitation due to strokes and heart attacks and about the ability of the most senior pilots to operate the largest and fastest planes . . ."); *EEOC v. Boeing Co.*, 843 F.2d 1213, 1215 (9th Cir.) (summarizing the findings upon which the FAA Age Sixty Rule is based: "namely, that progressive deterioration occurs with age; that sudden incapacity becomes significantly more frequent after age 60; that the risk of such incapacity could not be gauged adequately except by reference to age; and therefore that the Age-60 Rule was necessary for safety of air carriers"), *cert. denied*, 109 S. Ct. 222 (1988).

<sup>103</sup> See *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 418 (1985). In *Western Airlines*, the Supreme Court stated that:

Although the FAA's rule for pilots, adopted for safety reasons, is relevant evidence in the airline's BFOQ defense, it is not to be accorded conclusive weight. The extent to which the rule is probative varies with the weight of the evidence supporting its safety rationale and "the congruity between the . . . occupations at issue."

*Id.* (citation omitted).

<sup>104</sup> 14 C.F.R. § 121.383(c) (1989); see also *Aman*, 856 F.2d at 948 (noting that the FAA Age Sixty Rule means that "to remain in the cockpit air carrier pilots must continue to meet medical certificate requirements and restrict themselves to flights outside the coverage of Part 121 [commercial air carriers] or accept demotions to positions of lesser authority, such as those of flight instructor or flight engineer").

<sup>105</sup> See *O'Donnell v. Shaffer*, 491 F.2d 59, 60 (D.C. Cir. 1974); *Airlines Pilots*

Some courts have begun to question the continuing validity of and need for this rule as well as its rigid application by the FAA. In *Aman v. Federal Aviation Administration*,<sup>106</sup> the Seventh Circuit noted that potential flight problems stemming from age may be offset by the increased experience of older pilots.<sup>107</sup> Additionally, the advances in medical science which would permit more thorough individual testing may justify the revocation of the blanket prohibition.<sup>108</sup> Thus, although the FAA has not committed an abuse of discretion in applying the rule without exception in the past, such an application might become an abuse if medical technology advances to a point where individual testing is feasible.<sup>109</sup> The revocation of the FAA Age Sixty Rule would have a serious detrimental effect on the airline's ability to justify age as a

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*Ass'n, Int'l v. Quesada*, 276 F.2d 892, 898 (2d Cir. 1960). In *Quesada*, the court noted that in promulgating the Age Sixty Rule, the FAA

found that the number of commercial pilots over sixty years of age has until recent years been very few but is increasing rapidly; that older pilots because of their seniority under collective bargaining agreements often fly the newest, largest, and fastest planes; that available medical studies show that sudden incapacitation due to heart attacks or strokes become more frequent as men approach sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks; that a number of foreign air carriers contacted had mandatory retirement ages of sixty or less; and that numerous aviation safety experts advocated establishing a maximum age of sixty or younger.

*Quesada*, 276 F.2d at 898; see also *supra* note 102 and accompanying text for additional information about the FAA's justifications for the Age Sixty Rule.

<sup>106</sup> 856 F.2d at 946.

<sup>107</sup> *Id.* at 954-57.

<sup>108</sup> *Id.* at 948. Additionally, at the inception of the Age Sixty Rule in 1960 the FAA itself noted that "medical science may at some future time develop accurate, validly selective tests which would safely allow selected pilots to fly in air carrier operations after age sixty." 24 Fed. Reg. 9772 (1959).

<sup>109</sup> See generally *Gray v. FAA*, 594 F.2d 793, 795 (10th Cir. 1979) (although the court held that at that time, the FAA's policy of denying all exemptions to the Age Sixty Rule was not an abuse of discretion, it noted that "[a]t some point, the state of the medical art may become so compellingly supportive of a capacity to determine functional age equivalents in individual cases that it would be an abuse of discretion not to grant an exemption"); *Starr v. FAA*, 589 F.2d 307, 314 (7th Cir. 1978) (noting that the FAA may adhere inflexibly to the Age Sixty Rule "until it is satisfied that medical standards can demonstrate an absence of risk factors in an individual sufficient to warrant a more liberal application of the Age 60 Rule").

