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## Age Discrimination of Airline Pilots: Effects of the Bona Fide Occupational Qualification

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# Comments

## AGE DISCRIMINATION OF AIRLINE PILOTS: EFFECTS OF THE BONA FIDE OCCUPATIONAL QUALIFICATION

BELINDA REED

### I. INTRODUCTION

**C**ONFLICTING DECISIONS<sup>1</sup> have been rendered recently by Federal Courts of Appeals in cases brought by airline pilots under the Age Discrimination in Employment Act (ADEA).<sup>2</sup> The persistent denial of *certiorari*<sup>3</sup> by the United

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<sup>1</sup> Compare *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982) (holding that airline's refusal to employ forty-eight year old pilot was a violation of Age Discrimination in Employment Act) with *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1770 (1982) (holding that airline's refusal to employ forty-three year old pilot was not a violation of Age Discrimination in Employment Act).

<sup>2</sup> The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-34 (1976)) provides in part that:

(a) It shall be unlawful for an employer

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

(2) to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, based on such individual's age; or

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

29 U.S.C. § 623(a) (1976).

The legislative history of the ADEA is presented in the following materials:

See H.R. REP. No. 805, 90th Cong., 1st Sess. (1967); S. REP. No. 723, 90th Cong., 1st Sess. (1967); *Age Discrimination in Employment*:

States Supreme Court in these cases has made it difficult to interpret the Supreme Court's inclinations in this area of the law. As a result of the Supreme Court's refusal to address the issues presented by these conflicting decisions, the Courts of Appeals will continue their case by case determinations, with employers never knowing which tests will be used to decide the fate of their hiring policies until a case is decided in a particular circuit.

The main issue presented in the ADEA cases which will be discussed in this comment is whether the employer's refusal to employ persons age forty and over can be justified as a "bona fide occupational qualification" (BFOQ)<sup>4</sup> — an exception to the ADEA.<sup>5</sup> The conflict of decisions is particularly noteworthy in the instance of airlines' refusal to hire older pilots. This comment will set forth the various tests being used at the present time by the circuit courts and will attempt to justify the decisions holding that the safety of passengers should be a primary BFOQ consideration.

## II. THE ADEA AND THE BFOQ EXCEPTION

In 1967 Congress enacted the ADEA.<sup>6</sup> The purposes of the ADEA are to promote the employment of older persons based on ability rather than on age, to prohibit arbitrary age discrimination in employment, and to help workers and employ-

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*Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor, 90th Cong., 1st Sess. (1967); Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967).*

<sup>3</sup> See *supra* note 1.

<sup>4</sup> The "bona fide occupational qualification" exception provides that:

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

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

<sup>5</sup> 29 U.S.C. § 623(f)(1) (1976).

<sup>6</sup> *Smallwood v. United Air Lines, Inc.*, 661 F.2d at 307.

<sup>7</sup> See *supra* note 2.

ers solve the problems associated with the impact of age on employment.<sup>7</sup> An exception to the ADEA provides that "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where differentiation is based on reasonable factors other than age,"<sup>8</sup> the Act's prohibition against age discrimina-

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<sup>7</sup> H.R. REP. No. 805, 90th Cong., 1st Sess. 8 (1967). The ADEA's Congressional statement of findings and purpose provides as follows:

(a) the Congress hereby finds and declares that —

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

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

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

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

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

29 U.S.C. § 621 (1976). The House of Representatives General Subcommittee on Labor unanimously supported the general purposes of the ADEA, H.R. REP. No. 805, 90th Cong., 1st Sess. 3 (1967), as did the Senate Subcommittee on Labor, S. REP. No. 723, 90th Cong., 1st Sess. 3 (1967).

<sup>8</sup> S. REP. No. 723, 90th Cong., 1st Sess. 9 (1967). *See supra* note 4. The House of Representatives Committee on Education and Labor considered and recommended various exceptions to the legislation (the ADEA). Those exceptions included the BFOQ. Another specific exception, which the committee declined to incorporate, would have allowed for a bona fide management training program. The committee believed so broad an exception might lead to abuse. H.R. REP. No. 805, 90th Cong., 1st Sess. 4-5 (1967).

The committee recognizes, however, that bona fide age requirements do exist for some positions designed to give employees knowledge and experience which can reasonably be expected to aid in developing capabilities required for future advancement to executive, administrative, or professional positions, and expects the Secretary [of Labor] to appropriately recognize such requirements.

*Id.* at 5. It is not the purpose of the ADEA to require hiring older workers who do not otherwise meet the qualifications of the employment. *Id.* at 7.

tion does not apply.<sup>9</sup>

### III. HISTORICAL DEVELOPMENT OF THE BFOQ EXCEPTION TO THE ADEA

#### A. *In Sex Discrimination Cases*

Tests currently being used to decide whether a valid BFOQ exception exists in age discrimination cases were developed in sex discrimination cases.<sup>10</sup> The following discussion will present the facts and decisions in three sex discrimination cases decided by the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals. The tests developed in two of these cases subsequently were combined to provide a two-prong test which has been applied in a recent age discrimination case involving an airline pilot.<sup>11</sup>

In 1969 the Fifth Circuit Court of Appeals decided *Weeks v. Southern Bell Telephone and Telegraph Co.*,<sup>12</sup> in which the plaintiff submitted to the defendant her bid for the position of switchman. Her application was returned with a letter stating that the defendant did not assign women to that job.<sup>13</sup> After an Equal Employment Opportunity Commission (EEOC) investigation of the facts and analysis of the duties of the switchman's position,<sup>14</sup> the EEOC found reason to believe that the defendant had violated Title VII of the Civil Rights Act of 1964.<sup>15</sup> The plaintiff instituted suit.<sup>16</sup>

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<sup>9</sup> It is important not to confuse the BFOQ exception with the doctrine of "business necessity," which operates only in the instance of unintentional discrimination. See *Swint v. Pullman-Standard*, 624 F.2d 525, 534 (5th Cir. 1980), *cert. granted in part*, 451 U.S. 906 (1981); *Miller v. Texas State Board of Barber Examiners*, 615 F.2d 650, 653 (5th Cir.), *cert. denied*, 449 U.S. 891 (1980). See also *infra* note 136 (discussing the business necessity test).

