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Rethinking the Age Sixty Mandatory Retirement Rule: A Look at the Newest Movement

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RETHINKING THE AGE SIXTY MANDATORY RETIREMENT RULE: A LOOK AT THE NEWEST MOVEMENT

Beatrice Kathleen Barklow

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Picture a packed room filled with angry airline pilots, various Federal Aviation Administration (FAA) "blue suits," congressmen, and other interested parties. One angry pilot stands to say, "Pilots should be allowed to continue to fly. DeBakey, that heart surgeon in Houston, is about 80 years old, but no one told him that he can't operate." An FAA administrator rises to respond,

That may be true, but the person on which Dr. DeBakey is operating chose him to be the doctor. When people board a plane, they have no choice about who will fly the plane. Moreover, when your Dr. DeBakey makes a mistake, he only kills one person. Only one family and their friends will be affected. But when a pilot makes a mistake, he has the potential to kill hundreds on the plane and even more on the ground. Likewise, the ripple of people affected is overwhelming. Your analogy is comparing apples to oranges.¹

On the other hand, there was a great round of spirited applause when David R. Hinson, the head of the FAA, said,

¹ Telephone Interview with Dan Meier, Regulatory Branch Flight Standards Services, Federal Aviation Administration, Washington, D.C. (Oct. 15, 1993). Mr. Meier was quoting, to the best of his memory, a recent argument at the latest FAA hearing on the Mandatory Age 60 Retirement Age for airline pilots.
"[a]s the new Administrator, I approach this issue with an open mind." The applause quickly waned, however, and silence again engulfed the room when Hinson continued with the comment, "[t]he principal issue we have to deal with is flight safety."

I. THE RECENT MOVEMENT

Commercial airline pilots have risen yet another time to challenge the FAA 1959 mandatory retirement rule for pilots. The rule applies to commercial aircraft pilots carrying more than thirty passengers or with payloads exceeding 7,500 pounds. Early in the history of the Age Sixty Rule, in *Holmes v. Helms*, the Ninth Circuit held that the FAA, to justify its denial of exemption, need only show that granting an exemption to the rule would adversely affect safety and thus would not be in the best interest of safety. The Court also held that the FAA need not show that the applicant is disqualified under a specific medical regulation.

On September 29, 1993, the FAA held a public hearing to re-examine the Rule after releasing a new study April 8, 1993. This study found that pilots approaching age sixty have not been involved in more accidents than pilots in other age groups, and that accident rates have not increased for commercial and private pilots between sixty and at least sixty-three. The study also looked at private pilots and other pilots who fly without age limits, however, and

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3 Id.
5 Steven Morris, *Grounded at 60: Pilots Cite Experience in Renewing Fight Against FAA Retirement*, Chi. TRIB., Mar. 1, 1992. 14 C.F.R. § 121.383(c) (1994) (Age Sixty Rule) states: "(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 or her 60th birthday. . . ." Department of Transportation, FAA, [Docket No. 23174; Notice No. 82-10], 47 Fed. Reg. 29,782 (1982).
6 705 F.2d 343 (9th Cir. 1983).
7 Id. at 347.
8 Id.
found that accident rates increase in some cases after age sixty-three.\textsuperscript{10} According to Hilton Systems, Inc., which conducted the study for the FAA, "[t]his suggests that (airlines) could cautiously increase the (mandatory) retirement age to sixty-three."\textsuperscript{11}

The challenge to the rule, though gaining momentum, has been harshly criticized from various organizations from its beginning.\textsuperscript{12} Although pilots challenging the rule have lost in U.S. courts, this new challenge has arisen out of a belief that recent medical technology will allow pilots to be tested for the detection of medical problems that might affect their ability to fly.\textsuperscript{13} While no pilot has ever been granted a waiver from the Age Sixty Rule, the FAA has waived other rules by allowing pilots to fly after suffering from heart conditions, alcohol abuse, and other potentially disabling conditions.\textsuperscript{14}

Part II of this comment examines the arguments on both sides of the mandatory retirement rule; Part III discusses past court challenges; Part IV studies the newest challenges; Part V summarizes the latest FAA findings and some possible effects of projected changes in the rule; and Part VI concludes with a prediction of the Rule's future.

\textsuperscript{10} Lester Reingold, Laying Siege to 'Age 60'; Professional Pilots Federation Lobbying to Allow Pilots Over Age 60 to Fly Commercial Routes, AIR TRANSP. WORLD, Vol. 30, June 1993, at 184. In opposition to the study, David Michaels, a professor of epidemiology who appeared on behalf of the Allied Pilots Association and the Air Line Pilots Association, both of which support the Age Sixty Rule, considered the study invalid anyway because accident rates are a "very crude tool" on which to base a decision. Arguments on FAA's Age 60 Rule Continue to Turn on Medical Evidence, AVIATION DAILY, Sept. 30, 1993, at 501.

\textsuperscript{11} Id.


\textsuperscript{13} Morris, supra note 5, at 1; Michael S. Serrill, Cockpit Gray: A Broad Ruling on Age Bias, TIME, July 1, 1993, at 45.

\textsuperscript{14} Morris, supra note 5, at 1.
II. HISTORY OF THE ARGUMENT

A. ARGUMENTS FROM BOTH SIDES

The Age Sixty Rule, since its inception more than thirty years ago, has been the subject of much debate. Its proponents and opponents have proclaimed their arguments publicly for years. Those arguments and justifications have not varied substantially in form over the rule's long existence.

1. The Initial FAA Argument for the Rule

The FAA policy goal is to promote passenger safety, while at the same time preserving the interests of pilots. The FAA presently supports mandatory retirement at age sixty because of safety concerns arising out of a medical study that found that heart attacks or strokes, unable to be accurately detected or predicted by medical knowledge in the 1960s, were more frequent in men approaching sixty. The FAA's study found that:

(1) [A]ging causes deterioration of important physical and mental processes related to degenerative arteriosclerosis (hardening of the arteries);
(2) because each individual experiences aging differently, predicting its effect would be impossible;
(3) during the later stages of life, age-related degeneration accelerates; and
(4) sudden incapacitation, often disabling without warning, results from age discrimination.

