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# AGE DISCRIMINATION IN EMPLOYMENT: AIR CARRIERS\*

BY RONALD A. BERGMAN†

## I. INTRODUCTION

DISCRIMINATION, or the failure to treat all persons equally,<sup>1</sup> is commonly thought of in connection with current national problems of race, national origin or possibly religion. This type of discrimination is based on feelings by one group of people towards another, and is totally unrelated to their ability to do a job. However, with older workers, there is a distinction, the feeling there being based on assumptions about their reduced ability to work due to their age.<sup>2</sup>

Age discrimination is a recent development, caused by unequal birth and death rates, and further influenced by war and medical advances. In 1965, 57 million people were over 45 years of age, representing a substantial portion of our population. These people have been arriving at these older ages fully capable of working. Moreover, their numbers are rapidly increasing, thus signifying the importance of the problem.<sup>3</sup>

## II. THE DEVELOPMENT OF AGE DISCRIMINATION IN EMPLOYMENT LAWS

At common law, the individual employment contract governed who would work, rates of pay and subsequent termination.<sup>4</sup> Today, in the absence of a contract, there is no constitutional right as such, to be employed.<sup>5</sup>

Discrimination is unlawful under the Railway Labor Act (RLA) only if it influences union membership.<sup>6</sup> Retirement provisions are non-discriminatory<sup>7</sup> and are a proper bargaining subject<sup>8</sup> under the statutory language

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<sup>1</sup> BLACK'S LAW DICTIONARY 553 (4th ed. 1951).

<sup>2</sup> SECRETARY OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT; A REPORT TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (June 30, 1965) (hereinafter THE SECRETARY'S REPORT).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> The Oakmar, 20 F. Supp. 650 (D. Md. 1938); Union Pacific R.R. v. Ruef, 120 (D. Neb. 1902); NLRB v. Columbus Ironworks, 217 F.2d 208 (5th Cir. 1954).

<sup>5</sup> Carraway v. Jefferson Parish School Bd., 251 F. Supp. 462 (D. La. 1966); United Steel Wkrs. v. Warrior and Gulf Nav. Co., 363 U.S. 574 (1960).

<sup>6</sup> CCH EMPLOYMENT PRACTICES GUIDE para. 2051.

<sup>7</sup> Lamson v. Georgia Southern and Florida R.R. Co., 90 S.E.2d 658 (Ga. 1955).

<sup>8</sup> McMullans v. Kansas, Okla. & Gulf R.R., 129 F. Supp. 157 (E.D. Okla. 1955); Jones v. Martin, 30 CCH Lab. Cas. para. 69,943 (E.D. Fla. 1956).

of "working conditions."<sup>9</sup> These contracts are supported by ample considerations and govern employment rights,<sup>10</sup> including age.<sup>11</sup>

The National Labor Relations Act (NLRA) is likewise unconcerned with discharges based on age.<sup>12</sup> The term "other conditions of employment," is sufficiently broad to cover retirement age in the collective bargaining contract.<sup>13</sup> Litigation has arisen under the NLRA where an employer was discharged for age when the true reason was union hostility,<sup>14</sup> and where seniority clauses had been violated.<sup>15</sup>

States have been keenly aware of age problems within their labor forces. Studies have been conducted, revealing these problems. Many employers have felt older workers increased their pension costs,<sup>16</sup> and accordingly, give excuses for discriminating, including promotion from within,<sup>17</sup> outdated skills, poor education, training costs, reduced efficiency and physical capacity.<sup>18</sup> For example, in one case, workmen's compensation was awarded a 33 year old who suffered a heart attack.<sup>19</sup> Heart attack probability arises with age and increases insurance costs.<sup>20</sup> Other employers regard their older employees highly, characterizing them as productive, dependable, loyal, stable and valued assets of the firm:

Yet if these same employees were for some reason suddenly to become unemployed, they would experience difficulty in becoming re-employed by artificial barriers based on the theory that they do not possess the same qualities for which they were appreciated only a short time before.<sup>21</sup>

However, tests have shown performance variations more related to individuals than age as a group.<sup>22</sup>

New York attempted a legislative solution to age discrimination in the 1930's which proved largely ineffective due to broad exemptions<sup>23</sup> and liberal court interpretations.<sup>24</sup> As of 1965, 23 states and Puerto Rico passed age discrimination legislation. These statutes commonly protect those between the ages 40-65<sup>25</sup> and prohibit discharge, refusal to hire and employment terms based on age.<sup>26</sup> Most exempt certain classes of employment but include labor unions and employment agencies within their

<sup>9</sup> *Goodin v. Clinch Field R.R.*, 229 F.2d 57 (6th Cir. 1956).

<sup>10</sup> *Ricks v. Norfolk & Western R.R.*, 184 F. Supp. 119 (E.D. Va. 1960).

<sup>11</sup> CCH, *supra* note 6, at para. 2051, 2052.

<sup>12</sup> *Id.* at para. 2051.

<sup>13</sup> *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948).

<sup>14</sup> *Blue Plate Foods, Inc. & Warehouse Employees Union*, 102 N.L.R.B. 1057 (Feb. 1953); *Consolidated Welding & Eng'ring Co. & United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO*, 146 N.L.R.B. 739 (Apr. 1964).

<sup>15</sup> *Ball Bros. Co. & Glass Bottle Blowers Assoc. Local 88*, 46 Lab. Arb. 1153 (June 3, 1966).

<sup>16</sup> Note, *Age Discrimination in Employment; the Problem of the Older Worker*, 41 N.Y.U.L. Rev. 383 (1966) (hereinafter *Age Discrimination*).

<sup>17</sup> *Id.* at 400.

<sup>18</sup> *Id.* at 396 to 399.

<sup>19</sup> *Klimas v. Trans Caribbean Airways, Inc.*, 10 N.Y.2d 209, 179 N.E.2d 714 (N.Y. 1961).

<sup>20</sup> *Age Discrimination*, *supra* note 16, at 407.

<sup>21</sup> TEXAS LEGISLATIVE COUNCIL, A REPORT TO THE 58TH LEGISLATURE ON AGE BARRIERS TO EMPLOYMENT 5 (Dec. 1962).

<sup>22</sup> *Age Discrimination*, *supra* note 16, at 396.

<sup>23</sup> *Gennaro Deodati v. Paul J. Kern*, 21 N.E.2d 355 (N.Y. Ct. App. 1939).

<sup>24</sup> Annot., 122 A.L.R. 1452 (1939).

<sup>25</sup> *Age Discrimination*, *supra* note 16, at 383.

<sup>26</sup> *Id.* at 389.

operation.<sup>27</sup> Terms vary considerably between the states.<sup>28</sup> Many problems have arisen with these laws, including lack of evidence showing discrimination,<sup>29</sup> burdens of due process,<sup>30</sup> enforcement agencies charged with duties under other statutes,<sup>31</sup> and weak statutory language<sup>32</sup> lacking prohibitions, remedies or enforcement machinery,<sup>33</sup> resulting in apprehension about the entire legislation. Experience has shown that the weight of state law aids in the removal of age barriers but that enforcement has been extremely difficult, necessitating cooperation, in order to be successful.<sup>34</sup>

Despite these problems, some state agencies have been effective in settling disputes.<sup>35</sup> Though court cases are limited in number, in one situation a statute was ineffective through a narrow interpretation,<sup>36</sup> but in another, *Walker Manufacturing Co. v. Industrial Comm. of Wisc.*,<sup>37</sup> the state's interest was upheld as a valid exercise of police power. Since Congress had not at that time legislated in the field, the states were free to do so.<sup>38</sup>

Congress first became aware of the problem when drafting the Civil Rights Act of 1964.<sup>39</sup> Although no age provisions were included,<sup>40</sup> Title VII, section 715, directed the Secretary of Labor to study the problem. The President was also concerned and issued an executive order, instructing all government contractors to cease age discrimination.<sup>41</sup> Congress then passed the Older Americans Act of 1965.<sup>42</sup> Equal opportunity for employment based on age was a stated purpose of this Act,<sup>43</sup> but no prohibitory terms were directed at age discrimination, the concern being to improve assistance programs.<sup>44</sup> Increased employment opportunity was recommended.<sup>45</sup>

The Secretary of Labor delivered his report to Congress on 30 June 1965.<sup>46</sup> He saw the issue as a choice to the population of paying an extra few cents an hour of the older worker's wage, thus enabling him to work, or as taxpayers, footing the entire bill for his support and receiving no

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 390.

<sup>29</sup> *Board of Education of West Haven v. Comm. on Civil Rights (Conn.)*, 53 CCH Lab. Cas. para. 9022 (Conn. 1966).

<sup>30</sup> Release, Civil Rights Comm. (Mich. 1966); 1965-68 CCH EMPLOYMENT PRACTICES, TRANSFER BINDER, para. 8059.

<sup>31</sup> *Age Discrimination*, *supra* note 16, at 409.

<sup>32</sup> TEX. CIV. STAT. ANN. art. 6252-14 (1963).

<sup>33</sup> TEX. CIV. STAT. ANN. art. 6252-16 (1967).

<sup>34</sup> TEXAS LEGISLATIVE COUNCIL, *supra* note 21, at 23.

<sup>35</sup> Policy Statement, State Board Against Discrimination (Wash. 1965); TRANSFER BINDER *supra* note 30, at para. 8034.

<sup>36</sup> *Johnson v. U.S. Steel Corp.*, 202 N.E.2d 816 (Mass. 1964).

<sup>37</sup> 135 N.W.2d 307 (Wis. 1965).

<sup>38</sup> *Id.* at 312 and 314.

<sup>39</sup> 78 Stat. 253, 42 U.S.C. § 2000(e) (1964).

<sup>40</sup> Secretary of Labor, Opinion Letters of the General Counsel, 10-1-65, G.C. 178-65, G.C. 192-65; 10-2-65, G.C. 254-65, G.C. 228-65; 10-6-65, G.C. 332-65.

<sup>41</sup> Exec. Order No. 11,141, 3 C.F.R. § 507 (Supp. 1967); 29 FED. REG. 2477 (1964).

<sup>42</sup> 79 Stat. 218, Title 1, § 101, 42 U.S.C. § 3001 *et seq.*; CCH TRANSFER BINDER *supra* note 30, at para. 8006.