<sup>10</sup> See *infra* notes 37-44. A comprehensive discussion of the BFOQ in sex discrimination cases is set forth in Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex L. Rev. 1025 (1977).

<sup>11</sup> See *infra* note 133.

<sup>12</sup> 408 F.2d 228 (5th Cir. 1969).

<sup>13</sup> *Id.* at 230.

<sup>14</sup> The fact that a job is strenuous does not bring it within the BFOQ exception unless sexual characteristics of the employee are crucial for the successful performance of the job. 14 C.J.S. *Civil Rights* § 69 (Supp. 1974).

<sup>15</sup> 408 F.2d at 229-30. 42 U.S.C. §§ 2000e to -17 (Supp. IV 1980).

<sup>16</sup> 408 F.2d at 230.

At trial, the defendant admitted a *prima facie* violation of the Civil Rights Act but asserted the BFOQ exception as an affirmative defense.<sup>17</sup> The federal district court found that the defendant had satisfied its burden of proving that the job of switchman was within the BFOQ exception. The Fifth Circuit Court of Appeals, however, reversed on this point.<sup>18</sup> Stating that to construe the BFOQ exception broadly would allow the exception to swallow the rule,<sup>19</sup> the Fifth Circuit held that the BFOQ exception in sex discrimination cases was to be narrowly interpreted.<sup>20</sup> The court further held that "an employer has the burden of proving that he had a reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."<sup>21</sup> An alternative to

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<sup>17</sup> *Id.* at 231-32. There are three procedural steps involved in a discrimination action. Those steps were set forth by the court in *E.E.O.C. v. County of Allegheny*, 519 F. Supp. 1328 (W.D. Pa. 1981). In that case the defendant, the county, had for many years maintained a policy of refusing to hire individuals over thirty-five for police officers. *Id.* at 1330. The main issue was whether defendant's policy could be justified on either the BFOQ exception or on "reasonable factors other than age." *Id.* at 1333 (quoting 29 U.S.C. § 623(f)(1) (1976)). Prior to its discussion of the BFOQ exception, the court explained the three procedural steps involved in a discrimination action. 519 F. Supp. at 1331. Those steps are:

- (1) Plaintiff bears burden of proof to establish, by a preponderance of the evidence, a *prima facie* case of discrimination;
- (2) If plaintiff satisfies the first step, burden shifts to the defendant to articulate some legitimate reason for rejection of the applicant;
- (3) If the defendant satisfies the second step, the plaintiff is afforded opportunity to prove by a preponderance of the evidence that the defendant's reasons are not legitimate, but merely a pretext for age discrimination.

*Id.* The court in *Allegheny* found that the defendant's policy could not be justified on either ground and enjoined the defendant from enforcing it. *Id.* at 1333. See generally *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Burwell v. Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980). The Supreme Court has ruled that only the burden of production, not of proof, shifts to the defendant once the plaintiff has made out a *prima facie* case of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

<sup>18</sup> 408 F.2d at 236.

<sup>19</sup> "The exception for a 'bona fide occupational qualification' was not intended to swallow the rule." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971).

<sup>20</sup> 408 F.2d at 232. The BFOQ defense has been characterized by the Supreme Court as "extremely narrow." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). This exception is to be narrowly applied. *Burwell v. Eastern Airlines, Inc.*, 633 F.2d 361, 370 n.15 (4th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965 (1981).

<sup>21</sup> 408 F.2d at 235. The "all or substantially all" test is the most frequently cited

this main *Weeks* test of a BFOQ was allowed where an employer demonstrated that it was impossible or highly impractical to deal with women on an individual basis.<sup>22</sup> If an employer sustains its burden under this alternate test, it may apply a "reasonable" general rule.<sup>23</sup>

Another sex discrimination case brought under Title VII<sup>24</sup> was *Diaz v. Pan American World Airways*,<sup>25</sup> decided by the Fifth Circuit in 1971. In *Diaz*, the male plaintiff applied for a job as a flight cabin attendant with the defendant airline and was rejected for that position.<sup>26</sup> After filing charges with the EEOC and after conciliation hearings failed, the plaintiff filed a class action on behalf of himself and others similarly situated, charging that the defendant had violated the 1964 Civil Rights Act.<sup>27</sup> The defendant admitted that it had discriminated on the basis of sex, but claimed that its policy came within the BFOQ exception.<sup>28</sup>

The district court entered judgment for the defendant based on a finding that female attendants were superior in the non-mechanical aspects of the job such as reassuring anxious passengers and giving courteous service.<sup>29</sup> The court found that passengers' psychological needs were better attended by female attendants.<sup>30</sup> The Fifth Circuit, however, was not convinced that the findings justified the discrimination because the apparent ability of females to perform the non-mechanical aspects of the job was tangential to the essence of the business involved.<sup>31</sup> The Fifth Circuit explained that the defendant

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test. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1042 (1977). In theory, this test allows a broadly defined BFOQ. Only one appellate decision, however, has upheld a BFOQ using the test. *Id.* at 1043. See *Long v. California State Personnel Board*, 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974).