In view of this, the FAA has argued that the increased risks of incapacitation and error could not be entirely screened out - even if the FAA incorporates the health protocol sug-
gested in Aman v. FAA$^{19}$ with existing operational tests - without compromising, by some amount, the current level of safety.$^{20}$ In defense of the practice of allowing other medically-exempt pilots to fly,$^{21}$ the FAA states these pilots are not comparable to the older pilots as those with specific health problems can be identified, tested, and monitored to prevent a compromise of safety.$^{22}$ For exempt pilots, the FAA argues, a developed means of assessment exists.$^{23}$

The FAA has also recently proclaimed its faithful adherence to the rule because it fears accidents resulting from health problems and slower reflexes arising out of old age.$^{24}$ In addition, the FAA adopted the airlines’ concern that “raising the retirement age could disrupt pension plans, flight schedules and health care plans.”$^{25}$ And on a technical level, the FAA fears that new jets coming into service may be too complicated for older pilots.$^{26}$ Thus, a retirement rule for older pilots could subtly address this problem by slowly removing less technically-trained pilots, primarily the older pilots, from the cockpit.

2. The Pilots Associations’ Arguments

The Air Line Pilots Association (ALPA), a pilots’ union representing over 42,000 unionized pilots at thirty-six airlines, formerly opposed the Age Sixty Rule, but now whole-heartedly supports the rule.$^{27}$ Union spokesman John Mayor provided three reasons for the change of sides. First, after much evaluation, testing, and studies, he said that “safety considerations are such that we think it is better to

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$^{19}$ 856 F.2d 946 (7th Cir. 1988), cert. denied, 499 U.S. 936 (1991); see infra note 90 for a further discussion of Aman.

$^{20}$ Aman, 856 F.2d at 949 (quoting FAA Denial of Exemption No. 25,008, at 13 (Sept. 8, 1987)).

$^{21}$ See discussion supra note 15 and accompanying text.

$^{22}$ FAA Denial of Exemption, No. 25,008, at 32 (Sept. 8, 1987).

$^{23}$ Id.


$^{25}$ Id.

$^{26}$ Id.

$^{27}$ Id.
err on the side of being conservative.” Second, pilots represented by ALPA also fear intrusion as a higher retirement would result in more stringent health tests with more invasive procedures. Finally, the Union supports the rule because it feels “the majority of the pilots prefer to retire at sixty.” Pilots against the rule accuse the Union’s representatives of having the ulterior motive of supporting the rule to displace older pilots just to increase the mobility of upward promotions for younger pilots.

3. Pilots and the Age Sixty Rule Opposition Argument

Like the arguments in favor of the Age Sixty Rule, the rule’s opposition has also existed for thirty years. Lately, their most prominent argument has arisen out of the study released April 8, 1993, which disclosed that airline pilots approaching age sixty have not been involved in more accidents than pilots in other age groups, as previously believed. In fact, based on data from commercial and private pilots, studies show no increase in the accident rates from pilots age sixty to at least age sixty-three. One retired pilot, Captain David Cronin, said the airlines are “losing valuable people by retiring pilots when they reach a certain number imposed by the FAA.” In addition, Joseph Ritorto, head of Teterboro, New Jersey Airport Air Traffic Committee, suggested that being sixty today is not what it used to be when older people were less active. Pilots argue that FAA regulations today require them to be in tip-top physical shape, not the “wing-chair” image of the age sixty in the past.

28 Id.
29 Id.
30 Id., quoting Michael Miro, spokesman for the Allied Pilots Association, which represents pilots at American Airlines and American Eagle.
31 Glenn Kessler, Higher Court Agrees to Clip Wings at 60; Rejects Appeal by Pilots on Mandatory Retirement, NEWSDAY, Mar. 26, 1991, at 1.
32 Armstrong, supra note 9, at 30.
33 Id.
34 Morris, supra note 5, at 1.
35 Forced Retirement, supra note 4, at A1, A24.
Many pilots, along with Captain Cronin, believe there should be no mandatory retirement age but instead heightened physical and proficiency tests. These pilots base this belief on the premise that all pilots now are required to take two physical exams a year as well as pass simulator tests twice a year. They propose that in addition to comprehensive medical testing at semi-annual intervals before age sixty, their approach would mandate testing at quarterly intervals after age sixty. Likewise, to ensure that safety standards are maintained, airline inspectors and FAA officials board planes without warning to observe pilots from time to time.

Older pilots are frustrated because the thirty year old rule makes little sense today in light of the improvements in general health and the "miraculous improvements in medical testing." Their frustration stems from their inability to prove they can fly safely because the rule prohibits their flying larger planes at all.

4. Airlines Support a Change in the Rule

Several major airlines support modifying the Age Sixty Rule. Delta Air Lines, Inc., the third-largest U.S. carrier, conditionally supports changing the rule up to age sixty-two as long as the change would not be retroactive. For Delta, a change in the rule would generate tremendous savings in training costs, one of the most expensive areas of the airline

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36 Id.
37 Id.
38 47 Fed. Reg. 29,782, supra note 5. The pilots' proposed approach would involve at least annual comprehensive flight proficiency tests, in addition to the current standard proficiency test. This proposed comprehensive flight proficiency test would include gathering quantitative objective performance data under stressed conditions and fatigue in a LOFT-type (Line-Oriented Flight Training) simulation under conditions of fatigue and exhaustion; assessing vigilance, handling of workload, and complex decisionmaking situations; and evaluating the pilots' ability to direct crew performance effectively and manage cockpit and ground support resources. Id.
39 Id.
40 Id.
41 Kessler, supra note 31, at 1.
42 Sidel, supra note 12, at 1.
Southwest Airlines Pilots Association went even further by donating $50,000 to the Professional Pilots Federation to aid efforts to change the rule. Continental Air Line’s CEO, Robert R. Ferguson, III, worried that in addition to serving no purpose today, except to discriminate on the basis of age, the rule “arbitrarily forces [their] most experienced skilled pilots into retirement.” Similarly, American Air Lines CEO and President Robert Crandall wants to modify the rule because experience is “extraordinarily important in aviation and having the ability to retain the services of our senior, well-trained captains for a few more years would represent a step forward in our efforts to be certain that American’s cockpits are always manned by the most qualified people.”