<sup>43</sup> 79 Stat. 218, Title 1, § 101(f), 42 U.S.C. § 3001 (1965).

<sup>44</sup> S. REP. NO. 247, 89th Cong. 1st Sess. (1965); *see* 1 U.S. CONG. & ADMIN. NEWS 1884 (1965).

<sup>45</sup> 1 U.S. CONG. & ADMIN. NEWS 1890 (1965).

<sup>46</sup> THE SECRETARY'S REPORT, *supra* note 2.

production in return.<sup>47</sup> Progress alone placed 3 1/2 million workers over 45 years of age out of work at once, according to the Secretary.<sup>48</sup> The report found sluggish human adjustment and impersonal scientific accommodation to be the central elements.<sup>49</sup> Hiring policies were the most usual form,<sup>50</sup> as half of all new jobs were found to be closed to those over 55 and one quarter closed to those over 45,<sup>51</sup> resulting in millions of man-hours lost<sup>52</sup> due to arbitrary limits.<sup>53</sup> The Secretary felt that in addition to removing barriers, older workers should be assisted in upgrading their qualifications.<sup>54</sup> The report included recommendations aimed at both problem areas,<sup>55</sup> and concluded that "the possibility of new non-statutory means of dealing with such arbitrary discrimination has been explored. That area is barren."<sup>56</sup> State statutes, if well administered, were recognized as effective but it was felt that elimination of discrimination would proceed more rapidly, under federal leadership.

Congress directed the Secretary of Labor to submit recommendations to implement his conclusions through the 1966 amendments to the Fair Labor Standards Act,<sup>58</sup> and the President delivered his Older American Message<sup>59</sup> the day prior to submission of the written draft to Congress.<sup>60</sup> Congress then passed the 1967 Age Discrimination in Employment Act,<sup>61</sup> with unanimous support for the general overall purpose.<sup>62</sup> It became effective on 12 June 1968.<sup>63</sup> Section 4 prohibits employers of 25 or more persons<sup>64</sup> in an industry affecting interstate commerce from discriminating in any possible form against present or prospective employees. Employment agencies and labor organizations with 25 or more members<sup>65</sup> are also prohibited from age discrimination in their activities. All three are forbidden to discriminate against an individual for pursuing his remedies under this Act.<sup>66</sup>

Four specific exceptions apply to section 4. The first concerns age as a bona fide occupational qualification reasonably necessary to the normal operations of the business; the second exception occurs when differentiation is based on reasonable factors other than age; the third reason concerns a bona fide retirement system which is not a subterfuge to avoid the pur-

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.* at 5.

<sup>50</sup> *Id.* at 6.

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

<sup>52</sup> *Id.* at 18.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.* at 22.

<sup>55</sup> *Id.* at 21.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 22.

<sup>58</sup> 80 Stat. 830, 29 U.S.C. § 203 (1966).

<sup>59</sup> 2 U.S. CONG. & ADMIN. NEWS 2214 (1967).

<sup>60</sup> CONG. RECORD, S. JOUR. vol. 113 No. 9, 90th Cong., 1st Sess. (1967).

<sup>61</sup> 81 Stat. 602, 29 U.S.C. § 620 (1964).

<sup>62</sup> H.R. REP. NO. 805, 90th Cong., 1st Sess. 3 (1967).

<sup>63</sup> 81 Stat. 602, § 3, 29 U.S.C. § 621 (1967).

<sup>64</sup> 50 or more between June 12 and June 30, 1968.

<sup>65</sup> 50 or more between June 12 and July 1, 1968. Note the one day difference.

<sup>66</sup> WAGES, HOURS AND PUBLIC CONTRACTS DIVISION, DEP'T OF LABOR PUBLICATION 1234, # 0-296-366, U.S. Gov't Printing Office (1968).

poses of the Act. An important proviso prohibits these plans from being an excuse for failure to hire any individual. The fourth exception allows discharge for good cause.

The Secretary of Labor has the enforcement duties of this Act, with the machinery of the Fair Labor Standards Act (FLSA) available to assist him.<sup>67</sup> FLSA civil remedies apply but not the criminal sanctions.<sup>68</sup> Liquidated damages are allowed for wilful violations.<sup>69</sup> The Secretary or an aggrieved individual can bring enforcement action. The Secretary, however, must first attempt voluntary compliance by conciliation, conference and persuasion. An individual must give the Secretary 60 days notice before his action, but the individual's right terminates when the Secretary commences action.<sup>70</sup> States are allowed 60 days to act<sup>71</sup> but lose their right when Federal enforcement commences.<sup>72</sup> Section 12 limits the protection to individuals at least 40 years of age but less than 65 years old.

The Secretary has delegated a major portion of his responsibilities under the Act.<sup>73</sup> The Wage, Hour and Public Contracts Division (WHPC) has been given the duty of enforcement and authority to issue interpretations of the Act's applications.<sup>74</sup> The WHPC Division issued an Interpretive Bulletin indicating how the office representing the public interest would seek to apply the Act, unless otherwise directed by the courts.<sup>75</sup> The Bulletin outlines broad interpretations for prohibitions and narrow ones for exceptions, following the U.S. Supreme Court concept of placing a heavy burden on one claiming the exemption.<sup>76</sup> Conditions of employment, compensation or privileges are broad,<sup>77</sup> while bona fide occupational qualifications<sup>78</sup> and reasonable factors other than age, are narrow.<sup>79</sup> Several opinion letters have been issued based on the Bulletin.<sup>80</sup>

<sup>67</sup> 29 U.S.C. § 209, 211.

<sup>68</sup> Address by Miss Bessie Margolin, Assoc. Solicitor, U.S. Dep't of Labor, Wash., D.C., *Fifteenth Annual Institute on Labor Law* at Southwestern Legal Foundation, Dallas, Texas, Oct. 17-18, 1968 (hereinafter Margolin).

<sup>69</sup> 29 U.S.C. § 216 (1964).

<sup>70</sup> H.R. REP. NO. 805 *supra* note 62, at 5; *see also* Halgreen, *Age Discrimination in Employment Act of 1967*, 43 LOS ANGELES BAR BULL. 361 (July 1968) (where the writer distinguishes between "bringing" and "maintaining" the action and the difference if either the Secretary or the individual files first). *See also* Grossfield v. W.B. Saunders Co., 59 Lab. Cas. 9184 (D.N.Y. 1968).

<sup>71</sup> 120 days in the first year.

<sup>72</sup> CCH *supra* note 6, at para. 2100.

<sup>73</sup> Secretary of Labor's Order No. 10-68, July 4, 1968; 33 FED. REG. 130 (July 4, 1968).

<sup>74</sup> Secretary of Labor's Order No. 11-68, July 3, 1968; 33 FED. REG. 129 (July 3, 1968).

<sup>75</sup> DEPARTMENT OF LABOR INTERPRETIVE BULL. WAGE AND HOUR AND PUBLIC CONTRACTS DIVISION, 29 C.F.R. Part 860, Sub. ch. C (Supp. 1968), 33 FED. REG. 12,227 (Aug. 1968) (hereinafter BULLETIN). *See also* CCH *supra* note 6, at para. 17,875, 8093; 34 FED. REG. 6396 (April 11, 1969).

<sup>76</sup> Margolin, *supra* note 68, at 38 where she lists the following cases in support of this policy. *Wirtz v. Idaho Sheet Metal Works, Inc.*, 383 U.S. 190 (1966); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *Walling v. Kentucky Finance Co., Inc.*, 359 U.S. 290 (1959); *Phillips, Inc. v. Walling*, 324 U.S. 496 (1945); *Foremost Dairies, Inc. v. Wirtz*, 381 F.2d 653 (5th Cir. 1967); *Wirtz v. Midwest Mfg. Corp.*, 58 CCH Lab. Cas. para. 32,070 (S.D. Ill., Aug. 6, 1968); and *Wirtz v. Basic, Inc.*, 256 F. Supp. 786 (D. N.J. 1966).

<sup>77</sup> BULLETIN, *supra* note 75, at 860.50.

<sup>78</sup> BULLETIN, *supra* note 75, at 860.102.

<sup>79</sup> BULLETIN, *supra* note 75, at 860.103.

<sup>80</sup> Department of Labor, Wage and Hours and Public Contracts Administrator, Opinion Letter, June 10, 1968 (hereinafter Opinion Letter).

### III. AVIATION EMPLOYMENT

#### A. *The Federal Aviation Agency Retirement Rule.*

The documentation available for legal research, leads to the conclusion that aviation employment has experienced the largest number of age discrimination problems. The Federal Aviation Act<sup>81</sup> charged the Federal Aviation Agency (FAA) with the duty to regulate the technical aspects of air transportation.<sup>82</sup> The principle purpose of this legislation was to provide for safe and efficient use of airspace.<sup>83</sup> Section 601(a)<sup>84</sup> gave the FAA Administrator duties:

[T]o *promote safety* of flight of civil aircraft in air commerce by prescribing and revising from time to time . . .

....

(5) reasonable rules and regulations governing, *in the interest of safety*, the maximum hours or *periods of service* of airmen, and other employees, of air carriers; and

(6) such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedures as the administrator may find necessary to provide adequately for national security and *safety* in air commerce [Emphasis added.].

Section 601(b) continues:

In prescribing standards, rules and regulations . . . the administrator 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 . . . the administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to *reduce and eliminate the possibility* of or recurrence of accidents in air transportation . . . [Emphasis added.].

Section 602(a) and (b) give the Administrator power to issue airman certificates "containing such terms, conditions, and limitations as to duration . . . and other matters as the Administrator may determine to be necessary to assure safety in air commerce." The Administrator has issued rules and regulations governing certification of pilots,<sup>85</sup> flight crews,<sup>86</sup> and airmen.<sup>87</sup> Part 67 of the Federal Aviation Regulations (FAR) governs medical standards and certification procedures, setting up procedures subjecting pilots to increasingly strict examinations as their age increases.<sup>88</sup>

Under Part 121 dealing with air carrier operations, the FAA adopted the following rule:

(c) 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

<sup>81</sup> 72 Stat. 731, 49 U.S.C. §§ 1302 *et seq.* (1964).

<sup>82</sup> 72 Stat. 731, Title 3, § 301-14, 49 U.S.C. § 1341-55 (1964).