BFOQ for the position of pilot, since the Age Sixty Rule is based on many of the same factors the airlines use in attempting to establish a BFOQ.

Congress and the courts apparently have recognized that public safety concerns can justify age discrimination in some circumstances, and consequently age will be considered a BFOQ in those instances. Despite this recognition, an employer will have to meet stringent proof requirements in order to establish that a safety based BFOQ is justified. An employer in the airline industry may not rely solely on the FAA Age Sixty Rule to establish such a defense for all aircraft employees. The courts obviously are not inclined to let an employer circumvent the goals of the ADEA merely by alleging that safety considerations dictate an age below those protected by the Act.

### B. *Judicial Treatment of the Airlines' BFOQ Defense*

An airline attempting to assert that age is a BFOQ will thus have to carry a burden that is at least equal to that required of other employers. Many courts have had the opportunity to evaluate such claims made by various airlines, but there have been differing results.

#### 1. *Conflict in the Lower Courts*

One of the first cases to address an airline's ability to justify age discrimination by claiming that age was a BFOQ was *Murnane v. American Airlines, Inc.*,<sup>110</sup> which was decided by the District of Columbia Circuit in 1981. Murnane, forty-three, had applied for the position of flight officer and had been turned down because of American's policy of only hiring persons under thirty years of age for such positions.<sup>111</sup> The position of flight officer was the lowest of three cockpit employment levels, the other two being co-pilot and captain.<sup>112</sup> American's "crew-concept"

<sup>110</sup> 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

<sup>111</sup> *Id.* at 99-100 (noting that "American has a general guideline against hiring persons over the age of thirty for the beginning position of Flight Officer").

<sup>112</sup> *Id.* at 99 American's general policy was that the "position of Flight Officer is

was that the two lower levels would be training positions for the ultimate goal of captaincy, and all crew members were hired with this goal in mind.<sup>113</sup> The entire process of advancing among these positions took an average of fourteen to twenty years,<sup>114</sup> and American did not permit anyone to establish a permanent career in either of the two lower positions.<sup>115</sup>

The court recognized that aviation accidents were largely a result of pilot error, and that these errors decreased as the pilot gained experience.<sup>116</sup> Since a pilot's experience would increase as he got older, the increased age of a pilot was not a detriment but a benefit to safety.<sup>117</sup> The problem, according to the court, was that American's crew concept required that all pilots progress

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the first of three employment levels, i.e., Flight Officer, Co-pilot, and Captain, which ultimately leads to a captaincy in an American Cockpit". *Id.*

<sup>113</sup> *Id.* (stating that "[i]t is American's fixed policy to require all Flight Officers to advance to the position of Captain" and nobody "is hired by American without this goal in mind").

<sup>114</sup> *Id.* at 99 n.2 (finding that "it takes an average of fourteen to twenty years to progress from the position of Flight Officer to that of Captain under American's extensive training system," although conflicting evidence was presented on this issue).

<sup>115</sup> *Id.* at 99. The court found that American was consistent in its use of the lower level positions as a training device:

This is referred to as American's "up-or-out" policy. More specifically, if a Flight Officer or Co-pilot has received the maximum amount of training required for such position and is not qualified at that juncture to advance to the next post, then it is American's policy to terminate such person's employment. American's procedures do not allow for a career as a Flight Officer or Co-pilot.

*Id.* (footnote omitted).

<sup>116</sup> *Id.* at 100 (noting that approximately ninety percent of all aviation accidents were a result of pilot error, and these incidents decreased with pilots who had more experience).

<sup>117</sup> *Id.* at 100 n.4. In affirming the district court's conclusion that age was a BFOQ for American, the court stated that:

It is noteworthy to us that the district court did not premise his BFOQ determination on a finding that there exists a correlation between the increased chronological age of a pilot and his or her decreased ability to operate an aircraft in a safe manner. On the contrary, he concluded that an older Captain who had served in that position for the longest possible period of time would be the safest Captain.