Pilots also found support in the Carnegie Inquiry Into the Third Age, a report on aging which found very few differences between the skills of older and younger workers. According to this report, the real difference between older and younger workers is that younger workers have “greater ambition, ‘trainability,’ flexibility, better health, information technology skills, qualifications and mobility, whereas older workers’ strengths are their stability, reliability, commitment, responsibility, maturity, and managerial skills.” Though no specific ages were targeted, the traits inherent in the age-related groups arguably may cancel out each other with respect to pilots’ flying ability. While airlines fear that older pilots might be “technophobic” and unable to learn new technology, this report showed that, although those between ages fifty and sixty were slightly slower to learn, their improvement rate matched that of the younger workers. While the older pilots’ learning curve might be

43 Id. (citing Neil Monroe, Delta spokesman).
44 Morris, supra note 5, at 1.
45 Reingold, supra note 10, at 184.
46 Id.
48 Id.
49 Id.
50 Id.
more gradual, their dedication, maturity and commitment to improving their skills allows them to improve at the same rate as younger pilots.

B. THE RULE'S GREATEST CRITICISM

The greatest criticism of the rule focuses upon its arbitrariness. Most of the rule's opponents find the selected age to be based on "armchair guesswork and stereotyped thinking about the beginning of old age," not "chosen on the basis of scientific medical studies."\(^{51}\) The only good thing that can be said about the rule is that it is motivated by a concern for public safety.\(^{52}\)

C. AN ATTACK ON THE OTA FLIGHT TIME STUDY

The OTA Flight Time Study, which is the foundation for much of the FAA's argument supporting the rule as it presently reads, likewise attracts criticism from the rule's opponents. Actually, the OTA report reaches no conclusion on whether or not the FAA should abandon the Age Sixty Rule.\(^{53}\) Critics assert that the study contains no accurate and relevant airline flying time data.\(^{54}\) Instead the Flight Time data, which represents the over-sixty pilots, uses information from inherently more dangerous flying such as crop-dusting, medical evaluation, pipeline and fire patrol, traffic surveillance, and law enforcement, as compared to the commercial passenger-carrying flights of the younger pilots.\(^{55}\) The report compared accident rates of pilots in age groups by ten-year intervals and concluded that pilots between ages sixty and sixty-nine have an accident rate that is 2.1 times higher than the accident rate for the fifty to fifty-nine year-olds, but lower than pilots in the thirty to

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\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Perry Bradley, Recent and Total Flight Time Have Stronger Influence on Accidents Than Age Alone, OTA Report Concludes, AIR SAFETY WK., Sept. 24, 1990, at 1.

\(^{55}\) Donald L. Hardison, Safety and Older Pilots, WASH. POST, Sept. 25, 1990, at 1.

\(^{51}\) Id.
thirty-nine year-old and twenty to twenty-nine year-old age brackets.\(^5^6\)

Another study conducted by the National Transportation Safety Board (NTSB), however, found that the majority of accidents were caused by mental error, not medical impairment or incapacitation.\(^5^7\) The report found that the types of failures in pilot performance that contributed to plane accidents were primarily caused by decision and judgment factors such as failure to follow procedures, failure to see and avoid other aircraft, attempted operation using defective equipment, and other misperceptions and misjudgments.\(^5^8\) These are errors that can be trained away, and are not attributable to age-related incapacitation. One pro-rule advocate, FAA aviation medical examiner Richard D. Reinhart, said "age is a factor; getting older is a factor. A specific age is not."\(^5^9\) If nothing else, both sides recognize the arbitrariness of the particular age-year selected for the rule.

### III. CASE HISTORY BACKGROUND OF THE CHALLENGE

The Age Sixty Rule has been challenged since its inception.\(^6^0\) In *Air Line Pilots Association, International v. Quesada* the Air Line Pilots Association (ALPA), which now supports the rule, sued the FAA seeking an injunction rendering the rule null and void before it even went into effect.\(^6^1\) The

\(^{56}\) **Office of Tech. Assessment, Medical Risk Assessment and the Age 60 Rule for Airline Pilots (1990) [hereinafter OTA report], at attach. 1 (technical analysis by Robert S. McDonough, M.D.).**

\(^{57}\) *Id.* at 2. The NTSB study also provided a breakdown of the specific episodes of pilot incapacitation. *Id.*

\(^{58}\) *Id.* at 2-3.

\(^{59}\) Reingold, *supra* note 10, at 184.


\(^{61}\) *Quesada,* 276 F.2d at 892.
FAA has given various justifications for the rule. For example, in 1959, the FAA justified the rule saying:

(a) there is a progressive deterioration of certain important physiological and psychological functions with age, that significant medical defects attributable to the degenerative process occur at an increasing rate as age increases, and that sudden incapacity due to such medical defects becomes significantly more frequent in any group reaching age 60, . . . and that such incapacity, due primarily to heart attacks and strokes, cannot be predicted accurately as to any specific individual on the basis of presently available scientific tests and criteria . . . [so that] any attempt to be selective in predicting which individuals are likely to suffer an incapacitating attack would be futile under the circumstances and would not be medically sound.62

Moreover, the FAA also stated that other factors, impossible to measure precisely, such as the “loss of ability to perform highly skilled tasks rapidly, to resist fatigue, to maintain physical stamina, to perform effectively in a complex and stressful environment, to apply experience, judgment and reasoning rapidly to new, changing and emergency situations, and to learn new techniques, skills and procedures,” coupled with medical defects, assume greater significance.63

On the other side, the ALPA claimed that the rule deprived pilots of their property rights without due process64 and “was arbitrary, discriminatory and without reasonable relation to the standards set forth” in the Federal Aviation Act.65 The trial court denied the ALPA’s motion for a preliminary injunction of the rule. After the plaintiffs appealed this denial of their motion for the preliminary injunction and judgment was reserved on the defendant Administrator’s cross motion for summary judgment,66 the

64 Quesada, 276 F.2d at 894.
65 Shawn T. Wells, From the Cockpit to the Nursing Home: A Look at the Recent Developments in the Law Concerning the Age-60 Rule, 57 J. AIR L. & COM. 755, 757 (1992) (citing Quesada, 276 F.2d at 894).
66 Quesada, 276 F.2d at 894.
United States Court of Appeals for the Second Circuit affirmed the trial court's ruling. The Second Circuit held this administrative regulation reasonable because regulations limit a person's property right when the restriction imposed preserves public health and safety.