<sup>22</sup> 408 F.2d 235 n.5.

<sup>23</sup> *Id.*

<sup>24</sup> See *supra* note 14.

<sup>25</sup> 442 F.2d 385 (5th Cir. 1971).

<sup>26</sup> *Id.* at 386.

<sup>27</sup> *Id.* See *supra* note 14.

<sup>28</sup> 442 F.2d at 386.

<sup>29</sup> *Id.* at 387.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 388.

could not exclude all males just because most males may not perform the job adequately.<sup>32</sup> The court stated that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."<sup>33</sup> The court's conclusion was that the essence of the airline business is to transport passengers safely from one point to another and noted that the test was one of business necessity, not business convenience.<sup>34</sup>

The third principal test used to decide whether the BFOQ exception obtains in a sex discrimination case is that announced in *Rosenfeld v. Southern Pacific Co.*<sup>35</sup> In that case the plaintiff, Ms. Rosenfeld, brought an action against her employer, Southern Pacific, charging a violation of Title VII.<sup>36</sup> The plaintiff had applied for the position of agent-telegrapher at the defendant's office in Thermal, California.<sup>37</sup> Southern Pacific had assigned the position instead to a junior male employee.<sup>38</sup>

Originally the plaintiff had asked for injunctive relief and damages for the specific discriminatory assignment of the Thermal position.<sup>39</sup> A pretrial order was entered, however, and circumstances surfaced which raised issues regarding the company's general labor policy.<sup>40</sup> The State of California intervened to defend the state's labor laws.<sup>41</sup>

The district court issued a summary judgment which provided, *inter alia*, that the action of Southern Pacific in refusing to grant the plaintiff the Thermal position was unlawful

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* The *Diaz* test is narrowly drawn and permits even fewer findings of a BFOQ than does the *Weeks* test. In practice, however, courts have interpreted both narrowly. Sirota, *supra* note 21, at 1044-45.

<sup>35</sup> 444 F.2d 1219 (9th Cir. 1971).

<sup>36</sup> *Id.* at 1220.

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* The assignment of Ms. Rosenfeld to the agent-telegrapher position would have put the company in violation of California laws. *Id.* at 1225. The court decided, however, that since the state law limitations on female labor ran contrary to the objectives of Title VII, the state laws were supplanted by Title VII. *Id.*



sex discrimination.<sup>42</sup> No damages, however, were awarded,<sup>43</sup> and Southern Pacific and the State of California appealed.<sup>44</sup> The subsequent closing of the Thermal plant raised a mootness question not relevant here.<sup>45</sup>

In the Ninth Circuit Court of Appeals Southern Pacific defended its policy of excluding women generically from certain jobs based on the arduous nature of the physical activity involved in the jobs.<sup>46</sup> Southern Pacific concluded that the policy came within the BFOQ exception.<sup>47</sup> In describing the agent-telegrapher position, Southern Pacific detailed the work requirements, which included seasonal ten-hour plus days and eighty-hour weeks.<sup>48</sup> The job also required heavy physical effort in climbing and lifting.<sup>49</sup>

After holding that the discrimination broadly prohibited by Title VII occurred under Southern Pacific's policy,<sup>50</sup> the court considered the issue of whether the policy could be upheld as a BFOQ. The court cited *Weeks*<sup>51</sup> but instead applied its own test: that "sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception."<sup>52</sup> The court held that the lower court committed no error in granting summary judgment<sup>53</sup> and thus determined that a BFOQ existed for Southern Pacific's policy.<sup>54</sup>

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<sup>42</sup> *Id.* at 1221 n.4.

<sup>43</sup> *Id.* at 1220-21.

<sup>44</sup> *Id.* at 1221.

<sup>45</sup> *Id.* The case was remanded to the district court to decide the issue of whether the closing of the Thermal plant rendered the case moot. The district court found that the case was not moot, and the Ninth Circuit Court of Appeals agreed. *Id.* at 1222.

<sup>46</sup> *Id.* at 1223. Southern Pacific also argued that the employment of a woman for the agent-telegrapher position would violate California labor laws. *Id.* See *supra* note 41.

<sup>47</sup> 444 F.2d at 1223.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1225.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> A commentator has noted that under *Rosenfeld*, individual testing of applicants would be unnecessary because knowledge of an applicant's gender would inform the

### B. *In Age Discrimination Cases*

In *Hodgson v. Greyhound Lines, Inc.*,<sup>55</sup> the trial court found Greyhound to be in violation of the ADEA because of its policy of refusing to consider applications for intercity bus drivers from those persons thirty-five years or older.<sup>56</sup> Greyhound claimed that its policy fell within section 4(f)(1) of the ADEA,<sup>57</sup> since age was a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."<sup>58</sup> The trial court applied the burden of proof formulated in *Weeks*,<sup>59</sup> that the employer had reasonable cause for believing that all or substantially all persons within the excepted class would be unable to safely and effectively perform the duties of the job.<sup>60</sup> The Seventh Circuit was of the opinion that the *Weeks* standard applied by the trial court, while applicable to the particular circumstances of that sex discrimination case, would not be the proper standard to apply in *Hodgson*.<sup>61</sup> The *Weeks* test concerned only the welfare of the applicant, and the *Hodgson* court was concerned with the welfare of third persons such as bus passengers and other motorists as well.<sup>62</sup>

The *Hodgson* court reversed the lower court's decision because it determined that the test formulated in *Diaz*<sup>63</sup> was more applicable to its decision than the *Weeks* test since, like

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employer whether the applicant possessed the sexual characteristics required for the job. Sirota, *supra* note 21, at 1046. A Supreme Court case discussing the need for individual testing is *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The state in *Dothard* claimed that height and weight requirements for the position of a prison guard were correlated with strength, which was essential for the successful performance of the job. *Id.* at 331. The court did say that if a test which measures strength directly were developed and administered fairly, it would satisfy Title VII standards because it would "measure the person for the job and not the person in the abstract." *Id.*; *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

<sup>55</sup> 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom.*, *Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975).