*Id.*

through the two lower-level crew positions before acting as a captain.<sup>118</sup> Because of the FAA Age Sixty Rule and the amount of time that was required to advance to the position of captain, older flight officers would only be able to serve as captain for a short period of time.<sup>119</sup> Upon their retirement, other pilots new to captaincy would succeed them, thus resulting in a decrease in experienced captains.<sup>120</sup>

Consequently, requiring American to hire older flight officers would result in less experienced captains, and this would jeopardize public safety.<sup>121</sup> By setting an age limit for new members of the cockpit crew, American maximized safety,<sup>122</sup> and the safe transportation of passengers was the essence of American's operations.<sup>123</sup> American had thus successfully justified its age discrimination by establishing that an age lower than forty was a BFOQ for a position as a flight officer because it resulted in experienced pilots remaining in the captaincy position for a longer amount of time before they were required to retire at age sixty.<sup>124</sup> The court then concluded that even if age had not been established as a BFOQ, the refusal to hire Murnane was still justified because the evidence indicated that he was not completely qualified for the position of

<sup>118</sup> *Id.* at 99 n.2.

<sup>119</sup> *Id.* at 100. The court recognized that:

[S]ince it takes at least ten to fifteen years to progress from Flight Officer to Co-pilot to Captain, if appellant were hired as Flight Officer in his forties he would probably not become Captain until his late fifties. The Federal Aviation Administration itself requires retirement at age 60, so that he would be able to serve only briefly as an American Captain before he had to retire.

*Id.*

<sup>120</sup> *Id.* As a result, American limited "its new hiring to relatively young pilots."

*Id.*

<sup>121</sup> *Id.* (the court concluded that the safest pilot is the one with the most experience, and "the best experience an American Captain can have is acquired by flying American aircraft in American's three cockpit positions").

<sup>122</sup> *Id.* ("by limiting its new hiring to relatively young pilots, American thereby ensures that the experience with American of its active Captains will be maximized" and this "maximizes safety").

<sup>123</sup> *Id.* at 101.

<sup>124</sup> *Id.* at 100.

flight officer regardless of age.<sup>125</sup>

Ironically, seven days after *Murnane* was decided, the Fourth Circuit reached almost the exact opposite conclusion in *Smallwood v. United Airlines, Inc.*<sup>126</sup> United had an aircraft crew classification system essentially identical to that of American's in *Murnane*.<sup>127</sup> Smallwood, a forty-eight year old pilot, had been refused a position as a flight officer because of his age.<sup>128</sup>

United's alleged BFOQ, however, was purportedly based on different factors than the one established by American. In attempting to establish a BFOQ defense, United did not use the same reasoning as American had in *Murnane*. Instead, United asserted that hiring pilots over the age of thirty-five would "disproportionately increase the chance of medical emergencies during flight."<sup>129</sup> Additionally, United argued that hiring older pilots would adversely affect its "crew concept" by requiring it to "un-train" pilots who had previously been with other airlines and learned another method of aircraft operation.<sup>130</sup> United contended that its three-tiered piloting system was effective because throughout each pilot's career, he had

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<sup>125</sup> *Id.* at 101-02. The court concluded that the evidence persuasively demonstrated that Murnane "would not have been selected during later stages of the pilot selection process" because of "major deficiencies in both [his] judgment and in his flying skill itself." *Id.* at 102. Consequently, because American proved that Murnane would not have been hired even if it had not engaged in the allegedly discriminatory hiring practices, Murnane was not entitled to recover. *Id.*

<sup>126</sup> 661 F.2d 303 (4th Cir. 1981).

<sup>127</sup> *Id.* at 305 n.2 (United classified its aircraft crew into three levels — Second Officer, First Officer, and Captain — and a new hire would progress through each position); see *supra* notes 112-115 and accompanying text for a discussion of American's classification system in *Murnane*.