The rule next withstood challenges from pilots arising out of the Age Discrimination in Employment Act of 1967 (ADEA). The courts again found that Congress had created exceptions in the ADEA that allowed employers to discriminate based on age when age is a "bona fide occupational qualification" (BFOQ).

A. Supreme Court Challenges

Pilots have challenged the Age Sixty Rule in all levels of the United States courts. Recently, in *Western Air Lines, Inc. v. Criswell*, two pilot captains over sixty sued their employer, Western Air Lines. Western had denied their applications for reassignment to the position of flight engineer. The pilots sued under the ADEA stating that Western violated the Act when it applied the Age Sixty Rule

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67 Id.
68 Id. at 896.
70 Id. Section 623 states that an employer may not:
   (1) 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) limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
   (3) reduce the wage rate of any employee in order to comply with this Act.
72 On a Boeing 727 and the McDonnell-Douglas DC-10, three crew members are in the cockpit: a captain, a first officer, and a flight engineer. The captain is the pilot who controls the plane and assumes responsibility for all phases of the flight operation. The first officer is the copilot. The flight engineer monitors a side-facing instrument panel, but does not actually fly the controls unless an emergency situation arises wherein the captain and first officer are incapacitated. Id. at 403 (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 114 (1985)).
to the flight engineer job. The district court found that because the flight engineer's normal duties are not critical to flight safety except in emergency situations, there was no merit in Western's BFOQ defense. The court of appeals affirmed this decision granting the pilots equitable relief. In doing so, the court of appeals specifically rejected Western's argument that the BFOQ defense was expressly used in deference to a legitimate concern for passenger safety.

The United States Supreme Court, after reviewing the legislative history of the rule and of the original ADEA, used the two-part test adopted by the Fifth Circuit in Usery v Tamiami Trail Tours, Inc. to hold that the Age Sixty Rule satisfies the BFOQ exception. The Respondent's Brief from the Criswell case sets out the Tamiami test most simply. The Diaz prong or "essence" prong requires that job qualifications be reasonably related to the essence of the particular business. The second prong or Weeks prong

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73 Id. at 406-08. The district court further informed the jury that Western could have established a valid BFOQ defense by proving: (1) that in 1978, the year in which these pilots were retired, it would have been entirely impractical to deal with each second officer over sixty individually to test and predict his or her particular ability to perform the job safely; and (2) that some second officers over age 60 did possess traits of physiological, psychological or other medical problems that did diminish safe and efficient job performance and that these traits cannot be tested accurately by means other than uniformly applying a blanket age cut-off. Id. at 407-08.

74 Id.
75 Id. at 408.
76 29 U.S.C. 623(f). The ADEA exception allows age discrimination: where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; or where such practices involve an employee in a work place in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such work place is located.

77 531 F.2d 224 (5th Cir. 1976).
78 Criswell, 472 U.S. at 416-17 (citing Tamiami, 531 F.2d at 413); see also Wells, supra note 65, at 762-63.
80 Id.
can be satisfied by meeting either of two sub-prongs.\textsuperscript{81} The first sub-prong requires the employer to prove that it has a reasonable cause, a factual basis, for the belief that all or substantially all persons over the age limit would be unable to perform safely the job duties involved.\textsuperscript{82} Alternatively, the second sub-prong of the \textit{Weeks} test requires the employer to prove that it is highly impractical to assess the safe job performance of persons over the proscribed age limit on an individual basis.\textsuperscript{83} Using this test,\textsuperscript{84} the Court affirmed the appellate court's decision and upheld the Age Sixty Mandatory Retirement Rule for pilots.\textsuperscript{85} The Court, however, rejected Western's extension of the rule's application to include flight engineers because the qualifications for a flight engineer are less rigorous than those for pilots.\textsuperscript{86}

\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} The two-prong test developed in \textit{Weeks} v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), and \textit{Diaz} v. Pan American World Airlines, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971), first requires the employer objectively to show that the discriminatory hiring or employment practices are "reasonably necessary to the essence of [the employer's] business." \textit{Tamiami}, 531 F.2d at 236. The second prong may be met in two ways because it requires age qualifications to be more than convenient or reasonable; they must be reasonably necessary to the particular business which is found only when an employer must rely on age as a proxy for the safety-related job qualifications from the first prong. \textit{Id}. The employer can satisfy this second prong by establishing a factual basis for belief that substantially all persons over a certain age could not meet the duties of the job safely and efficiently or by showing that there is no possible or practical way to test each older worker on an individual basis. \textit{Criswell}, 472 U.S. at 418; \textit{Tamiami}, 531 F.2d at 235; see also \textit{Wells}, supra note 65, at 762-63.
\textsuperscript{85} \textit{Criswell}, 472 U.S. at 423; see also Jane W. May, \textit{The Bona Fide Occupational Qualification Exception — Clarifying the Meaning of "Occupational Qualification,"} 38 \textit{VAND. L. REV.} 1345, 1367 n. 192 (1985).
\textsuperscript{86} \textit{Criswell}, 472 U.S. at 418. Courts have been using a more stringent BFOQ test lately. First, the court must apply the \textit{Diaz} test, where the Fifth Circuit added a threshold requirement to the application of the BFOQ exception, assuring that the mandatory age is substantially related to the essential function of the business. Basically, the \textit{Diaz} prong considers a BFOQ valid only when the "essence of the business operation would be undermined" by failing to follow the discriminatory hiring practice, making it a "business necessity test, not a business convenience test." May, supra note 85, at 1351. Before applying the \textit{Weeks} test as explained by \textit{Tamiami}, the court must closely evaluate the specific duties involved with the employee's job. If the court finds the job is a specific assignment such as that of a pilot, it must examine the job requirements that the pilot has "actually performed in the past and is likely to perform in the future." May, supra note 85, at 1367. This new test better effectu-
B. Seventh Circuit Court Addresses the Age Sixty Rule

Various circuit courts have also upheld the Age Sixty Mandatory Retirement Rule. Two Seventh Circuit cases, *Aman v. FAA* and *Baker v. FAA*, are particularly insightful in their analysis of the most recent challenges to the Age Sixty Rule.