<sup>83</sup> 2 U.S. CONG. & ADMIN. NEWS 3741 (1958).

<sup>84</sup> 49 U.S.C. § 1421(a).

<sup>85</sup> 14 C.F.R. part 61.

<sup>86</sup> 14 C.F.R. part 63.

<sup>87</sup> 14 C.F.R. part 65.

<sup>88</sup> 14 C.F.R. part 67.13(e) (2).

60th birthday. No person may serve as a pilot of an airplane engaged in operations under this part if that person has reached his 60th birthday.<sup>89</sup>

The rule immediately brought on attempts to repeal it or to establish exceptions. *Robert E. Chew v. E. R. Quasada*<sup>90</sup> sought to declare the rule invalid and to enjoin its enforcement. Chew had reached the age of 60. The court examined the Administrator's powers under the Federal Aviation Act and concluded the regulation was, "a valid exercise of validly delegated congressional power and that the regulation is reasonably related to the achievement of the Administrator's purpose and duty; the promotion of safety in air commerce."<sup>91</sup> The FAA had submitted medical information showing increased probability of sudden incapacitation maladies in any group reaching 60 years old.<sup>92</sup> Plaintiff argued that Congress did not have the power, even in the interest of safety, to make age the exclusive criterion for compulsory retirement,<sup>93</sup> relying on *Railroad Retirement Board v. Alton Railroad Co.*<sup>94</sup> in support of his challenge to the chosen method of using age as a criterion. The court said that even if *Alton* was the law, it was not controlling since that case had a pension plan, bearing no relation to safety. *Alton* actually recognized the power of Congress to retire aged workers.<sup>95</sup>

On the same day, in a different forum<sup>96</sup> The Airline Pilots Association (ALPA) was arguing deprivation of property rights in violation of due process by insisting that the regulation was not legally promulgated, that it intruded into the realm of collective bargaining, and that irreparable injury would be suffered.<sup>97</sup> The court was unsympathetic:

Any attempt to weigh the countervailing considerations of dollar loss to the approximately forty pilots [in 1960] against the public safety in air carrier operations borders on vulgarity.<sup>98</sup>

The court dug much deeper into the safety aspect of the problem, citing a statement by Harry F. Guggenheim of the Cornell-Guggenheim Aviation Safety Center:

There is of course a wide range of individual differences in ability in older years. One cannot say with certainty that a given man over sixty cannot safely pilot a modern transport plane, or that the cutoff point comes at this age or even younger. But there is increasing evidence that as men grow older, they unfortunately experience deterioration for which maturity, experience, judgment and skill cannot compensate adequately. We must keep in mind

<sup>89</sup> 14 C.F.R. part 383(c), 24 FED. REG. 9767; See also 33 FED. REG. 9172; this regulation was formerly parts 40.260(b), 41.48(e) and 42.40(c) and contained the following language: "No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft while engaged in carrier operations." 24 FED. REG. 9768, 9778, 9773 (Dec. 1, 1959); See also 24 FED. REG. 5247 (June 27, 1959).

<sup>90</sup> 182 F. Supp. 231 (D. 1960), 39 CCH Lab. Cas. 66,327 (1960), *aff'd*, 286 F.2d 319 (2d Cir.), *cert. denied*, 366 U.S. 962 (1961), *reh. denied*, 368 U.S. 870 (1961).

<sup>91</sup> 39 CCH Lab. Cas. 69,729 (1960).

<sup>92</sup> ALPA Narrative Brief, *supra* note 90, at 3.

<sup>93</sup> 39 CCH Lab. Cas. 69,728 (1960).

<sup>94</sup> 295 U.S. 330 (1935).

<sup>95</sup> *Id.* at 367 and again at 381.

<sup>96</sup> *ALPA v. Quesada*, 182 F. Supp. 595 (S.D.N.Y. 1960), 39 CCH Lab. L. Rep. para. 66,334.

<sup>97</sup> ALPA Narrative Brief, *supra* note 90, at 4.

<sup>98</sup> 39 CCH Lab. L. Rep. at 69,752.



the ever-increasing performance characteristics of modern aircraft. Where higher speeds significantly reduce the time available to conduct a sequence of operations in emergencies there is no doubt that many of these older pilots can successfully continue flying their present aircraft, and even make transition to faster ships by completing more objective and rigid flight checks. *But there will be the occasional one who cannot—and this may not be discovered until there is a disastrous crash, which may take many lives*<sup>99</sup> [Emphasis by the court.].

Obviously impressed with this argument, the court concluded that there was no reliable method to predict accurately the occurrence of sudden incapacitation due to heart attacks, strokes or seizures.<sup>100</sup>

The court felt that the Administrator's duties would not be met by merely responding to disasters, and that the public deserved more. This view is reasonable under Section 601(b) where Congress was concerned about eliminating the "possibility" of accidents. Relying on the Administrator's expertise, the court denied the motion for a stay pending appeal.

On the same day, the Second Circuit affirmed.<sup>101</sup> ALPA rendered two arguments: First, that the regulation was invalid because it was issued without holding adjudicatory hearings required by the Administrative Procedure Act<sup>102</sup> (APA) and the Federal Aviation Act;<sup>103</sup> and second, that the pilot's licenses were denied without due process of law.

The court reviewed the safety clauses in the Federal Aviation Act and found that an opportunity for submission of written briefs and data was afforded under Section 4 of the APA and that the public interest would not be served by providing each pilot with an individual hearing. The rule was legislative in nature. The Court held that Section 609 of the Federal Aviation Act, providing for revocation or modification of licenses, required a hearing only when the order was directed to an individual pilot and not one affecting all 18,000<sup>104</sup> pilots, where public interest required a speedy process. A due process argument, therefore, was not present.

Plaintiffs next asserted the limitation was arbitrary. The court said:

It is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress. The Administrator is an expert in this field; this is the very reason he was given the responsibility for the issuance of air safety regulations. We can only ask whether the regulation is reasonable in relation to the standards prescribed in the statute and the facts before the Administrator. Of that there can be no doubt in this case.<sup>105</sup>

The court found the rule was not discriminatory because it applied only to carrier pilots.

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

<sup>100</sup> *Id.* at 69,753.

<sup>101</sup> 39 CCH Lab. L. Rep. para. 66,335; 276 F.2d 892 (2d Cir. 1960), 40 CCH Lab. L. Rep. para. 66,459.

<sup>102</sup> 5 U.S.C. §§ 1001-11 (1964).

<sup>103</sup> 49 U.S.C. § 1421, Sec. 609 (1964).

<sup>104</sup> FEDERAL AVIATION ADMINISTRATION, STATISTICAL HANDBOOK FOR 1966 table 8.31 at 181, showed 14,469 pilots and co-pilots with 3,911 other flight personnel including flight engineers for 1965.

<sup>105</sup> 40 CCH Lab. Cas. 70,238 (1960).

The Administrator did not act unreasonably in placing greater limitations on the certificates of pilots flying planes carrying large numbers of passengers who have no opportunity to select a pilot of their own choice. The Federal Aviation Act contemplates just such distinctions between the regulations governing "Air Commerce" and those governing other air transportation. See Section 601(b), 49 U.S.C. Sec. 1421(b).<sup>106</sup>

Two months later, ALPA sought an injunction *pendent lite*<sup>107</sup> which was denied.<sup>108</sup> Undaunted, ALPA appealed a second time, unsuccessfully contending that the District Judge erroneously vacated a notice of deposition.<sup>109</sup> Thus ended a series of challenges to the rule which in every case was upheld on its merits. The administrative, procedural, economic and constitutional arguments were made and rejected by the courts; and, in ALPA's view, in an almost hostile manner.<sup>110</sup>

### B. *The Stewardess Retirement Problem.*

The policies of several airlines considering stewardesses too old to work after age 32 have been described as a flagrant case of age discrimination.<sup>111</sup>

Based on the Executive Order<sup>112</sup> for government contractors to cease age discrimination concerning stewardesses, the Defense Department sought advice from the Department of Labor on age restrictions of ten airlines contracting for defense work.<sup>113</sup> Other airlines held government mail contracts.<sup>114</sup> The Department of Labor replied that the limits were arbitrary and should not be based on chronological age.<sup>115</sup> Spurred into action by Congressman O'Hara,<sup>116</sup> the Air Force attempted to negotiate removal of the age restrictions with varying success.<sup>117</sup> Some airlines refused to comply, and since the Executive Order had no enforcement powers, no further action was taken.<sup>118</sup> The carriers used safety to justify their policies, citing the younger girls' superior health, attitude, personality, appearance and desire.<sup>119</sup>

Meanwhile the Transport Workers' Union (TWU) representing several stewardess groups, resolved to end such discrimination.<sup>120</sup> On 17 December 1964, the New York State Commission for Human Rights initiated an

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

<sup>107</sup> 40 CCH Lab. Cas. 66,653 (1960).

<sup>108</sup> *Id.* at 70,917, 18.

<sup>109</sup> 286 F.2d 319 (2d Cir. 1961), 42 CCH Lab. Cas. 16,185 (1961).

<sup>110</sup> ALPA Narrative Brief, *supra* note 90, at 3.

<sup>111</sup> Address by Representative James O'Hara before the United States Senate, March 29, 1966, 112 CONG. REC. 54, 89th Cong., 2d Sess. (1966).

<sup>112</sup> No. 11,141 *supra* note 41.

<sup>113</sup> Letter from Jack Moskowitz to Stanley H. Ruttenberg, December 23, 1965.

<sup>114</sup> Statement of Francis A. O'Connell before the State of New York Commission for Human Rights on Airline Industry-Maximum Age Requirements (Stewardesses) at 6, December 7, 1965.

<sup>115</sup> Letter from Stanley H. Ruttenberg to Jack Moskowitz, January 13, 1966.

<sup>116</sup> Letter from James G. O'Hara to Aaron J. Racusin, March 28, 1966.

<sup>117</sup> Letter from Aaron J. Racusin to James G. O'Hara, April 14, 1966.

<sup>118</sup> Statement of James F. Horst before the Senate Labor and Public Welfare Committee on S. 788 and S. 830 at 4, March 16, 1967.

<sup>119</sup> Statement of Francis A. O'Donnell before the Equal Employment Opportunities Commission on Discrimination Because of Sex, Flight Attendants at 5, May 10, 1966.