<sup>56</sup> 499 F.2d at 859.

<sup>57</sup> *Id.* at 861. *See supra* note 2.

<sup>58</sup> 499 F.2d at 861. *See supra* note 4.

<sup>59</sup> 499 F.2d at 861. *See supra* notes 11-20.

<sup>60</sup> 499 F.2d at 861.

<sup>61</sup> *Id.*

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

<sup>63</sup> *Id.* at 862. *See supra* notes 23-32.

the airline industry, the essence of the bus industry is the safe transportation of its passengers.<sup>64</sup> The *Diaz* test requires only that the employer prove that hiring those within the excepted class would undermine the essence of the business operation,<sup>65</sup> that being the safe transportation of passengers.<sup>66</sup> The *Hodgson* court held that Greyhound had to prove only that elimination of the hiring policy based on age might jeopardize the life of just one more person than might otherwise occur under the present hiring procedure.<sup>67</sup>

In *Hodgson*, the plaintiff contended that a person aged forty to sixty-five should be judged based on his "functional age,"<sup>68</sup> his capacity to do the job, rather than on his chronological age.<sup>69</sup> Even accepting the argument that physical examinations could effectively screen out degenerative disabilities which affect the driving skills of persons in the forty to sixty-five age bracket,<sup>70</sup> the appellate court questioned whether Greyhound could practically scrutinize the older drivers on a regular and frequent basis.<sup>71</sup> In holding for the defendant, the court of appeals determined that functional age was not practicably or readily discernible.<sup>72</sup>

The two-pronged test<sup>73</sup> to determine the validity of a BFOQ was announced in *Usery v. Tamiami Trail Tours Inc.*<sup>74</sup> In *Usery*, the plaintiff sought to enjoin the defendant from denying employment to individuals protected by the ADEA and from withholding payment of wages allegedly due eight men who sought and were denied employment as intercity bus drivers.<sup>75</sup> The defendant admitted that it refused to consider the applications of two of the men solely because of their

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<sup>64</sup> *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d at 862.

<sup>65</sup> *Diaz v. Pan American World Airways, Inc.*, 442 F.2d at 388.

<sup>66</sup> *Id.*

<sup>67</sup> *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d at 863.

<sup>68</sup> *Id.* at 864.

<sup>69</sup> *Id.*

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

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *infra* notes 52-61.

<sup>74</sup> 531 F.2d 224 (5th Cir. 1976).

<sup>75</sup> *Id.* at 226-27.

ages,<sup>76</sup> but that the other six were excluded for reasons other than age.<sup>77</sup>

The trial court entered judgment for the defendant.<sup>78</sup> The court concluded that the defendant had demonstrated that a factual basis existed for its belief that all or substantially all men over forty could not perform the duties of the job efficiently and safely.<sup>79</sup> Additionally, the trial court found that recurring physical examinations and other tests to determine mental and psychological problems associated with aging would be impractical and untrustworthy.<sup>80</sup>

In affirming the trial court's judgment, the appellate court in *Usery* stated that the threshold obstacle to be overcome by the defendant when claiming a BFOQ defense is the test set forth in *Diaz*,<sup>81</sup> that the job qualifications invoked by the employer to justify his age discrimination must be reasonably necessary to the essence of the business.<sup>82</sup> Once the defendant has overcome the *Diaz* obstacle, it is still required to justify its discrimination as a BFOQ under the *Weeks* element. The *Weeks* test allows proof either that the defendant has a factual basis for believing that all or substantially all applicants over forty would be unable to perform the job safely and efficiently or that there is no reliable way to differentiate the qualified applicants from the unqualified applicants in the class.<sup>83</sup> Thus, the *Usery* court developed a two-pronged test for a BFOQ based on the holdings in *Diaz* and *Weeks*. In holding that the trial court's findings were not clearly erroneous,<sup>84</sup> the appellate court emphasized the testimony presented by a doctor, one of the defendant's witnesses. The doctor testified that: (1) certain physiological and psychological changes that accompany the aging process decrease the person's abil-

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<sup>76</sup> *Id.* at 227. The two complaining witnesses whose applications were denied solely because of their ages were forty-three and fifty-seven. *Id.*

<sup>77</sup> *Id.* at 227. The remaining six witnesses were ages forty-one to fifty-three.

<sup>78</sup> *Id.* at 228.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 236.

<sup>82</sup> *Id.* at 235.

<sup>83</sup> *Id.* at 236.

<sup>84</sup> *Id.* at 224.

ity to drive safely and (2) even the most refined examinations cannot detect all of these changes.<sup>85</sup>

In *Arritt v. Grisell*,<sup>86</sup> the plaintiff applied for the job of a police officer in Moundsville, West Virginia, and his application was denied.<sup>87</sup> The sole ground for the denial was that he was forty years old and was therefore ineligible to take the physical and mental examinations required by a West Virginia law. This law established an eighteen to thirty-five age limit for initial appointment to the position of police officer.<sup>88</sup> The plaintiff sued the city and three members of the Police Civil Service Commission,<sup>89</sup> claiming that, *inter alia*,<sup>90</sup> the defen-

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<sup>85</sup> *Id.* at 237.