1. *Aman v. FAA*

The *Aman* court, like other courts before it, denied twenty-eight airline captains’ and flight engineers’ appeal from FAA decisions denying their petition for exemption from the Age Sixty Mandatory Retirement Rule. The FAA’s denials stated that granting individual exemptions would not maintain the level of safety achieved by uniform enforcement of mandatory retirement at sixty. *Aman* initially arose because the FAA and courts disregarded the recommendation of a six-member panel comprised of five physicians and a psychologist qualified in the fields of cardiology, aerospace medicine, and neuropsychology.

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87 *Baker v. FAA*, 917 F.2d 318 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1338 (1991); *Aman v. FAA*, 856 F.2d 946 (7th Cir. 1988); *EEOC v. United Air Lines, Inc.*, 755 F.2d 94 (7th Cir. 1985); *Monroe*, 736 F.2d at 394; *Trans World*, 713 F.2d at 940; *Rombough v. FAA*, 594 F.2d 893 (2d Cir. 1979); *Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979); *Coppenbarger v. FAA*, 558 F.2d 836 (7th Cir. 1977); *Quesada*, 276 F.2d at 892.

88 856 F.2d at 946.

89 917 F.2d at 318.

90 *Aman*, 856 F.2d at 949. The pilot-petitioner’s original petition for exemption included recommendations from the six-member “Age 60 Exemption Panel,” which comprised five physicians and a psychologist with impressive qualifications in the areas of cardiology, aerospace medicine, and neuropsychology. This panel had developed an extensive battery of physiological and psychological tests to assess the fitness of pilots over age 60. In the petition, the panel stated that this battery of tests, if administered and supplemented properly by additional medical tests and used with the existing operational tests already required by the FAA and airlines, could adequately provide for exemptions from the Age 60 Rule. *Id.*

91 *Id.*
The pilot-petitioners had two main arguments concerning this protocol test which the Aman court discounted.\(^9\) The pilots' first argument was that pilots older than sixty, who are psychologically and medically able to meet FAA and airline operational testing standards, are no more likely to cause accidents due to sudden incapacitation or undetected deterioration of piloting skills than pilots younger than sixty. To successfully maintain this claim, the court required the pilots to demonstrate that the FAA had little or no substantial evidence for the finding that the strict enforcement of the Age Sixty Rule, with no exemptions granted, does reduce age-related risks of incapacitation and undetected deterioration of the pilots' flying skills.\(^9\)

The FAA, in support of the rule, stated that error and risks of age-related incapacitation could not accurately be screened out.\(^9\) The FAA used expert testimony to indicate the increased risk of physical deterioration among pilots over the age of sixty occurring during the time span between the required biannual medical tests. The Aman court reviewed the evidence that stated that no available tests, as set forth by the pilot-petitioners, by the airlines, or by the FAA, could accurately identify or predict possible losses of flying skills.\(^9\) After considering the FAA's evidence and that supplied by the experts of the pilot-petitioners, the court concluded that because the petitioner's protocol battery of tests could not eliminate "all the incremental risk associated with sudden incapacitation or undetected deterioration of skills among pilots over sixty, a substantial body of medical opinion continues 'to doubt the feasibility'" of the pilot-petitioner's battery of tests as an accurate predictor of pilot risk.\(^9\)

\(^9\) See Wells, supra note 65, at 772.  
\(^9\) Aman, 856 F.2d at 949.  
\(^9\) The FAA asserted in its Denial of Exemption No. 25,008, at 13 (Sept. 8, 1987), that the likelihood of sudden death, disability, or incapacitation accelerates with age by each additional year and that to grant exemptions would compromise the level of safety. Aman, 856 F.2d at 949.  
\(^9\) Aman, 856 F.2d at 949.  
\(^9\) Id.
In their second claim, the pilot-petitioners argued that older pilots who satisfied the protocol and existing operational tests possess greater experience, and are therefore safer than the average younger pilots, making them deserving of exemption from the Age Sixty Rule. According to the court, the FAA did not adequately address this issue.

The court noted that the FAA did not "present findings of fact supported by substantial evidence (or even by the presumably lesser quantum of evidence required to avoid arbitrariness and capriciousness) or to identify the governing principles and set forth a 'rational connection between the facts found and the choice made.'" In addressing this second claim, the court considered the pilot-petitioners' evidence, which included a comparison of accident rates represented by various age groups of pilots with commercial and air carrier certificates. The court found that the comparison demonstrated below average accident rates for pilots between fifty-five years and fifty-nine years and the age sixty and over group.

After finding the FAA's response to the pilot-petitioners' petition "incomplete," because the FAA failed to present any factual or legal basis to support its rejection of the pilot-petitioners' claim of experience increasing with age, the Aman court then remanded the case to the FAA for explanations concerning the FAA's deficiencies. The pilots then supplemented their original petitions with additional exhibits from over 200 scientists, physicians, aviation industry officials and other pilots, as well as interest organiza-

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97 Id. at 955.
98 Id.
99 Id.
100 Aman, 856 F.2d at 955. Clearly, this data included the accident rates for the age 60 and over pilots not subject to the rule. Id.
101 Id. The court noted the deficiencies in the FAA's evidence supporting the dismissal of the pilots' petition, as the FAA failed to give facts supported by substantial evidence or even the evidence necessary to avoid arbitrariness and capriciousness. Id. Likewise, the FAA failed to identify governing principles or find a rational nexus between the facts they presented and the age chosen. Id. Moreover, the court noted the FAA's failure to give any facts supporting its rejection of the pilots' assertion that older pilots' experience offset the existence of undetected physical loss. Id. For a more detailed analysis of Aman, see Wells, supra note 65, at 771-778.
The amended Petitioner's Brief now included evidence which the pilot-petitioners felt supported their cause in several ways. The brief stated that in the aviation field, pilot experience increases safety, while pilot inexperience has caused fatal accidents. The brief further stated that aviation industry experts unanimously support the theory that experience is possibly the most critical factor for determining airline safety. Moreover, forced retirements because of the Age Sixty Rule have created a shortage of qualified and experienced pilots as well as a reduction in overall cockpit experience levels. The amended brief included aviation accident statistics that indicate that accident rates decline as pilots' age and experience increases.