<sup>128</sup> *Smallwood*, 661 F.2d at 306. United's policy was that "a maximum age of 35 at hire was necessary to achieve peak productivity." *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* United had focused its testimony "[o]n the fact that there was an 'un-training' factor to be considered when evaluating the desirability of employing pilots with significant prior experience. It was further noted that difficulties might arise when someone moved from a command position elsewhere to a subordinate position with United." *Id.* at 306-07. Smallwood, however, discredited United's argument by presenting "uncontradicted evidence that major air carriers find applicants with prior Navy or Air Force experience especially desirable." *Id.* at 307.



only been introduced to United's way of operating.<sup>131</sup>

The Fourth Circuit did not believe that United had surpassed the two-pronged test required to establish a BFOQ.<sup>132</sup> The court concluded that there was no evidence to support United's claim that hiring pilots over the age of thirty-five would impair its "crew concept."<sup>133</sup> Thus, the court found that the second prong of the test had not been met because United had not established that substantially all pilots hired within Smallwood's age range would not be able to perform effectively.<sup>134</sup> Additionally, the court concluded that United's medical tests were sufficiently advanced to determine which of these potential pilots might cause a safety risk due to health problems in flight.<sup>135</sup>

Approximately one year later, the Fifth Circuit expressed its views regarding age discrimination in the airline industry and sided with the District of Columbia Circuit.<sup>136</sup> In *Johnson v. American Airlines, Inc.*,<sup>137</sup> the airline did not refuse initial employment because of an appli-

<sup>131</sup> *Id.* at 306. United's "crew concept" was that their pilots interacted effectively because throughout their career they learned one, and only one, method of aircraft operation — United's. *Id.*

<sup>132</sup> *Id.* at 308. United's evidence "failed to show a relationship between a maximum age-at-hire limitation and airline safety." *Id.* at 309. For a discussion of the two-pronged test required for an employer to establish a BFOQ defense to a claim of age discrimination, see *supra* notes 69-81 and accompanying text.

<sup>133</sup> *Smallwood*, 661 F.2d at 308 (the court essentially concluded that a BFOQ defense was not established because the alleged harm to the cockpit crew was not a function of age).

<sup>134</sup> *Id.* The court emphasized that under "United's pilot progression policy, Smallwood, if employed, would probably remain a Second Officer until his mandatory retirement at age 60. It is undisputed that a significant number of United's pilots maintain Second Officer status from hire to mandatory retirement" at age sixty. *Id.* Consequently, it was difficult for United to establish that all or substantially all persons within Smallwood's age range would be unable to perform safely when it was already permitting such persons to act in that capacity. *Id.*

<sup>135</sup> *Id.* at 308-09.

<sup>136</sup> *Johnson v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). The court recognized the two apparently conflicting decisions in *Smallwood* and *Murnane*, but concluded that *Murnane* was the better decision because the *Smallwood* court relied on authority that did not involve the BFOQ defense. *Id.* at 991-92, 993 n.3.

<sup>137</sup> 745 F.2d at 988.

cant's age, as in the two previously discussed cases. Instead, the plaintiffs were American Airlines captains who wanted to continue working in the position of flight officer after their sixtieth birthdays.<sup>138</sup> The court concluded that sufficient evidence had been presented to justify a jury verdict that American had established a BFOQ defense.<sup>139</sup> The court emphasized that safety factors weighed heavily in favor of supporting American's policy of using the flight officer position as a training ground for future captains.<sup>140</sup>

## 2. *The Supreme Court Fails to Resolve the Conflict*

In 1985, the United States Supreme Court addressed the applicability of the BFOQ defense in the airline industry in *Trans World Airlines v. Thurston*.<sup>141</sup> Trans World permitted flight engineers to continue working past the age of sixty but did not automatically allow captains to transfer to flight engineer status after they were forced to discontinue piloting due to the FAA Age Sixty Rule.<sup>142</sup> A pilot approaching the age of sixty could "bid" for a position as flight engineer, but if no vacancy occurred before

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<sup>138</sup> *Id.* at 991.