<sup>86</sup> 567 F.2d 1267 (4th Cir. 1977).

<sup>87</sup> *Id.* at 1269.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> In addition to plaintiff's claim that defendant violated the ADEA, the court further addressed plaintiff's specific claim based on 42 U.S.C. § 1983 that defendant's action and policy violated the equal protection clause of the fourteenth amendment. 42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Rights Act, Pub. L. No. 96-170, 93 Stat. 1284 (currently codified at 42 U.S.C. § 1983 (Supp. IV 1980)). The *Arritt* court justified denying the plaintiff's claim citing the Supreme Court holdings in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), and *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). In *Murgia* the Court upheld a Massachusetts statute which established a mandatory retirement age of fifty for uniformed state police officers against an equal protection clause challenge. In applying *Rodriguez*, the *Arritt* court stated that an equal protection analysis requires strict scrutiny of a classification only when that classification interferes with a fundamental right or disadvantages a suspect class. 567 F.2d at 1271-72. Regarding "suspect class," see, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race). Further, the *Arritt* court concluded that since strict judicial scrutiny is not required, the proper standard is rationality, that is, whether the classification is rationally related to furthering a legitimate state interest. 567 F.2d at 1272. The *Arritt* court reasoned that the plaintiff's equal protection clause claim failed because the State of West Virginia had a legitimate state interest in assuring the physical preparedness of police officers. *Id.*

dants had violated the ADEA.<sup>91</sup> The plaintiff sought unpaid wages, damages, costs and fees, and an injunction requiring the defendants to employ him as a police officer.<sup>92</sup> The trial court entered summary judgment in favor of the defendants,<sup>93</sup> who claimed that age was a BFOQ.<sup>94</sup> The plaintiff's motion to rebut the defendant's BFOQ affidavit was denied.<sup>95</sup>

The trial court had applied the *Hodgson* test,<sup>96</sup> that the employer had merely to demonstrate 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>97</sup> The court of appeals in *Arritt*, however, reversed and remanded, holding that the *Usery* two-pronged test was the proper standard to be applied<sup>98</sup> rather than the *Hodgson* test. The court of appeals remanded the case to allow the plaintiff an opportunity to rebut the defendant's BFOQ affidavit.<sup>99</sup>

#### IV. RECENT APPLICATION OF THE BFOQ EXCEPTION IN CASES INVOLVING AGE DISCRIMINATION AGAINST AIRLINE PILOTS

In *Murnane v. American Airlines*,<sup>100</sup> a forty-three year old pilot applied for a position as flight officer with the defendant airline.<sup>101</sup> The position of flight officer was the first of three employment levels at American — flight officer, co-pilot, and captain — that ultimately lead to captaincy.<sup>102</sup> American's policy was for all persons hired for flight officer to advance to captain;<sup>103</sup> this is referred to as an "up-or-out" policy.<sup>104</sup> The

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<sup>91</sup> 567 F.2d at 1269.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1271.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d at 863.

<sup>98</sup> 567 F.2d at 1271.

<sup>99</sup> *Id.*

<sup>100</sup> 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1770 (1982).

<sup>101</sup> 667 F.2d at 99.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

airline also has a general guideline against hiring anyone older than thirty as a flight officer.<sup>105</sup>

The trial court dismissed the plaintiff's complaint<sup>106</sup> because it found that American had established a BFOQ and that the plaintiff would not have been hired in any event because he was not competitively qualified.<sup>107</sup> In affirming the trial court's findings,<sup>108</sup> the *Murnane* court, acknowledging that American's policy was to refuse to hire persons over the age of thirty for the beginning position in the cockpit,<sup>109</sup> addressed the guideline as if it were aged forty.<sup>110</sup> The appellate court noted that those persons age thirty to forty were not within the class intended to be protected by the ADEA.<sup>111</sup>

Even though American admitted that there were economic reasons for hiring younger pilots who would spend more time as captains, the court saw this benefit as merely collateral, not overriding safety aspects.<sup>112</sup> Those safety aspects were brought out at trial.<sup>113</sup> Evidence was adduced which indicated

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<sup>105</sup> *Id.* at 99-100.

<sup>106</sup> *Id.* at 100.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 102.

<sup>109</sup> *Id.* at 100.

<sup>110</sup> *Id.* at 100 n.3. Section 631 provides:

Age limits.

Individuals who are at least 40 but less than 70 years of age

(a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

29 U.S.C. § 631 (Supp. III 1979). Section 631 has been interpreted as follows:

Although section 4 of the (ADEA) broadly makes unlawful various types of age discrimination by employers, employment agencies, and labor organizations, section 12 limits this protection to individuals who are at least 40 years of age but less than 65(70) years of age. Thus, for example it is unlawful in situations where (the ADEA) applies, for an employer to discriminate in hiring or in any other way by giving preference because of age to an individual 30 years old over another individual who is within the 40-65(70) age bracket limitation of section 12. Similarly, an employer will have violated the (ADEA), in situations where it applies, when one individual within the age bracket of 40-65(70) is given job preference in hiring, assignment, promotion or any other term, condition, or privilege of employment, on the basis of age, over another individual within the same age bracket.

29 C.F.R. § 860.91(a) (1981).

<sup>111</sup> 667 F.2d at 100 n.3; 29 U.S.C. § 631 (Supp. III 1979).

<sup>112</sup> *Murnane*, 667 F.2d at 101 n.6.