The pilot-petitioners argued in the brief that older pilots should be given the same treatment as pilots with serious disabilities whom the FAA has specially exempted and allowed to return to work. Finally, the pilot-petitioners argued that the advances in medical science strongly support exemptions from the Age Sixty Rule. They supported this claim with evidence that their medical and psychological testing protocol, developed by a medical panel of experts, has gone unchallenged by the scientific and medical community in its ability to screen pilots who are over the age of sixty. With this new support, the public docket was reopened.

The FAA, however, represented by the Director of Flight Standards Service, once again denied the petition for ex-
emption on May 26, 1989. The FAA denied the exemption for several explicit reasons. The FAA stated that the pilot-petitioner’s data in the brief was suspect and that despite medical diagnosis, treatment and prevention, pilots as they age will nonetheless experience some decline in areas necessary for flight performance and safety. The areas the FAA targeted for age-based decline included mental psychomotor, emotional, intellectual, and physical attributes. To support this claim, the FAA admitted that while there may be individual exceptions, data exist which demonstrate that the general population exhibits rates of disability and death because of physical changes and disorders accompanying aging. Finally, the FAA’s denial notes that in the general population, the aging process is too unpredictable and individualized, involving too many variables which make it immeasurable. Thus, airline safety could be compromised. The FAA downplayed the pilots’ claim that pilots who are sixty and over are similar to medically-exempt younger pilots, claiming that younger pilots can be tested to monitor medical problems. The FAA will issue exemptions only when technology has developed a technique to assess the pilots’ abilities and detect problems. Clearly, the FAA has determined that medical technology cannot accomplish this with aging pilots susceptible to acute cardiovascular or neurologically induced incapacitation or any other cognitive disabilities.

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110 Denial of Exemption FAA Nos. 25,008 and 25,524, supra note 102, at 33.
111 Id.
112 Id.
113 Id.
114 Id.
115 Denial of Exemption, FAA Nos. 25,008 and 25,524, supra note 102, at 32.
116 Id.
117 Id. at 32-34; see Wells, supra note 65, at 778, n. 124 (discussing the FAA’s foundation for denying the exemption based on the controversial “Flight Time Study”).
2. **Baker v. FAA**\(^{118}\)

a. The *Baker* Court’s Examination of the Pilot-Petitioners’ Evidence

In *Baker v. FAA* thirty-one pilot-petitioners pursued their suit by filing an appeal on July 21, 1989, alleging that the FAA’s denial lacked substantial evidence.\(^{119}\) Again, the petitioners attacked the FAA’s denial based on the Flight Time Study.\(^{120}\) The pilot-petitioners attacked the Flight Time Study in two ways. The petitioners argued that the FAA’s report that showed an increase in accident rates of pilots over the age of sixty had a fatal flaw as it artificially deflated the accident rates for pilots below the age of sixty.\(^{121}\) Moreover, the petitioners claimed that because the report actually showed a decrease in pilot accident rates with increasing pilot experience, then the report actually supports an exemption for older pilots who have more experience.\(^{122}\) Further, the petitioners stated that if the study excluded the flawed groupings, age sixty and over, then the accident rates actually declined with age.\(^{123}\) Likewise, the petitioners emphasized that increasing pilot experience corresponds directly with substantial reductions in accident rates, while accident rates decrease with age in the only class of general aviators which the flaw did not affect.\(^{124}\) When such flaw was removed, the accident rate for general aviation pilots remained constant to age.\(^{125}\) The Seventh Circuit Court of Appeals still rejected petitioners’ claims and again affirmed the FAA’s decision to refuse to grant the

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\(^{118}\) 917 F.2d at 318.

\(^{119}\) Id.; see also Petitioner’s Brief, *supra* note 102, at 2. For a further discussion of *Baker* and the Flight Time Study, see Wells, *supra* note 65, at 779, n. 126 and accompanying text.

\(^{120}\) The pilots claim the Flight Time Study data was flawed as it excluded airline and commuter pilots’ accidents while including the air carrier flight time. Petitioner’s Brief, *supra* note 103, at 13.

\(^{121}\) Petitioner’s Brief, *supra* note 102 at 9-10.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Id.

\(^{125}\) Id.
exemptions. The court found the petitioners' claim lacking substantial evidence. Likewise, the court held that the petitioners had failed to carry their burden to show that extenuating factors justified the Age Sixty Rule exemptions, even given the FAA's expansive discretionary authority concerning this area and the notable concern with public safety.

The court also extended this intrusive scrutiny into its examination of the FAA's evidence. The Baker court started with an attack on the FAA's dependence on the Flight Time Study, finding discrepancies between the number of accidents resulting from pilots younger than sixty juxtaposed to the number of pilots over sixty. That the study recognized millions of safe air carrier miles flown by pilots under sixty, while statistics on safe carrier miles for pilots over age sixty were not available because of the Age Sixty Rule, did not escape the Baker court's attention. The court quickly recognized the Flight Time Study bias which drastically understated the accident rates for all pilots under sixty while overstating the accident rates for those pilots over age sixty.

Likewise, the court discredited the FAA's analogy comparing fatal car accidents to aircraft accidents because of pilots' training, tested skills, proven ability, and medical fitness. The court found the value of this analogy diminished because elderly people seem more likely to die as a result of traffic accidents because of the effects of aging on the body and the difficulty of physical rehabilitation.