<sup>139</sup> *Id.* at 994. The court held that:

[T]here was evidence to support the jury's verdict in favor of American. First, American presented evidence that it used the third crew position to train future pilots and that the possibility existed that so many ex-captains would become flight officers that the training position would be blocked and that safety would possibly be endangered. Second, American presented two expert witnesses who testified that in their opinion the presence of senior ex-captains in the position of third crew member created a possible hazardous situation, and that it was impossible to determine which ex-captains would pose a safety hazard.

*Id.* (footnote omitted).

<sup>140</sup> *Id.* at 992-93. The court noted that in adopting the BFOQ defense, Congress had extensively questioned a New York government official on the applicability of New York's BFOQ defense, and he stated that "[c]onsideration may be given to age as a bona fide occupational qualification . . . where age is a bona fide factor in an apprentice training or on-the-job training program of long duration." *Id.*

<sup>141</sup> 469 U.S. 111 (1985).

<sup>142</sup> *Id.* at 115-17; see *supra* notes 100-109 for a discussion of the FAA Age Sixty Rule.

his sixtieth birthday he was forced to retire.<sup>143</sup> Conversely, a pilot who was displaced for any reason other than age, such as medical disability, did not have to resort to the bidding system but instead was permitted to "bump" a less senior flight engineer.<sup>144</sup>

The Supreme Court affirmed the Second Circuit Court of Appeals' decision that Trans World Airlines' transfer policy was illegally discriminating on the basis of age against the pilots who could not find a vacant flight engineer position.<sup>145</sup> The Court concluded that the BFOQ defense to such discrimination did not apply because "age under 60 is not a BFOQ for the position of flight engineer."<sup>146</sup> The Court did not address, however, the question of whether age is a BFOQ for the flight engineer position when that position is consistently used as the first step in a training program of which the ultimate goal is captaincy. In fact, the Court specifically noted that the airline employed a great number of persons in the flight engineer position who were over sixty years old and could not effectively make such an argument.<sup>147</sup> Consequently, *Trans World* appears to be distinguishable from *Murmane* and *Johnson*.

The Supreme Court again wrestled with the issue of

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<sup>143</sup> *Trans World*, 469 U.S. at 116. The court noted that under Trans World's bidding process:

[A] captain may remain with the airline only if he has been able to obtain "flight engineer status" through the bidding procedures outlined in the collective-bargaining agreement. These procedures require a captain, prior to his 60th birthday, to submit a "standing bid" for the position of flight engineer. When a vacancy occurs, it is assigned to the most senior captain with a standing bid. If no vacancy occurs prior to his 60th birthday, or if he lacks sufficient seniority to bid successfully for those vacancies that do occur, the captain is retired.

*Id.* (footnote omitted).

<sup>144</sup> *Id.* at 116-17 (noting that a captain who was medically disabled could automatically displace a flight engineer with less seniority, and his ability to do this did not depend upon the availability of a vacancy).

<sup>145</sup> *Id.* at 121-24.

<sup>146</sup> *Id.* at 123.

<sup>147</sup> *Id.* at 121 n.18 (noting that the airline had at least 148 persons employed in the capacity of flight engineer who were over the age of sixty).

BFOQ defenses in the airline industry in *Western Airlines, Inc. v. Criswell*,<sup>148</sup> and its decision again did not resolve the extent to which the BFOQ defense is applicable in the airline industry. In this case, Western had imposed a mandatory retirement plan that required flight engineers as well as pilots to retire at age sixty.<sup>149</sup> Consequently, pilots forced to retire at sixty were not permitted to downgrade to the position of flight engineer because flight engineers were forced to retire at the same time.<sup>150</sup> The airline attempted to justify this policy by arguing that the same considerations that established age sixty as a BFOQ for pilots also apply to flight engineers.<sup>151</sup>