<sup>113</sup> *Id.* at 100.

that pilot error accounted for ninety percent of all aviation accidents, but that aviation accidents decreased with increased pilot experience.<sup>114</sup> American introduced evidence which showed that the best experience an American captain could have would be acquired by flying American's aircraft in its three cockpit positions.<sup>115</sup>

The court noted that under American's system it took ten to fifteen years to advance to captain, and that if the applicant had been hired as a flight officer in his forties, it was probable that he would not have become a captain until his late fifties.<sup>116</sup> Since the Federal Aviation Administration requires commercial airline pilot retirement at age sixty,<sup>117</sup> the plaintiff would have been able to serve as a captain only briefly before mandatory retirement.<sup>118</sup> The ADEA, however, sought to exclude economic considerations from being the basis for a BFOQ.<sup>119</sup> Essentially, in order to compare the costs associated with hiring older workers (pilots) with the costs of hiring younger workers (pilots), it would be necessary to classify the groups based solely on age.<sup>120</sup> This classification is

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* 14 C.F.R. § 121.383(c) (1982). Compulsory age limits on hiring which are imposed by statutes, regulations, or employer's rules and which apply regardless of the employee's condition at the time of termination appear to be bona fide occupational qualifications when the conditions are imposed clearly for the convenience and safety of the public. 15 Am. Jur. 2d *Civil Rights* § 239 (1976).

<sup>118</sup> *Murnane*, 667 F.2d at 100.

<sup>119</sup> In setting forth Congress' purpose in enacting the ADEA, the C.F.R. states that: [i]t should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the (ADEA), unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation — an assumption plainly contrary to the terms of the (ADEA) and the purpose of the Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the (ADEA) is directed.

29 C.F.R. § 860.103(h) (1981).

<sup>120</sup> *Id.*



specifically prohibited by the ADEA and was the very reason for its passage.<sup>121</sup> Therefore, a claim that it is more expensive to hire older pilots than younger pilots would not be a sufficient basis for a BFOQ. The *Murnane* court determined, however, that if the benefit of hiring younger pilots was merely incidental to the safety aspects, that benefit would not be sufficient to declare the BFOQ invalid.<sup>122</sup>

In dismissing the plaintiff's complaint, the *Murnane* court held that the maximization of safety was "reasonably necessary to the normal operation" of the airline.<sup>123</sup> The court also stated that safe transportation of passengers was the "essence" of American's business.<sup>124</sup> In the judgment of the court, the airline industry was to be accorded "great leeway and discretion" to determine how the industry may be operated most safely.<sup>125</sup>

One commentator<sup>126</sup> has pointed out that the *Murnane* court applied only the *Diaz* prong, i.e., the undermining of the essence of the business. The commentator concludes that by ignoring the *Weeks* prong, the requirement of a factual basis for the employer's belief that all or substantially all persons to be excepted would be unable to perform the duties of the job safely and efficiently or that it is impractical to deal with a class of persons on an individualized basis, the *Murnane* court "implicitly acknowledged that these technological advances may be used to deny prospective pilots a position without depriving an entire class of persons the opportunity to be considered for jobs."<sup>127</sup> The commentator further notes that a principal area of dispute in cases involving age discrimination against pilots is whether the advancements in medical science have made it possible to predict accurately the occurrence of

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<sup>121</sup> *Id.*

<sup>122</sup> *Murnane*, 667 F.2d at 101 n.6.

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

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

<sup>125</sup> *Id.*

<sup>126</sup> Rosenblum, *Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions*, 32 HASTINGS L.J. 1261, 1269-74 (1981).

<sup>127</sup> *Id.* at 1274 n.69.

inflight disabilities of pilots.<sup>128</sup>

Just one week after *Murnane* was decided by the Court of Appeals for the District of Columbia, the Fourth Circuit decided *Smallwood v. United Air Lines*.<sup>129</sup> In *Smallwood*, the plaintiff applied to United Air Lines (United) for a position as a flight officer in August of 1977.<sup>130</sup> At that time he was forty-eight years old and had ten years experience with Overseas National Airways in the positions of first officer and captain.<sup>131</sup> United's response to his application was a form letter which listed its basic qualifications, and next to "Age 21 through 29"<sup>132</sup> a light pencil mark appeared.<sup>133</sup> The letter stated that United would offer no encouragement but would keep the application on file.<sup>134</sup> The plaintiff replied that in light of the "national policy against age discrimination in employment,"<sup>135</sup> United should reconsider his application.<sup>136</sup> In December 1977, United wrote to the plaintiff telling him that it was processing applications only from applicants twenty-one to thirty-five years of age.<sup>137</sup> In March 1978, the plaintiff filed a charge against United with the Wage and Hour Division of the Department of Labor,<sup>138</sup> which resulted in unsuccessful conciliation hearings.<sup>139</sup> The plaintiff then sued United in federal court, asserting an ADEA claim.<sup>140</sup>

At trial, the defendant presented evidence to prove that airline safety would be adversely affected by the hiring of pilots

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<sup>128</sup> *Id.* at 1272.

<sup>129</sup> 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982).

<sup>130</sup> *Id.* at 305.

<sup>131</sup> *Id.* at 306.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* All functions previously vested by section 623 in the Secretary of Labor or the Civil Service Commission were transferred to the EEOC by Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978). The plan is set out in the Appendix to Title 5, Government Organization and Employees, and became effective January 1, 1979. Section 1-101 of Ex. Ord. No. 12106 provided for this transfer. Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1980).

<sup>139</sup> 661 F.2d at 306.