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126 Baker, 917 F.2d at 319.
127 Id.
128 Id.
129 Id. at 320-21.
130 Id. at 320. The court specifically noted the flaws in the study. The pilot-petitioners pointed out the flaw itself when they showed that airline and commuter pilots' accidents were not included in the data compilations but air carrier flight time was included. Id. at 320-21.
131 Baker, 917 F.2d at 319.
132 Id. at 320.
133 Id. at 321.
134 Id. at 321.
Likewise, the court noted that the FAA failed to consider the amount of exposure experienced by older drivers as compared to that of older pilots, considering their continued training, medical fitness and experience.\textsuperscript{135}

Similar to the court's observation in \textit{Aman}, the \textit{Baker} court noted the petitioner's failure to disprove the FAA's claim that "[a]ssessing the risks associated with determining which pilots may fly beyond age [sixty] concerns detrimental conditions which are unknown."\textsuperscript{136} The pilots had no test battery which could indicate with certainty the age-related deterioration of skills.\textsuperscript{137} Clearly, from the discussion, the court felt forced to rule against the pilots because of the lack of reliable tests that would justify a change in the rule forcing immediate retirement at sixty regardless of the pilots' physical and mental condition.\textsuperscript{138}

The court acknowledged the petitioners' "catch-22" situation nothing that pilots "cannot get exemptions until they show they can fly large passenger aircraft safely, and they cannot show they can fly such planes safely until they get exemptions."\textsuperscript{139} Overall, the court recognized the testimonials of experts in flying and medicine to the experience and judgment of the older pilots, but was restrained by the infeasibility of testing the good health and performance of the pilots.\textsuperscript{140} The court explicitly denied the dissent's attack by stating they were not "holding that every airline pilot, on his or her [sixtieth] birthday, and regardless of physical condition or experience, becomes a significantly greater safety hazard than before . . . ." \textsuperscript{141}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Baker}, 917 F.2d at 321.
\item \textit{Aman}, 856 F.2d at 954.
\item \textit{Baker}, 917 F.2d at 321.
\item \textit{Id.} at 322.
\item \textit{Id.} at 319 ("[W]e cannot justify a conclusion that, on average, experience sufficiently offsets possible age-related impairment of health or skills to clearly guarantee a net constancy or increase in safety."). This court concluded that while the pilots did give evidence showing pilots 60 or older had more experience than average younger crew members, they failed to show that there was a need for that increased experience. \textit{Id.} at 320.
\item \textit{Id.} at 322. Any statistical comparisons given are suspect because pilots over age 60 are not allowed to fly larger passenger aircraft. \textit{Id.} at 321.
\end{enumerate}
\end{footnotesize}
In conclusion, the *Baker* court warned the FAA that it did not hold that the pilot-petitioners' arguments were wrong but instead urged the FAA to examine this area carefully.\(^{142}\) Although the court might be unwilling to overrule the agency at this time, the rule is not "sacrosanct and untouchable."\(^{143}\) The court warned that the rule might be overruled if future evidence of accurate individual testing so demands.\(^{144}\)

b. The *Baker* Dissent

The *Baker* dissent attacked the FAA's rigid conformance to this rule.\(^{145}\) The dissent questioned the FAA's justifications for the blanket denial of all petitions for exemptions from the rule's enforcement.\(^{146}\) Senior District Judge Will challenged the *Aman* court's direction for the FAA on remand.\(^{147}\) In fact, the dissent after listing the various tests and batteries available, expressed its disbelief that the FAA cannot reliably test all pilots and attacked the FAA's balancing test between physical deterioration and pilot experience.\(^{148}\)

Moreover, the dissent noted that even if a pilot was suddenly incapacitated, the "safety net" is not that pilot's experience but the presence of the other two qualified pilots in the cockpit.\(^{149}\) An airline cockpit crew usually consists of

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\(^{142}\) *Id.* at 323.

\(^{143}\) *Baker*, 917 F.2d at 322.

\(^{144}\) *Id.* at 322-23.

\(^{145}\) *Id.* at 323-24.

\(^{146}\) *Id.* at 324. Senior District Judge Will found it ridiculous that pilots with thousands of flying hours and flawless records, who have passed every physical battery and flight test, are suddenly grounded on their 60th birthdays, even though they had flown up to standards the day before without any restrictions and are deemed qualified the day after to fly planes with 30 or fewer passengers. *Id.* at 323.

\(^{147}\) *Id.* at 324. The dissent stated that the majority in *Aman* had offered no guidance for the FAA on how to review the denial on remand. *Id.*

\(^{148}\) *Id.* at 323-24. The dissent noted that the FAA had identified the skills and physical and cognitive abilities necessary for flying but could not find any way to test for them in pilots over 60, while at the same time testing them in pilots under 60. *Id.* at 324. See *Wells*, *supra* note 65, at 787; see also *supra* notes 60-71 and accompanying text.

\(^{149}\) *Baker*, 917 F.2d at 324.
three pilots: the pilot-in-command (captain), the co-pilot (first officer), and the flight engineer (second officer). Because their responsibilities overlap considerably and all three focus on tasks of information gathering, problem solving, decision making, psycho-motor coordination, and transmission of information to the airport system, each part of the team is trained to take over if there is any emergency on the plane, thus the “safety net” feature.

The dissent vigorously attacked the FAA’s continued dependence on the flawed Flight Time Study when the majority in Aman found aspects of it to support the petitioner’s claim. The dissent explained why the pilot-petitioners have had to rely on the presented stories of pilots on the brink of sixty performing heroic deeds and saving lives where less experienced pilots might have failed. Finally, the dissent, in accord with the majority, recognized the pilots’ dilemma in being unable to produce data to show that pilots over age sixty are as safe as younger pilots.