<sup>120</sup> 12TH CONSTITUTIONAL CONVENTION, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, REPORT OF PROCEEDINGS, RESOLUTION 3 (Oct. 11-15, 1965).

investigation into the maximum working age limits.<sup>121</sup> The investigation revealed that the first stewardess was hired in 1935, but age limits were not set until the 1950's, and in some cases, 1964. The limit commonly was 32 or 35. The first discharge for age was in 1963, with others following. The limit was not an industry practice since 24 of the 38 airlines in the

<sup>121</sup> CCH TRANSFER BINDER *supra* note 30, para. 8051; 112 CONG. REC. 54, 89th Cong., 2d Sess. (1966).

REPORTED AGE CEILINGS FOR CONTINUED EMPLOYMENT AS AIRLINE STEWARDESS  
The 38 airlines listed in the World Aviation Directory as A-1 or  
U.S. Air Carriers Certified by the Civil Aeronautics Board\*

No Age Ceiling			
Group	#	Airlines	Number of Stewardesses
A	1	Airlift Int'l	48
	2	Eastern	1,773
	3	New York Airways	14
	4	North East	171
	5	Pan American	2,085
	6	United	2,352
B	7	Delta	INA†
	8	Flying Tiger	62
	9	Lake Central	72
	10	National	423
	11	Pan Am-Grace	INA†
	12	Seaboard	60
C	13	Trans Caribbean	INA†
	14	Alaska	21
	15	Aloha	22
	16	Caribbean-Atlantic	50
	17	Central	68
	18	Hawaiian	33
	19	Mackey	19
	20	North Central	125
	21	Pacific	50
	22	Pacific-Northern	42
	23	Piedmont	96
	24	West Coast	62

With Age Ceiling			Age Ceiling
A	1	American	1,800
	2	Mohawk	141
	3	TWA	2,200
B	4	Allegheny	116
	5	Braniff	342
	6	North West	800
	7	Slick	37
	8	Bonanza	52
	9	Continental	320
	10	Frontier	91
C	11	Ozark	112
	12	Southern	80
	13	Trans Texas (Now Texas Int'l)	80
	14	Western	393

Group A: Airlines with stewardess bases in New York State.

Group B: Airlines with operations in New York State, no stewardess bases in New York State.

Group C: Other Airlines.

† INA—Information not available as of November 1965.

\* Taken from CCH Employment Practices Guide para. 8051, *supra* note 6. It should be noted that there will be changes in the figures cited in this table by the time this article is published.

United States at the time did not have the policy, and some were discontinuing it. Foreign carriers had age ceilings in the 1940's and 1950's with age 67 in Norway being the maximum. No ceilings existed for male stewards which performed identical duties. The Commission concluded that "retirement age should be predicated solely on the individual stewardess' continued ability to perform the duties of the position required. Age was not a bona fide occupational qualification for continued employment."<sup>122</sup>

The TWU argued in part that the FAA had not seen fit to propose such a rule for certification of flight personnel.<sup>123</sup> They cited Representative William Hathaway who said "the airlines must learn that they are not operating flying bunny clubs, but just another form of transportation."<sup>124</sup>

Although released for the press five days after the New York Commission report, the result of a survey completed by the Airways Club, an organization composed primarily of businessmen, and the only one representing the interests of airline passengers exclusively, was probably available to the Commission.<sup>125</sup> "The typical member has an income of \$23,000 yearly, flies every two weeks and is an officer of his corporation."<sup>126</sup> In a survey of the membership, with one-fourth of the 25,000 members responding, only 39 percent thought stewardesses should have age ceilings. Sixty-one percent said no, or did not care. Only 26 percent said age mattered to them. Of those which did prefer an age group, 40 percent chose ages 26 to 30, with 11 percent choosing over 36 years old.<sup>127</sup> Eighty-five percent of the club members were men.<sup>128</sup>

Thirteen airlines filed suit challenging the jurisdiction of the State Commission to apply Article 15 of the New York Anti-Discrimination Law. In *Allegheny Airlines v. Fowler*<sup>129</sup> the airlines contended the State Commission's proceedings were unconstitutional. The court dismissed for lack of jurisdiction of the subject matter since the administrative process was incomplete. In addition, the court said:

[T]he actual constitutional questions . . . if any there be . . . are uncertain and abstract.<sup>130</sup>

<sup>122</sup> *Id.*

<sup>123</sup> O'Connell *supra* note 114, at 4.

<sup>124</sup> *Id.* at 6.

<sup>125</sup> N.Y. TIMES, March 29, 1966 at 81, Col. 5.

<sup>126</sup> Letter from Morton M. Winthrop to Robert Chancellor, May 5, 1966.

<sup>127</sup> Airways Club, Press Release (March 29, 1966).

The following questions were used:

1. Do you think that the airlines should have age ceilings for stewardesses?  
YES 39%      No or DON'T CARE 61%
2. Would the age of the stewardess matter to you?  
YES 26%      No or DON'T CARE 74%
3. Do you prefer a stewardess of a particular age group?  
YES 30%      No or DON'T CARE 70%
4. If you answered yes to #3, which group do you prefer?  

18-25	26-30	31-35	36-40	40-ABOVE
19%	48%	22%	11%	—
5. Should a stewardess be unmarried?  
YES 17%      No or DON'T CARE 83%

<sup>128</sup> N.Y. TIMES, *supra* note 125.

<sup>129</sup> 261 F. Supp. 508 (S.D.N.Y. 1960).

<sup>130</sup> *Id.* at 521.

. . . I am satisfied that the issues raised here are so abstract and hypothetical as to preclude judicial relief at this stage.<sup>131</sup>

*Allegheny Airlines v. Fowler*<sup>132</sup> was decided in 1966. In March 1967, hearings were in progress before the Senate Labor and Public Welfare Subcommittee, on proposed drafts of the Federal Age Discrimination in Employment Act of 1967. During those hearings, representatives of the stewardesses testified in favor of eliminating the 40 to 65 age limitations.<sup>133</sup> Besides highly resenting the idea of being too old to work at age 32, the problem of 10,000 potentially unemployed women in their mid-thirties, skilled in only one field, was presented to Congress as a threatening situation,<sup>134</sup> assuming continued growth at the then present rate for the industry. Actually, few stewardesses reach this age due to marriage and raising families. The fact that many airlines had no limits and still had competent stewardesses was seized upon in expounding the practice as definitely not a bona fide occupational qualification.<sup>135</sup> The carriers claimed younger girls showed more enthusiasm<sup>136</sup> and had greater physical capabilities.<sup>137</sup> The stewardesses countered:

[I]t is necessary for stewardesses to be young and pretty—because of the airlines [sic.] image.<sup>138</sup>

. . . [S]ome airlines . . . are contemplating uniforms of the mini-skirt style . . . the latest quip,—I hope United will follow suit—then we could really fly the friendly thighs of United . . . While this may appeal to the predatory male more than last year's movies, does it really warrant government subsidy? The purpose of the airline industry is supposed to be interstate commerce, not sex.<sup>139</sup>

Many stewardesses were currently flying at age 50,<sup>140</sup> resulting from hirings prior to the maximum age limits, known as grandmother clauses.<sup>141</sup> It was emphasized in favor of the stewardesses that professional athletes had no such limitations,<sup>142</sup> and neither did actresses.<sup>143</sup> The limits were raised to age 40 by Congress, but were not removed completely as the stewardesses had hoped. Congress was aware of the fact that the employment contract was entered with age limitation stipulations in it.<sup>144</sup> Despite this, the union felt it was morally wrong.<sup>145</sup> Some airlines offered other em-

<sup>131</sup> *Id.* at 522.

<sup>132</sup> *Allegheny*, *supra* note 129.

<sup>133</sup> *Hearings on S. 830 & 788 Before the Subcomm. on Labor on Age Discrimination in Employment of the Senate Labor and Public Welfare Committee*, 90th Cong., 1st Sess. (March 1967).

<sup>134</sup> *Id.* at 199.

<sup>135</sup> *Id.* at 201-02.

<sup>136</sup> Horst, *supra* note 118, at 5.

<sup>137</sup> *Id.* at 6.

<sup>138</sup> *Id.* at 5.

<sup>139</sup> Statement of Colleen Bolland, President, Airline Stewards & Stewardesses Local 550, TWU, AFL-CIO before the Senate Hearings on S. 830 & S. 788 at 6, March 16, 1967.

<sup>140</sup> *Id.* at 6.

<sup>141</sup> *Id.* at 4.

<sup>142</sup> Reply Statement of TWU, O'Donnell & Schwartz, attorneys for TWU, before the Senate hearings, *supra* note 133, April 20, 1967.

<sup>143</sup> *Id.* at 4.

<sup>144</sup> *Hearings*, *supra* note 133, at 207.

<sup>145</sup> *Id.* at 208.

ployment with the carrier which possibly toned down the stewardess' case.<sup>146</sup>

Several congressmen were not convinced. They related the prehirng contracting situation to a yellow dog contract and wanted an amendment making an exception in this specific case.<sup>147</sup> Section 3(b) of the Age Discrimination in Employment Act as eventually passed, directed the Secretary of Labor to report back to Congress within six months on the feasibility of lowering the limits or making an exception. The compromise resulted from a majority feeling that the stated purpose of the legislation was to protect older persons, and stewardesses were not yet old.<sup>148</sup> Only four trunks and six locals imposed limitations during 1967. Thirty carriers had no limits or did not enforce them,<sup>149</sup> offering those previously required to resign, a chance to return,<sup>150</sup> in some cases without loss of seniority.<sup>151</sup>

Meanwhile, the New York proceedings ripened to a point where the administrative process had heard the airline argument.<sup>152</sup> The New York Court held that the law did not protect the stewardesses, because its protection was limited to those between the ages of 40 and 65. The equal protection clause of the state constitution did not include age within the purview of constitutional protection.<sup>153</sup> TWU had resolved to pursue every possible means of eliminating discrimination because of sex, age and marriage.<sup>154</sup> Northwest Airlines requested an interpretation from the Equal Employment Opportunity Commission (EEOC) on the issue of whether sex was a bona fide occupational qualification for stewardesses, thus presenting TWU with an excellent opportunity to carry out its resolution. The EEOC is charged with administering the provisions of the Civil Rights Act of 1964.<sup>155</sup> Title VII prohibited discrimination in employment based on sex. The EEOC decided to hear the controversy. The stewardesses argued that the FAA required stewardesses,<sup>156</sup> that the FAA was considered removing pilot retirement,<sup>157</sup> that the FAA had no stewardess retirement rule<sup>158</sup> and that image was the airlines' real excuse.<sup>159</sup> As a result of these hearings, the EEOC concluded that sex was

<sup>146</sup> *Id.* at 286.