<sup>140</sup> *Id.*

over the age of thirty-five.<sup>141</sup> The defendant contended that the age limitation was a BFOQ because hiring older pilots would impede its "crew concept"<sup>142</sup> — the safe, effective and coordinated functioning of its three officers in the cockpit<sup>143</sup> — and that the hiring of older pilots would disproportionately increase the chance of inflight medical emergencies.<sup>144</sup> The trial court ruled for the defendant, adopting most of the defendant's proposed findings of fact.<sup>145</sup>

The plaintiff appealed and the defendant cross-appealed.<sup>146</sup> In reversing the trial court's ruling,<sup>147</sup> the Fourth Circuit responded to the defendant's "crew concept" claim, that pilots from other airlines would not be able to integrate successfully with United-trained pilots.<sup>148</sup> The court noted that evidence indicated that most new pilots were hired from the ranks of ex-military pilots<sup>149</sup> and that the alleged harm to the "crew

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 307.

<sup>146</sup> *Id.* at 304. Defendant cross-appealed, contending that Smallwood's claim was time barred by 29 U.S.C. § 626(d)(1) (Supp. IV 1980), which allows only 180 days for a discrimination claim to be filed. Section 626 (Supp. IV 1980) provides:

Filing of charge with Commission; timeliness, conciliation, conference, and persuasion

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed —

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, concurrence, and persuasion.

The trial court found that even though the August 24, 1977, letter from United to Smallwood comprised the act of discrimination, equitable considerations tolled the statute. The Fourth Circuit held that the second letter, which was dated December 12, 1977, was the first discriminatory act and as such occurred within the 180 day time limitation. 661 F.2d at 309.

<sup>147</sup> 661 F.2d at 309.

<sup>148</sup> *Id.* at 308.

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

concept" was a function of prior experience and not the age of the pilot at the time he is hired.<sup>150</sup> The appellate court also held that the defendant failed to establish its claim that the chance of increased medical emergencies should be a BFOQ consideration.<sup>151</sup> Noting that the preventive medical examinations would have the same screening effect on newly hired pilots as they would on career United pilots<sup>152</sup> and that the defendant's physical examination program was effective in detecting potentially disabling medical problems,<sup>153</sup> the appellate court held that the defendant had failed to show a relationship between the age at hire of pilots and airline safety.<sup>154</sup>

The test adopted by the Fourth Circuit in *Arritt*, the two-pronged test, was applied by the *Smallwood* court to hold that the airline's refusal to employ a forty-eight year old pilot was a violation of the ADEA.<sup>155</sup> The defendant, in addition to claims of "crew concept"<sup>156</sup> impairment and increased medical emergencies, contended that hiring older pilots would cause economic detriment.<sup>157</sup> The appellate court stated that economic considerations were not allowed as the basis for a BFOQ.<sup>158</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 309.

<sup>153</sup> *Id.* at 308-9.

<sup>154</sup> *Id.* at 309.

<sup>155</sup> *Id.* at 307.

<sup>156</sup> See *supra* notes 126-128.

<sup>157</sup> *Smallwood v. United Air Lines, Inc.*, 661 F.2d at 307.

<sup>158</sup> *Id.* In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court faced a situation in which ability tests were excluding more Negroes than whites from certain higher paying jobs at a power generating plant in North Carolina. The Court in that case seemed to leave open the question of whether job requirements which test for an applicant's capacity for future promotion could be justified on a showing of genuine business need. *Id.* at 432. Even though *Griggs* is a case involving racial discrimination, such cases are closely tied to age discrimination cases because Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (Supp. IV 1980), and the ADEA are similar. *Arritt v. Grisell*, 567 F.2d 1267, 1270 n. 11 (4th Cir. 1977). Speeches made in both houses of Congress in connection with the passage of the ADEA referred to the proposed ban on age discrimination as justified on bases similar to those supporting Title VII racial discrimination prohibitions. *Id.* In recognizing that the Civil Rights Act of 1964 proscribes practices that may be fair in form but operate to discriminate, the *Griggs* Court stated that the "touchstone is business necessity." *Griggs v. Duke Power Co.*, 401 U.S. at 424, 431 (1971). If an employment practice cannot be

## V. ANALYSIS AND IMPLICATIONS

Even in view of the congressional mandate that an airline is required to operate with the "highest possible degree"<sup>159</sup> of care, the *Smallwood* court reached a decision that extends the *Arritt* decision to the airline industry.<sup>160</sup> The two-pronged test formulated in *Usery*<sup>161</sup> and adopted in *Arritt*<sup>162</sup> was used to show that the refusal to hire pilots over the age of thirty-five based solely on their age was not a BFOQ.<sup>163</sup> The Fourth Circuit's decision in *Smallwood* is in direct conflict with the District of Columbia Circuit Court's earlier decision in *Murnane*, that the refusal to hire pilots over the age of forty was a BFOQ.<sup>164</sup> The *Murnane* court accepted the contention that safety of transportation of airline passengers would be adversely affected by requiring the air carriers to hire the older pilots,<sup>165</sup> while the *Smallwood* court held that the airline had failed to show a relationship between the age of pilots at hire and airline safety.<sup>166</sup> Further, the *Murnane* court stressed that safe operation is not sufficient, that "safest" air transportation is the goal<sup>167</sup> and that courts do not have the expertise to substitute their judgment for that of the airline.<sup>168</sup>

The *Smallwood* court was of the opinion that United was attempting to claim a BFOQ based on economic considerations<sup>169</sup> while the *Murnane* court saw American's similar policy as providing only collateral economic benefits.<sup>170</sup> It should be reemphasized that the *Murnane* court recognized that eco-

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shown to relate to job performance, then that practice is prohibited. *Id.* The Court also noted that during the attempts to succeed in passing Title VII, proponents of the bill assured critics that job-related tests would not be affected and that the very intent of the bill was to promote hiring on the basis of job qualifications. *Id.* at 434.