Thus, Western was essentially arguing that the FAA Age Sixty Rule<sup>152</sup> should extend to all members of the cockpit crew, and not just to the senior pilots, for safety reasons.<sup>153</sup> The jury rejected this argument, and Western appealed on the grounds that the jury instructions did not adequately emphasize the airline's concern for the safety of its passengers.<sup>154</sup> The Supreme Court affirmed the court of appeal's rejection of this argument, noting that the standard for establishing a BFOQ was "reasonable necessity" and that this adequately permitted evaluations of safety concerns.<sup>155</sup> Despite the extra safety considerations

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<sup>148</sup> 472 U.S. 400, 405 (1985).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* Western denied the requests of pilots approaching age sixty for reassignment as flight engineers, "ostensibly on the ground that [the] employees were members of the company's retirement plan which required all crew members to retire at age sixty". *Id.*

<sup>151</sup> *Id.* at 418. Western attempted to convince the Court that "flight engineers must meet the same stringent qualifications as pilots" and consequently it was "quite logical to extend to flight engineers the FAA's age-60 retirement rule for pilots". *Id.*

<sup>152</sup> For a discussion of the FAA Age Sixty rule, see *supra* notes 100-109 and accompanying text.

<sup>153</sup> *Western Airlines*, 472 U.S. at 406. Western argued that all crew members should be forced to retire at sixty because "with advancing age the likelihood of onset of disease increases and . . . in persons over age sixty it could not be predicted whether and when such disease would occur". *Id.*

<sup>154</sup> *Id.* at 408.

<sup>155</sup> *Id.* at 419. In rejecting Western's argument that the instructions did not adequately emphasize the airline's concern for public safety, the Court concluded

required of the airline industry, Western had not established that an age under sixty was reasonably necessary to the particular job of flight engineer.<sup>156</sup>

As in *Trans World*, however, the idea of a three-tiered training program, which seemed to be of overwhelming importance in *Murnane* and *Johnson*, does not appear to have been emphasized by Western. Consequently, the Supreme Court's position on a BFOQ defense is still unclear when the airline consistently uses the flight engineer position as a training ground for its future pilots.

#### IV. CONCLUSION

The effects of age discrimination on the individual can be devastating, and this is especially true when the particular individual is a competent pilot. A pilot's ability to combat the effects of age discrimination may be less than the ability of persons in other occupations since discrimination in the airline industry is potentially justified due to safety concerns. The overriding concern in the airline industry for public safety might justify such discrimination in situations when it would ordinarily be considered reprehensible.

The courts have not been clear regarding which factors justify the use of this defense in the airline industry. If the

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that the standard required for a BFOQ did not ignore public safety considerations:

When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is "reasonably necessary" to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case. The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound". When the employer's argument has a credible basis in the record, it is difficult to believe that a jury of lay persons — many of whom no doubt have flown or could expect to fly on commercial air carriers — would not defer in a close case to the airline's judgment.

*Id.* at 419-20 (footnote and citation omitted).

<sup>156</sup> *Id.* at 420.

pilot can prove that the airline is discriminating merely for economic reasons or to avoid a perceived increase in the chance of medical emergencies in flight, then the airline will probably be denied the BFOQ defense. In these situations, an airline's discrimination on the basis of age may be unlawful. If the airline can prove that it discriminates in hiring on the basis of age as the result of a valid training program designed to increase pilot experience and expertise, then the pilot may be required to change careers. Although this is certainly unfortunate for the particular pilot involved, the safety interests of the numerous passengers on board apparently outweigh his right to enjoy his chosen livelihood for as long as he may wish.

Although the FAA Age Sixty Rule is not conclusive evidence of a BFOQ, it does appear to be an integral factor in the determination since it imposes a maximum age limit for pilots around which a valid discriminatory training program may be established. With the advance of medical technology, the Age Sixty Rule may become increasingly outdated and obsolete. Even today, courts have begun to question its continued validity. The airlines may be required to make individual determinations regarding a pilot's capacity to remain in that position after the age of sixty, instead of retaining a blanket rule mandating retirement. Consequently, pilots wishing to continue commercial piloting after reaching the age of sixty may have a glimmer of hope, even where the airline's discrimination is part of a training program designed to increase safety in the skies.



# **Current Literature**