<sup>147</sup> H.R. REP. NO. 805, *supra* note 62, at 5.

<sup>148</sup> *Id.* at 6, 7.

<sup>149</sup> *Editorial*, AVIATION WEEK & SPACE TECHNOLOGY, Aug. 28, 1967, at 34, 35 (hereinafter AWST).

<sup>150</sup> Letter of Understanding, from Homer Kinney (Northwest Airlines) to Colleen Bolland, June 15, 1967; Letter of Understanding, from D.J. Crombie (T.W.A.) to Colleen Bolland, Aug. 8, 1967; Letter of Understanding, from W.S. Magill Jr. (Southern Airways) to Colleen Bolland (no date available).

<sup>151</sup> Letter of Understanding, from W.S. Magill Jr. (Southern Airways) to Colleen Bolland, June 15, 1967.

<sup>152</sup> *Hearings on Eloise Soots v. American Airlines Inc., Case No. 12288-65, Before the New York State Comm. For Human Rights*, February 20, 1967.

<sup>153</sup> *American Airlines, Inc. v. State Comm. For Human Rights*, 286 N.Y.S.2d 493 (N.Y. App. Div. 1968).

<sup>154</sup> Equal Employment Opportunities Comm., Press Release, February 23, 1968.

<sup>155</sup> 42 U.S.C. § 2000(e) *et seq.* (See especially Title VII, Sec. 713(b)).

<sup>156</sup> O'Connell, *supra* note 119, at 8.

<sup>157</sup> *Id.* at 9.

<sup>158</sup> See 14 C.F.R. §§ 121.391, 97.424 (1965).

<sup>159</sup> O'Connell, *supra* note 119, at 11.

not a bona fide occupational qualification.<sup>160</sup> The actual ruling was delayed due to prejudicial claims against a member of the EEOC regarding her then pending personal employment possibilities,<sup>161</sup> but was subsequently published.<sup>162</sup>

The judicial process on the issue of rules prohibiting work after marriage had previously resulted in the following early decision:

The general rule is that employees who marry, and thereafter have resigned because of a company rule prohibiting continuation of employment after marriage, are held to have voluntarily quit their work without good cause, and are not eligible for unemployment compensation.<sup>163</sup>

Subsequently, in *Cooper v. Delta Airlines, Inc.*,<sup>164</sup> a federal district court was faced with the issue of whether Title VII of the Civil Rights Act of 1964 prohibited an airline from refusing to employ females as stewardesses. Deciding the question in the negative, the court noted that the EEOC had not yet ruled on the stewardesses' case and that it was "plain that Congress did not ban discrimination in employment due to one's marital status and that is the issue in this case."<sup>165</sup> The limit was thought to be a bona fide occupational qualification. When later faced with identical issues<sup>166</sup> the same court stressed the fact that the plaintiff stewardess had signed the employment contract with the marriage ban, and that as a condition of employment, it did not violate the Civil Rights Act.

Despite the judicial precedent established, the EEOC issued rulings on three individual stewardess complaints,<sup>167</sup> reaching an opposite result. Two of the stewardesses were discharged for marriage—one for reaching age 33. The EEOC said:

The concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees presently in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirements of the job.<sup>168</sup>

The carriers argued that women undergo physical and personality changes when they pass age 38 and that Title VII of the Civil Rights Act had no ban on age discrimination.<sup>169</sup> The EEOC countered:

Respondent's maximum age restriction on stewardesses is part and parcel of its policy of restricting the flight cabin attendant job to women, and is a sex based condition of employment.<sup>170</sup>

<sup>160</sup> 32 FED. REG. 10228 (July 11, 1967); 32 FED. REG. 11050 (July 28, 1967).

<sup>161</sup> *Air Transport Association v. Aileen C. Hernandez*, 54 Lab. Cas. para. 9030 (D. D.C. 1966); 264 F. Supp. 227, 55 Lab. Cas. para. 9062 (D.C. of C. 1967).

<sup>162</sup> CCH, *supra* note 6, at para. 8002.

<sup>163</sup> *Brown v. Southern Airways, Inc.*, 170 So. 2d 245 (La. Ct. App.), *cert. denied*, 171 So. 2d 478 (1964).

<sup>164</sup> 274 F. Supp. 781 (E.D. La. 1967).

<sup>165</sup> *Id.* at 783.

<sup>166</sup> *Cooper v. Doyal*, 205 So. 2d 59 (La. Ct. App. 1967).

<sup>167</sup> *Christina A. Neal v. American Airlines, Inc.*, CCH, *supra* note 6, at para. 8002 (June 20, 1968); *June Dodd v. American Airlines, Inc.*, CCH, *supra* note 6, at para. 8001 (June 20, 1968); *Virginia Lane Colvin v. Piedmont Aviation, Inc.*, CCH, *supra* note 6, at para. 8003 (June 20, 1968).

<sup>168</sup> *Neal v. American Airlines, Inc.*, *supra* note 167, at 6004, 6005.

<sup>169</sup> *Id.* at 6003.

<sup>170</sup> *Id.* at 6005.

Since the FAA requires flight attendants be given recurrent training and a performance check<sup>171</sup> at least once a year, nothing prevents terminating the attendant's employment if she cannot pass these tests. Otherwise, termination for age is discrimination based on sex and violates Title VII of the Civil Rights Act.<sup>172</sup>

The Secretary of Labor delivered his report under Section 3(b) of the Age Discrimination in Employment Act on 27 November 1968. He felt the problem was unique and, in view of recent developments, the:

[T]he problem appears to be well on the way to solution through the issuance of a decision by the EEOC . . . and through modifications of collective bargaining agreements as they affect the employment of stewardesses . . . the agreement reached on August 11, between TWU and American Airlines, permits the airline to continue to offer stewardesses the opportunity to transfer to ground jobs . . . or . . . retirement (or) . . . of continuing to fly if they so choose.<sup>173</sup>

Based on these observations, the Secretary recommended reexamination at a later time.

### C. The Pilot Hiring Problem.

The maximum hiring age policies of several air carriers bear indications of future judicial confrontations, especially since passage of the Age Discrimination Act of 1967. The retired military pilot is typically between 38 and 42, possesses all the FAA pilot certificates, thousands of hours of flying time and a first class physical profile. Although most possess 20/20 vision, the FAA permits correctable vision<sup>174</sup> and has considered further relaxing of the vision requirements.<sup>175</sup> The carriers, however, have refused to hire these individuals as flight crew members.

During 1963 and 1964, a large number of airline pilots retired that were hired after World War II.<sup>176</sup> Hiring practices were relaxed to include those less qualified than was previously the case, and the age limits were raised to 35. One carrier official said:

We have found a good supply of pilots in this higher age bracket who were previously blocked from employment only by the thirty year age limit . . . and we have already hired a number of them.<sup>177</sup>

Many of these previously could not fly for carriers due to their age.<sup>178</sup> Some acquired their qualifications at great physical expense only to find forbidding age limits.<sup>179</sup> Such was the plight of those who were not military

<sup>171</sup> 14 C.F.R. § 121.424(b) (1965).

<sup>172</sup> *Neal v. American Airlines, Inc.*, *supra* note 167, at 6006.

<sup>173</sup> Letter from Williard Wirtz to Hubert Humphrey, November 27, 1968, at 2.

<sup>174</sup> *Washington Advisory, Editorial*, FLYING, January, 1969 at 29. Distant visual acuity of 20/30 without glasses will be acceptable for first and second class permit holders, and 20/40 without glasses for third class permits instead of the former 20/20. Contact lenses would be allowed for the correction. The rule was proposed for early 1969 consideration after the FAA noted that, of those pilots wearing glasses or having vision defects, who also had accidents, none of the accidents were visual related.

<sup>175</sup> *Id.*

<sup>176</sup> *Editorial*, AWST, Apr. 6, 1964, at 29.

<sup>177</sup> *Editorial, United Recruits Private Pilots*, AWST, June 15, 1964, at 41.

<sup>178</sup> *Letters to The Editors*, AWST, Nov. 23, 1964, at 110.

<sup>179</sup> *Letters to the Editor*, AWST, Dec. 28, 1964, at 70; Apr. 1, 1963, at 104.



trained. Of those who elected to remain in the military, the same problems were present when they left the service and tried to work for the carriers. Though well qualified,<sup>180</sup> they were not hired because of their age. Although deteriorating physical conditions, increased training costs and unwillingness to step down to the third seat were management's excuses,<sup>181</sup> these pilots preferred flying to selling insurance.<sup>182</sup> The carriers, however, saw it differently.

The pilot we hire today probably will not become a captain until the SST era. He's got to be a thinker, a computer operator. That's why we are stressing youth, personality, education, well rounded, etc. We're going to have to train him so we might as well start with this kind of person.<sup>183</sup>

Of the Air Force pilots on active duty who might be considered potential airline pilot material, 27.6 percent are between the ages 20 to 30, 47.8 percent are between 31 and 40—"well beyond the hiring age of most trunk lines."<sup>184</sup> "[T]he ideal pilot, one who has youth,"<sup>185</sup> and all the experience qualities of the older pilots, was the typical wishful thinking of personnel officers.

Other reasons given by the carriers for age restrictions were that hiring military retired pilots might affect the aspirations of junior pilots, or create a morale problem.<sup>186</sup> Retirement and training costs being the same for both older pilots and younger pilots was an additional reason.<sup>187</sup> Most pension plans call for retirement at age sixty.<sup>188</sup>

No airline to my knowledge has hired a new forty year old pilot . . . age seems to be mostly important for economic reasons. The impression exists that it is so expensive to train a new pilot for the third seat (to say nothing of recurrent and transition training) that at age thirty-five, with only a twenty-five year useful work life to look forward to, a new pilot is just about marginal in terms of amortizing the expense.<sup>189</sup>

It would appear that amortization of the initial training expense can be the only valid business reason for not hiring older pilots since older pilots already employed by carriers are presently given currency and transition training.