<sup>159</sup> *Murnane*, 667 F.2d at 101 (citing 49 U.S.C. § 1421(b) (1976)).

<sup>160</sup> *Smallwood*, 661 F.2d at 307.

<sup>161</sup> See *supra* notes 59-61.

<sup>162</sup> *Arritt*, 567 F.2d at 1271.

<sup>163</sup> *Smallwood*, 661 F.2d at 307.

<sup>164</sup> *Murnane*, 667 F.2d at 100.

<sup>165</sup> *Id.* at 101.

<sup>166</sup> *Smallwood*, 661 F.2d at 309.

<sup>167</sup> *Murnane*, 667 F.2d at 101.

<sup>168</sup> *Id.*

<sup>169</sup> *Smallwood*, 661 F.2d at 307.

<sup>170</sup> *Murnane*, 667 F.2d at 101 n.6.

conomic benefits existed for American if it were to continue to hire only younger pilots.<sup>171</sup> These younger pilots would ultimately serve more years as captains.<sup>172</sup> The *Murnane* court, however, saw these economic benefits as only collateral, incidental to American's otherwise valid BFOQ which provided substantial safety benefits to the public.<sup>173</sup>

Neither the *Murnane* nor the *Smallwood* courts applied the *Rosenfeld* "sexual characteristics" test.<sup>174</sup> The other tests, *Diaz* and *Weeks*, have withstood the shift of focus from sex discrimination to age discrimination. It appears, however, that the "sexual characteristics" test is not applied to a case involving age discrimination.

In view of the recent bankruptcy of Braniff Airways, Inc.,<sup>175</sup> and the resulting unemployment of experienced pilots,<sup>176</sup> the *Smallwood* decision could be important both from the standpoint of precedent and as setting policy. The Supreme Court denied *certiorari* in the *Smallwood* case.<sup>177</sup> It is difficult, however, to determine the Supreme Court's inclinations in this area of the law because it also denied *certiorari* in *Murnane*.<sup>178</sup> *Murnane* could also be important from the standpoint of precedent and as setting policy — policy and precedent in conflict with *Smallwood*. The *Smallwood* decision, obviously, favors Braniff pilots. The *Smallwood* court's requirement that the employer pass the two-pronged *Usery* test<sup>179</sup> resulted in a holding which struck down the airline's employment policies as a violation of the ADEA.<sup>180</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Rosenfeld*, 444 F.2d at 1225. See *supra* notes 32a-32t and accompanying text.

<sup>175</sup> Gregory, *Braniff Bites the Dust*, 116 AVIATION WEEK & SPACE TECH., May 24, 1982, at 11.

<sup>176</sup> *Id.* Many Braniff senior employees, like those of most pioneer airlines are too old to find jobs easily. These senior employees are also too young to draw social security. Furthermore, their pensions are in limbo. *Id.*

<sup>177</sup> 661 F.2d 305 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982).

<sup>178</sup> 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1770 (1982).

<sup>179</sup> *Smallwood*, 661 F.2d at 307. The *Smallwood* opinion only mentions *Arritt*, but the *Arritt* court had adopted the two-pronged test formulated in *Usery*. See *supra* note 76.

<sup>180</sup> *Id.* at 304.

The fact that the courts have issued conflicting decisions should not be surprising. Congress has given the airline industry two mandates which are seemingly in conflict. An airline is expected to exercise the highest possible degree of safety in transporting passengers,<sup>181</sup> and yet the ADEA prohibits age discrimination in the hiring of those responsible for the safety of the passengers.<sup>182</sup> Even though economic benefits as a basis for a BFOQ are excluded,<sup>183</sup> the courts, and eventually the air passengers, are still left with problems associated with the natural process of aging, from which pilots are not immune.<sup>184</sup>

## VI. CONCLUSION

The risks involved in hiring an unqualified applicant for the position of airline flight officer are staggering.<sup>185</sup> In noting this obvious fact, the *Hodgson* court stated:

When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities (older persons). In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job related.<sup>186</sup>

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<sup>181</sup> *Murnane*, 667 F.2d at 101. 49 U.S.C. § 1421(b) (1976) states as follows:

In 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 and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce.

*Id.*

<sup>182</sup> See *supra* note 2.

<sup>183</sup> See *supra* notes 97-100 and accompanying text.

<sup>184</sup> *Smallwood*, 661 F.2d at 307.

<sup>185</sup> *Hodgson*, 499 F.2d at 862.

<sup>186</sup> *Id.* *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972).

Perhaps the various tests are producing inconsistent results because any explicitly defined test to be applied in this area would be insufficient. What the courts are actually addressing when an airline attempts to invoke a BFOQ exception are the conflicting rights of two classes of persons — those persons forty and over desiring to be employed as airline pilots and those persons who expect and require safe air travel on commercial carriers. Each class has been recognized by Congress as deserving protection, and the courts must address these conflicting rights. Since the Supreme Court has refused to hear the cases involving the BFOQ as applied to age discrimination of airline pilots, the circuit courts will continue their case by case determinations, with employers never knowing which tests will be used to determine the fate of their hiring policies until a case is decided in a particular circuit. Since pilot error can be so devastating, courts should be encouraged to follow the balancing analysis stated by the *Hodgson* court and place upon the airline a lighter burden in this area where the human risks involved in hiring an unqualified applicant are great.