#### IV. A CRITICAL VIEW

##### A. *The FAA Pilots Retirement Rule.*

Two issues linger concerning the "age 60 rule" which have not been tested in the courts. One is an individual exception to the rule based on evidence of the sound medical condition of the particular individual, and

<sup>180</sup> *Letters to The Editor*, AWST, May 10, 1965, at 120; March 21, 1966, at 122.

<sup>181</sup> *Letters to The Editor*, AWST, Aug. 3, 1964, at 102.

<sup>182</sup> *Letters to The Editor*, AWST, Aug. 2, 1964, at 102; March 21, 1966, at 122.

<sup>183</sup> *Editorial (Wright)*, AWST, Jan. 31, 1966, at 35.

<sup>184</sup> *Id.* at 37.

<sup>185</sup> *Id.* at 38.

<sup>186</sup> *Letters to The Editor*, AWST, Apr. 25, 1966, at 136.

<sup>187</sup> *Letters to The Editor*, AWST, Apr. 4, 1966, at 118.

<sup>188</sup> JOHN M. BAITSELL, *AIRLINE INDUSTRIAL RELATIONS-PILOTS AND FLIGHT ENGINEERS* 158 (Harvard Graduate School 1966).

<sup>189</sup> Milton Horowitz, *Careers*, FLYING, Sept., 1966, at 46.

the second is discrimination against older pilots, based on their age, in favor of younger pilots. The "individual" exception was attempted as late as 1967 when Captain Charles Force Hunter applied for a waiver in connection with administrative action under the FAA.<sup>190</sup> The FAA said that prediction of heart attacks was futile since "The FAA does not have sufficient medical or other evidence at this time on which to justify initiation of a selective system of the type rejected when the "age sixty rule" was adopted."<sup>191</sup>

The difficulty with this approach may have been caused by ALPA's position which prevented Captain Hunter's employment as a line check pilot after reaching 60 years of age.<sup>192</sup> The position of ALPA evidently was not unified on all occasions. Perhaps, like the rest of our population, the growing number of younger pilots in ALPA would just as soon see their elders step aside at age 60 to provide room for advancement. Age becomes important when considering a younger man's chance for promotion. Consequently, the next few years will experience few openings, caused by retirement,<sup>193</sup> since the relative youth of the present overall pilot group indicates potential blocks to advancement of younger men.<sup>194</sup> Conversely, the success of the individual exemption approach would admittedly depend on medical evidence sufficient to detect heart attacks or other incapacitating maladies, since no one would argue contrary to the highest degree of safety in the public interest. If this technology were available, a strong argument would be present for enabling a pilot to continue his usefulness to society in his chosen profession, to say nothing of the cost of replacing his training and experience from an economic consideration.

Throughout the judicial proceedings on the "age 60 rule," the issue of age discrimination itself was not raised. The *Alton* court approached the threshold of the issue when it stated that Congress had the power to set a maximum age limit in the interest of safety, but the 1967 Age Discrimination in Employment Act was a later product of Congress. ALPA was disappointed with the Age Discrimination Act in that it was directed to employer rules, and not governmental agency rules. The Act also contains a broad exception in terms of a bona fide occupational qualification. Both the Interpretive Bulletin<sup>195</sup> and an opinion letter recognized the rule as falling within the exception.<sup>196</sup> It should be pointed out that these decisions are not court tested and as the Labor Department itself has said, they are merely indications of how the agency seeking enforcement would proceed unless directed otherwise by the courts. A liberal court might easily seize upon the Executive Order forbidding government contractors from age discrimination as likewise prohibiting a governmental agency from issuing rules doing just that. However, despite the possibilities of

<sup>190</sup> FAA Reg. Doc. No. 8007 (Apr. 28, 1967).

<sup>191</sup> Letter from Henry Weiss to Charles H. Ruby, Oct. 12, 1967.

<sup>192</sup> Letter from Donald W. Madole to A. Gramza, Nov. 13, 1967; Narrative Brief of ALPA at 34.

<sup>193</sup> BAITSELL, *supra* note 188, at 15.

<sup>194</sup> *Id.* at 22.

<sup>195</sup> BULLETIN, *supra* note 75, at 860.102.

<sup>196</sup> Opinion Letter, *supra* note 6, at para. 18,017.

this theory, it appears that the public safety idea again creeps in. If sufficient medical evidence were available to refute that of the early 1960's and indeed that of 1967, according to the FAA, an upset route would be available. Surely, if this were the case, the rule could no longer qualify as a bona fide occupational qualification as there would be no need for continuing the blanket rule. An examination of FAA medical reports and studies is, therefore, important to this discussion.

One must keep in mind the time period of 1958-61, during which the rule was formulated and the litigation contesting it took place. The FAA, apparently relied on studies conducted by outside agencies when they were initially faced with the need for the rule.<sup>197</sup> In view of the medical knowledge available then, the rule was reasonable, even if arbitrary in ALPA's opinion. Since that time, a number of FAA studies have been completed on various groups of employees in the aviation industry, including pilots. In the 1961 and 1962 studies of air traffic controller performance, it was discovered that performance on the job and during training decreased rapidly enough with advancing age to recommend establishing an upper age limit for that type of employment in the interest of safety.<sup>198</sup>

Shortly thereafter, Mr. Najeeb E. Halaby, Administrator of the FAA, reported that some airline pilots may be able to keep their jobs beyond age 60 because of the FAA's research program. "This program is designed to study man's aging process and develop *individual standards* based on each pilot's physical condition."<sup>199</sup> According to Mr. Halaby:

When these criteria are established, the agency will be able to tailor a retirement standard *for each pilot* instead of requiring all to retire at the age of sixty when present medical statistics indicate it is generally prudent . . . every man ages in a different way and at a different rate. Conceivably a seventy-five year old man could be physically younger than a man of forty [Emphasis added.].

He said testing was expected to be completed by the end of the next year. In that event the FAA could amend its retirement rule the following year, which was 1964.

The FAA was either premature in making this announcement or the goal was not reached. Reports received from the FAA, for purposes of this article, indicate the latter unless appropriate information was not released. The results of Captain Hunter's exemption application substantiate the

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<sup>197</sup> ALPA v. Quesada, *supra* note 96, at 596.

<sup>198</sup> FEDERAL AVIATION ADMINISTRATION, CIVIL AEROMEDICAL RESEARCH CENTER, PROBLEMS IN AIR TRAFFIC MANAGEMENT: I LONGITUDINAL PREDICTION OF EFFECTIVENESS OF AIR TRAFFIC CONTROLLERS 61-1 (Dec. 1961); & same title, Part III, IMPLICATIONS OF AGE FOR TRAINING AND JOB PERFORMANCE OF AIR TRAFFIC CONTROLLERS 62-3 (Feb. 1962). See also FEDERAL AVIATION ADMINISTRATION, PROBLEMS IN AIR TRAFFIC MANAGEMENT 65-21 (July 1965). But see FEDERAL AVIATION ADMINISTRATION, BIOMEDICAL SURVEY OF ATC FACILITIES 2. EXPERIENCE AND AGE 4 (March 1965), where it was found that the years of experience with ATC were a greater cause for certain irritations than age alone. In FEDERAL AVIATION ADMINISTRATION, THE RELATIONSHIP BETWEEN CHRONOLOGICAL AGE, LENGTH OF EXPERIENCE AND JOB PERFORMANCE RATINGS OF AIR ROUTE TRAFFIC CONTROL SPECIALISTS 67-1 at 9 (June 1967), it was determined that more research was necessary to determine why older ATC men receive lower ratings.

<sup>199</sup> N.Y. Times, Mar. 11, 1962, at 88, Col. 1.

first reason, unless factors not in the record bore substantial weight. That was in 1967. In 1964 the FAA research center said:

[A]t the present time no medical methods exist for evaluating an adult human being in terms that will provide a useful estimate of his overall status as an aging animal . . . chronological age fails to serve as an accurate index of the rate at which these capabilities change in every individual. Men who are in their fifth and sixth decades demonstrate a physiological performance commensurate with second and third decade function, whereas young men may be old for their age.<sup>200</sup>

The report concludes with a hope, that with several years of studies, techniques could be developed to ascertain physiological age rating for individuals and their detection.<sup>201</sup> Other studies have concentrated on the physical degeneration and slower reaction times associated with age.<sup>202</sup> Although work capacity is generally known to decrease with age, one study showed proper exercise could decrease the deterioration rate, thus recognizing exceptions to the general rule.<sup>203</sup> It appears proper to conclude from this evidence that medical technology is not available at this time sufficient to support either the individual exception approach, or the age discrimination approach. Certainly, the attitudes of the courts towards public safety in this or any field of the law indicates that any attempt to overturn the rule without medical evidence would meet with disaster.

The next question to be considered is, whether there is evidence of incapacitation while flying due to the effects of age, in those areas of aviation which have no retirement rule. An analysis of the answer to this question lends the most favorable support for upsetting the rule. General aviation has no retirement rule for pilots. A 1967 report concerning accident statistics of general aviation pilots concluded:

. . . [T]he accident rate for *commercial* pilots in the forty-five to fifty-nine age group was significantly lower than the average for the other age groups . . . [Emphasis added].<sup>204</sup>

and that:

An analysis of the accident percentage of older general aviation pilots (over sixty) for 1965 reveals that this age group has an accident record *essentially comparable, and in some cases superior, to that of the younger pilot group*. Especially for the private pilot group, the age and accidents were not significantly related.<sup>205</sup>

Other factors are more important to the accident rate than age. For example, physicians average approximately four times greater rates than

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<sup>200</sup> FEDERAL AVIATION ADMINISTRATION, OFFICE OF AVIATION MEDICINE, STUDIES ON AGING IN AVIATION PERSONNEL 64-1 (Aug. 1964).

<sup>201</sup> *Id.* at 12.

<sup>202</sup> FEDERAL AVIATION ADMINISTRATION, PILOT VISION CONSIDERATIONS: THE EFFECT OF AGE ON BINOCULAR FUSION TIME 66-35 (Oct. 66).

<sup>203</sup> FEDERAL AVIATION ADMINISTRATION, AEROMEDICAL RESEARCH DIVISION, EXPERIMENTAL EVALUATION OF WORK CAPACITY AS RELATED TO CHRONOLOGICAL AND PHYSIOLOGICAL AGING 63-18 (Sept. 1963).

<sup>204</sup> FEDERAL AVIATION ADMINISTRATION, OFFICE OF AVIATION MEDICINE, AIRCRAFT ACCIDENTS BY OLDER PERSONS 67-22 at 2 (Oct. 1967).

<sup>205</sup> *Id.* at 4.

average general aviation pilots.<sup>206</sup> Risk taking attitudes and judgments, resulting in a disregard of basic flying rules, appear to be the key underlying threat uniting the major variables studied.<sup>207</sup>

General aviation flying admittedly differs from carrier operation in many ways. Retired carrier pilots may continue flying in general aviation, or as a check or instructor pilot on an airliner, provided the regular crew is present.<sup>208</sup> In 1965, the oldest active pilot in general aviation was 93 years old.<sup>209</sup>

Available information shows that between 1952 and 1967, 16 scheduled airline pilots died on duty from heart attacks. Six were during flight, nine immediately after landing and one before takeoff. Only one happened during landing resulting in a subsequent crash. Age distribution may be the most significant aspect of the problem, according to Captain Orlady, citing James Campbell of ALPA.<sup>210</sup> Using this same research, ALPA estimated ten percent of its pilots are age 50 to 59 and predict that 27.8 percent would be in that bracket by 1972 and 41.1 percent by 1987. Of the 4,544 association members, 1,552 cases of temporary incapacitation during flight were noted. The incapacities for the air carrier pilots might appear to be high and present a definite safety hazard. However, only one occurred during a crash, and that one was not definitely, but only possibly linked to the age-caused incapacitation. The reason for this low incidence is no doubt in part due to the fact that every member of the flight crew is fully qualified and capable of taking over the duties of another member should he become incapacitated, and indeed this has been done. Safety is the main reason for placing 3 members in the larger aircraft cockpits and two in the smaller. It appears that this system of multiple crewmember qualification is sufficient insurance to meet age incapacitation problems.

A sound and safe method for medically overturning this rule would do much for one of the purposes of the Age Discrimination in Employment Act—that is to enable older persons to contribute more to society. An air carrier pilot is a very highly skilled member of the transportation team and for those who could continue past the age of 60, a significant contribution would be made. Additional medical research should be done on the exemption problem, as well as research showing what the results would be if air carrier pilots were incapacitated in light of the multi-pilot qualified crew.

There are no other provisions in the Federal Aviation Act bearing on employment discrimination as such. Section 404(b)<sup>211</sup> dealing with dis-

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<sup>206</sup> FEDERAL AVIATION ADMINISTRATION, OFFICE OF AVIATION MEDICINE, PHYSICIAN FLIGHT ACCIDENTS 66-25 at 2 (July, 1966).

<sup>207</sup> *Id.*

<sup>208</sup> Opinion Letter, *supra* note 80, Oct. 3, 1968; CCH *supra* note 6, at para. 18,052.

<sup>209</sup> *Supra* note 204, at 1.

<sup>210</sup> N.Y. Times, January 7, 1968, at 69, Col. 2. In the last 6 years (before 1969) only one accident, that of American Flyers in 1966, has been attributable to a possible heart failure. See Huggins, C.E., *Two Steps and You're Out*, THE AIRLINE PILOT, August, 1969, at 16, 17.

<sup>211</sup> 49 U.S.C. § 1374(b) (1964).

crimination between customers served has not been applied to the employment situation.<sup>212</sup>

### B. *The Stewardess Retirement Problem.*

In a legal sense, the problem with stewardesses has not been put to rest. The EEOC has no enforcement powers of its own but must induce the complaining party<sup>213</sup> or the Attorney General<sup>214</sup> to go to the courts for enforcement of its orders. This means time lost awaiting jury trials and additional time for review; yet the EEOC has not done this in the stewardess case. The strength of the EEOC decision that discharge for age is discrimination based on sex under Title VII of the Civil Rights Act, derives its usefulness from the fact that the airlines involved have chosen to adhere to and comply with the mandate. The American Airlines—TWU Agreement of 11 August 1968, is evidence of that and the theory that informal governmental pressure, carrying inherent adverse publicity for the carrier's image in the event of refusal to comply, is effective. Unfortunately, the only court decisions are to the contrary. The sex discrimination issue has not reached a federal circuit court and the only district court opinion is contrary to that of the EEOC decision. The age issue itself has not been ruled on by a federal district court.

Upon reviewing the entire chain of events beginning with commencement of the New York Commission for Human Rights Proceedings, it is evident that considerable emotion has born weight on the course of events. The limitation of protection to ages 40-65, inherent in both the state and federal age legislation, renders the problem outside the scope of the age discrimination laws. Congress in fact, specifically excluded the stewardesses from the operation of the Act. It would be different if Congress had not been presented with the problem and had not held hearings on the subject. The EEOC reaches a result exactly contrary to both Congress and the district court in *Cooper*, through a liberal interpretation of Title VII. There is therefore sufficient precedent available to upset the EEOC decision, at least in its present style, if the carriers choose to do so.

Considerable weight was given to the results of the Airways Club survey throughout these proceedings. No clear evidence was available, however, to show whether those results coincided with the feelings of the traveling public at large. In addition, only 25 percent of the Airways Club membership responded. Congress was not convinced that the public agreed with the girls' arguments or it would have included them within the operation of the Age Discrimination Act. There is little doubt that the power of strike threats by the Union has played an additional role in the results. Air France has only recently experienced the same problem.<sup>215</sup> There, a sur-

<sup>212</sup> 3 AV. L. REP. para. 16,225. See *Transcontinental Bus System, Inc. v. Civil Aeronautics Bd.*, 10 AV. CAS. 17,384 (1969).

<sup>213</sup> § 706(e); 42 U.S.C. § 2000(e)[5](e) (1964).

<sup>214</sup> § 707; 42 U.S.C. § 2000(e)(6) (1964). The EEOC itself is limited to conference, conciliation and persuasion. § 706(a), 42 U.S.C. § 2000(e)[5](a) (1964).

<sup>215</sup> Cook, L., *Depressing; Men React to Air France Decision*, Seattle Times, August 28, 1969 at 2.

vey indicated that several male travelers were unhappy with the carriers decision to raise Air France's stewardess retirement age to 50. Some thought "this idea ought to bring the railroads back to popularity" or "its a pretty depressing prospect." Others said they were only interested in good service, or "maybe it will turn out that French stewardesses, like good French wine, improve with age." Although Air France gave in to the union in order to prevent a walkout, the union did agree to set up a commission jointly with the carrier to judge the continued "attractiveness" of the older hostesses and to decide if they should be asked to take ground jobs if they are less than pleasing to the eye. This idea is more equitable than the unflexible EEOC decision, both for the public and for the girls. One consideration that should be added to the duties of this commission is the determination of whether the enthusiasm of the girl to serve her passengers has deteriorated with her years on the job. This is the airline argument that has the most validity, as anyone who has traveled a great deal by air can affirm. Perhaps the EEOC has already admitted to this idea when they said that nothing prevents termination if the stewardess cannot pass her recurrent and FAA tests. The only trouble here is that the girl is on her best behavior and production during these tests. Therefore, there should be some form of unannounced, inflight spot checks to ensure superior service.

The remedies available for stewardesses who were terminated prior to the EEOC decisions are not clear. In some cases, the agreements between the union and the carrier operate retroactively for a certain period,<sup>216</sup> or in favor of those who had a claim pending under the Equal Opportunity in Employment Act,<sup>217</sup> or for a short period of time only.<sup>218</sup> The solution appears to be relegated to the collective bargaining process since legislation does not exist for retroactive relief.

### C. *The Case For Utilizing Older Pilots*

One of the initial considerations that should be made in decisions of whether to employ older pilots is whether the public has any adverse reactions to the hiring of older pilots. Public confidence is a powerful force bearing on many of the safety rules and on actions the carriers take to solve certain hazardous problems. Although there has been no general survey taken on this subject, there is some evidence available to indicate that the public respects experience, which must come with age. Some passengers have expressed a preference for a pilot in his 50's.<sup>219</sup>

The carriers cannot deny that older pilots are unable to fly since they

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<sup>216</sup> Letter, *supra* note 150, from D.J. Crombie (T.W.A.) to Colleen Bolland, Aug. 6, 1967.

<sup>217</sup> Letter, *supra* note 150, from Homer Kenney (N.W. Airlines) to Colleen Bolland, June 15, 1967.

<sup>218</sup> Letter, *supra* note 150, from W.S. Magill, Jr. to Colleen Bolland (no date available); *but see* Sprogis v. United Airlines, Inc. v. Civ. Action No. 68C2311 (N.D. Ill.); Langsdale v. United Airlines, Inc. & ALPA Int'l (S.D. Fla. 1968), CCH Employment Practices Guide para. 6011. *See also* Anderson v. United Airlines, California Unemployment Ins. Appeal Bd. No. P-B-3, Feb. 2, 1968; CCH EMPLOYMENT PRACTICES GUIDE para. 1210.54, where unemployment insurance was allowed a stewardess discharged for age.

<sup>219</sup> Letters to the Editor, AWTST, Jan. 11, 1965, at 98.

extensively utilize pilots over 40 years old, many of whom require physical waivers, particularly for vision. Corporate operators in many cases have extended their hiring ages as high as 40,<sup>220</sup> but continue at the same time in their efforts to find a "young, experienced" man.<sup>221</sup> The Air Force has of necessity, used older World War II and Korean veteran pilots for combat missions in the Vietnam War and found their performance to be "excellent."<sup>222</sup> They have been dubbed "the ancient airlines."

There is little quarrel that those military or other experienced pilots who are unwilling to accept a beginning position on the seniority list will cause morale problems, but for those who do accept a third seat, the adjustment should proceed smoothly. Military pilots are accustomed to being "outranked" by others their junior in years. This is caused by frequent transfers and variant operating conditions. One example is the army warrant officer instructor pilots who regularly instruct students outranking them. Another example is that the pilot in command is often a warrant officer or captain and the co-pilot may be a lieutenant colonel or a major. No doubt, the civilian pilot in command is often younger than the rest of the crew. The problem of the older pilot's reluctance to take directions from the younger, therefore, does not appear to be as great as the carriers say it is.

The military pilot in particular should not object to the fact that his airline retirement pay will be lower than others, since he already has a military retirement to supplement it. A certain number of those leaving the military are interested exclusively in seeking the nearest rocking chair or fishing pole, but many are able, and desire to continue contributing a valuable service to society. They should be allowed to do so. Most people would agree that 40 years old is too young to retire from all service. The government has spent large sums of money training the military pilot and giving him experience. Surely the government, who also has an interest in airline economics, would not look lightly at allowing this investment to slip away without further utilization.

The Age Discrimination in Employment Act protects those who are at least 40 but not yet 65 years old, as has previously been discussed. Most retired military pilots fall within this age group or will do so shortly after their retirement. These and civilian pilots who possess equal or better qualifications than those being hired, have a cause of action under the Act. The issue predicted for judicial confrontation will center on the broad interpretation of prohibitions under Section Four<sup>223</sup> and the narrow interpretation of exceptions. The carriers will probably claim a bona fide occupational qualification exception under Section Four (f) (1). Reasonable factors other than age are no excuse where the candidate passes a physical examination given equally to all. The seniority system, retirement pension, or insurance plan exception falls under the proviso of sub-

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<sup>220</sup> *Editorial*, AWST, April 11, 1966, at 123.

<sup>221</sup> *Help Wanted Ads*, AWST, Oct. 13, 1969, at 84.

<sup>222</sup> *Editorial (Brownlow)*, AWST, Jan. 13, 1969, at 11.

<sup>223</sup> 81 Stat. 603 (1967).



paragraph (2) which disallows the exception in the prehiring phase. Performance of duties less efficiently than their younger counterparts is a valid reason, provided such standards are validly related to the job requirements, and such factors uniformly apply to all pilots, regardless of age.<sup>224</sup> The Department of Labor Interpretive Bulletin has this to say about costs in general:

It should be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the act and the purpose of Congress in interpreting it. Differentials so based would serve only to perpetrate and promote the very discrimination at which the act is directed.<sup>225</sup>

This interpretation has not been judicially tested and awaits a proper case for judicial enlightenment. It may, however, be some indication of congressional intent during the passage of this legislation.

Assuming a court were to follow the above reasoning, some reason other than costs of training and return on investment will have to be found by the carriers for continuing the maximum hiring age policy. The term "bona fide occupational qualification" is either broad or narrow depending upon the interpretation decided upon by the decision-maker. While affording versatility and flexibility, the term gives little predictability.

The Deputy Administrator, Wage and Hour and Public Contracts Division has indicated that "this question is under consideration but it will be some time before a conclusion is reached."<sup>226</sup> Industry requirements, until recent months, have continued to exceed prior predictions for hiring of new pilots.<sup>227</sup> Most carrier advertisements for pilots have been withdrawn, but several are continuing to hire. A majority of the age hiring restrictions remained 35 years old or less as of 1967,<sup>228</sup> thus neatly exclud-

<sup>224</sup> BULLETIN, *supra* note 75, part 860.103; CCH *supra* note 6, at para. 17,875.07.

<sup>225</sup> BULLETIN, *supra* note 75, part 860.103 at h.

<sup>226</sup> Letter from B.P. Robertson to R.A. Bergman, November 21, 1968.

<sup>227</sup> Editorial, *What the Airlines Need in New Flight Personnel*, AIR TRANSPORT WORLD, Jan. 1967, at 27.

<sup>228</sup> The following hiring age figures were extracted from a survey conducted by AIR TRANSPORT WORLD MAGAZINE, January 1967.

CARRIER	AGE
Allegheny Airlines	23-30
Aloha Airlines	32 Max
American Airlines	21-35
Braniff Int'l	21-30
Delta Air Lines	21-31
Eastern Airlines	21-35
Flying Tiger Line	N/A
Frontier Airlines	30 Max
Hawaiian Airlines	20-30
Los Angeles Airways	25-29
Mohawk Airlines	20-35

ing the military, who must in most cases, remain on active duty at least until he reaches 38 years old.

## V. CONCLUSION

No statistics on maximum ages for hiring stewardesses were available for this study; however, there is some evidence that a minimum of 21 is commonly set. This appears reasonable in light of the extensive, away-from-home travel that is involved. Flight attendant duties include working without supervision and serving liquor.<sup>229</sup> Twenty-one seems reasonable also as a minimum age of maturity of the extent required to meet in-flight emergencies. It is entirely possible that a woman over 40 could bring an action under the Age Discrimination in Employment Act, if she were refused initial employment solely because of her age. Such a result would provide a completely new problem in this field. It would indeed be interesting to observe the outcome.

It has been assumed that age discrimination problems for ground personnel employment has been similar to that discussed for the rest of the non-air carrier work force, in the initial section of this article. Even if this assumption is not accepted, the fact that the annual growth rate of air carrier employees was 16.2 percent in 1965, totaling 248,326<sup>230</sup> by 1966, is sufficient to indicate that the contribution to society<sup>231</sup> is an important one. The 1965 payroll for all air carrier employees, was 1.75 billion dollars.<sup>232</sup> There is, therefore, no reason to doubt that the findings in the Secretary of Labor's report on age discrimination, include air carrier employee's problems.

The 1967 Age Discrimination in Employment Act has a direct bearing on these problems since air carriers are engaged in interstate commerce. With over three quarters of a billion dollars in unemployment insurance being the current rate for 850,000 workers aged 45 or over, the importance of this legislation cannot be over-emphasized, particularly when 370,000 employers of all types are within coverage of the Act and 47

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New York Airways	21 Min
North Central	19-30
Northeast	21-32
Northwest Airlines	21-32
Ozark Airlines	20-30
Piedmont Airlines	31 Max
Seaboard World	21-35
Southern Airways	20-35
Trans Caribbean	N/A
Trans Texas Airways	21-30
Trans World Airways	20-32
Western Airlines	21-32
United Airlines	20-29
Pan American World Airways	20-30

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It should be recognized that these figures are almost three years old and many have now changed, possibly due to the new federal age legislation, and possibly due to recognition of the merits of hiring older pilots.

<sup>229</sup> Bolland, *supra* note 139, at 4.

<sup>230</sup> CIVIL AERONAUTICS BOARD, HANDBOOK OF AIRLINE STATISTICS Table 55, at 87 (1967).

<sup>231</sup> *Id.*, Table 56, at 88.

<sup>232</sup> FEDERAL AVIATION ADMINISTRATION, STATISTICAL HANDBOOK Table 8.30 at 179 (1966).

percent of their 37 million employees are between the ages of 40 and 65. One of two jobs now vacant are closed to those over 55.<sup>233</sup> An indication of interest is seen by the 20,000 to 25,000 investigations anticipated by the Labor Department during the first fiscal year of operation under the Act. By 1 September 1968, 137 complaints and hundreds of inquiries had been received in Washington in addition to 2,596 in the field offices.<sup>234</sup> Some experts in the personnel field, however, have expressed a doubt as to the effectiveness of this legislation. In a survey of their opinion, they feel that employers will simply find other valid excuses when the real reason is age.<sup>235</sup>

It is submitted that the majority of hiring officers in the carriers are not fully aware of the ramifications of age discrimination in employment legislation. The difficulty of enforcing this legislation is readily apparent when one views the tremendous volume of inquiries and complaints shouldered by the Department of Labor.<sup>236</sup> In addition, the element of proof to sponsor a successful court action is difficult to obtain in most cases. Most employees, and especially prospective employees, simply have no means of obtaining the proof needed. They are quietly dismissed or hear nothing about their applications or inquiries, never knowing the true reason.

The air transport industry is not immune to work stoppages due to strikes. Frequently, a problem will linger for several years before reaching volatile characteristics, leading to a conflict. The "age 60 rule," which is continuing under the FAA, is not a dead issue. ALPA is focusing its attention on medical developments as they occur.<sup>237</sup> The results of other types of older pilot flying, coupled with the safety factor of multi-member crew pilot qualification, indicate that the FAA would do well to sponsor more research on the subject.

The maximum hiring age policies could stand close scrutiny by the Labor Department. However, the difficulty of proof, added to an already heavy enforcement workload, results in uncertainty as to whether the Age Discrimination in Employment Act will actually help society utilize the talents of the older pilot as it should.

The stewardess problem is currently under control but only because the carriers are not pressing their views. The result reached by the EEOC bears witness to an inadequately researched subject, resulting in an in-

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<sup>233</sup> Margolin, *supra* note 68: There are about 20,000 flight attendants currently in the air carrier work force, 19,000 women and 1,000 men. See Speech by Sonia Pressman before the Second Annual J. F. Kennedy Career Seminar for College Students in the Eastern States, April 14, 1969; CCH EMPLOYMENT PRACTICES GUIDE para. 8007.

<sup>234</sup> Margolin, *supra* note 68.

<sup>235</sup> Editorial, 64 U.S. NEWS & WORLD REPORT, July 1, 1968, at 63.

<sup>236</sup> The difficulty of enforcement is further borne out by the fact that the Wage and Hour Administrator has 1,000 inspectors in the field to investigate age problems but still finds it necessary to ask for co-operation from individuals to get employers to comply. See Speech by Robert D. Moran before the National Council of Senior Citizens, Wash., D.C., June 5, 1969; CCH EMPLOYMENT PRACTICES GUIDE para. 8031.

<sup>237</sup> Huggins, *supra* note 210, at 15 and 17, explaining ALPA Information Bulletin of Sept. 9, 1969 opposing the FAA's proposed rule for instituting the double master 2 step electrocardiogram test as a routine part of the physical examination. ALPA claims that medical opinion is too varying to institute such a program.

flexible rule, which is not equitable to either side. A superior plan has emerged in the Air France case where the carrier and the union together screen out those hostesses who do not please the public eye. With a slight modification to include an evaluation of service performance and enthusiasm, the formula would be superior to the EEOC's inflexible rule. It is difficult to follow the EEOC's reasoning in those cases where no male flight attendants were in the carrier's employment, thus providing no basis for applying the rule to women simply because they are women.