The dissent expressed concern about the FAA’s willingness to reissue “special permits” to pilots under sixty recovering from heart disease, drug abuse, and alcoholism, while simultaneously denying exemptions from the Age Sixty

150 47 Fed. Reg. 29,782, supra note 5; see also supra note 72.
151 Id.
152 Baker, 917 F.2d at 323 (listing flight simulator tests, vision and depth perception tests, hearing tests, stress tests, blood tests, psychological workups, x-rays, angiograms, and EKGs). The dissent explained that as pilots grow older, the way their experience offsets the decrease in skills depends on two factors: (1) how much experience does the pilot have; and (2) have the pilot’s skills ‘deteriorated’? Id. at 325. Yet this argument cannot be disproved because, the FAA argues, the second cannot be measured reliably. Id.
153 Id. (citing Aman, 856 F.2d at 957). The pilot-petitioners presented the story of what has been termed the “heroic deed” of a 59 year-old Captain David Cronin, who on his second-to-last flight emergency landed a 747 Boeing after its cargo door blew open in mid-flight. Overcoming the failure of two of the plane’s four engines, Cronin chose to disregard emergency operating procedures which required him to dive, reduce speed, and drop the landing gear. Relying on his 38 years of experience, Cronin ignored that advice because it would have caused the plane to lose too much altitude. Instead, Cronin, operating manual controls, saved the lives of all passengers and crew, with the exception of the nine killed immediately by the cargo door, by landing the malfunctioning plane safely at a much higher than normal speed. Id. at 319-20.
Rule.\textsuperscript{154} The FAA responded in \textit{Aman} to this kind of attack by explaining that current tests can predict the course of medical deficiencies accurately but cannot accurately predict the deficiencies accompanying the aging process.\textsuperscript{155} The \textit{Baker} dissent noted, however, that the FAA offered no evidence to support that distinction in medical testing, which allows the FAA to grant special permits to younger pilots while refusing even to set forth criteria and sensible regulations, much less exemptions, for pilots over sixty.\textsuperscript{156}

Again agreeing with the majority, the dissent ridiculed the FAA’s comparison of age-related fatalities of automobile traffic accidents to age-related in-flight accidents of pilots over the age of sixty.\textsuperscript{157} Recognizing the need for advanced technology, the dissent indicated a desire to remand this case for action in the following three areas: (1) the FAA should adopt “regulations establishing ascertainable and meaningful standards to govern the granting of at least some exemptions to the [Age Sixty Rule]” because the present FAA regulations fail to guide the FAA in exercising its available discretion; (2) the FAA should show, with current substantial evidence, that all pilots over sixty are significantly more prone to “sudden incapacitation” than younger pilots; and (3) the FAA should provide a significant explanation for its treating requests for medical exemption certificates under 14 C.F.R. § 67.19 differently from Age Sixty Rule exemptions.\textsuperscript{158}

\section*{IV. PRESENT CONSIDERATION OF THE RULE: THE MOST RECENT CHALLENGE}

Since the beginning of the Age Sixty Rule, everyone has agreed that age sixty is an arbitrary cut-off.\textsuperscript{159} For instance, in 1990 Boeing Airlines raised the retirement age of its test

\begin{itemize}
\item[\textsuperscript{154}] \textit{Id.} at 325-26.
\item[\textsuperscript{155}] \textit{Id.} at 325.
\item[\textsuperscript{156}] \textit{Baker}, 917 F.2d at 325.
\item[\textsuperscript{157}] \textit{Id.} at 326; \textit{see supra} note 133 and accompanying text for explanation.
\item[\textsuperscript{158}] \textit{Id.} at 326-27.
\item[\textsuperscript{159}] \textit{Older Pilots}, S.F. CHRON., Apr. 23, 1990, at A18.
\end{itemize}
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pilots to sixty-three believing the theory that medical testing had become more reliable and individuals more health conscious. As test pilots undergo "more grueling" and more dangerous work than that normally experienced by airline pilots, other airlines could adopt a similar extension. After Boeing's change, which resulted from a settlement with twenty-eight pilots who received a total of $4.4 million in back pay, EEOC attorney Steve O'Rourke stated, "there's a growing realization of the ability of medical science to detect medical risk on an individual basis. You [don't] need to use this broad brush of an age rule." Furthermore, similar agreements had been reached with Lockheed and Rockwell International. McDonald Aircraft Company in St. Louis, which makes military aircraft, eliminated the age rule, as have General Dynamics Corporation, Northrop Corporation, and the National Aeronautics and Space Administration.

Following EEOC v. Boeing Co., filed in 1984, Douglas Aircraft Co. made a compromise with their pilots to allow them to keep flying until age sixty-five, as long as they pass more stringent physical exams.

Although opportunities have arisen for change, the FAA and Congress have been reluctant to extend the Rule. In 1979, the House voted 240 to 165 to kill a bill that would have allowed airline pilots to fly eighteen months past their sixtieth birthday, pending outcome of a National Institute of Health study on the effects of aging in pilots. Because of this arbitrariness, various organizations and individuals have challenged the rule.

A. AN ATTACK ON THE AGE SIXTY RULE IN CONGRESS

On October 19, 1989, Iowa Republican Congressman James Lightfoot introduced a bill to raise the mandatory retirement age for pilots.

160 Id.
161 Morris, supra note 5, at 1.
162 Id.
164 Morris, supra note 5, at 1.
pilot retirement age to sixty-five. In response, the House Public Works And Transportation Investigations Oversight Subcommittee required the Office of Technology Assessment (OTA) to review the Age Sixty Rule medical aspects. After the OTA's results were revealed, the 1989 bill failed. However, in March of 1993, Republican Jim Lightfoot plans to reintroduce legislation that would raise the mandatory pilot retirement age to sixty-five. Lightfoot's new attack again cites the unpublished FAA Civil Aviation Medical Institute report, which concluded there is no medical evidence to support the age restrictions. Representative Lightfoot claims, "the Federal Government continues to practice age discrimination on our

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166 Reingold, supra note 10, at 184.
167 H.R. REP. No. 3498, 101st Cong., 1st Sess. (1989). This bill sought to amend section 602(b) of the 1958 Federal Aviation Act (49 U.S.C. 1422(b) (1988)) with the following addition to the end of the Act:

(3) Limitation on Age Restrictions. — The Administrator shall not, solely by reason of the age of a person, if such person is less than 65 years of age —

(A) refuse to issue an airman certificate to, or refuse to renew such certificate for, such person, if such person is applying for the issuance or renewal of such certificate in order to serve or continue to serve as a pilot of an aircraft; or

(B) require an air carrier to terminate the employment of, or refuse to employ, such person as a pilot on an aircraft of such air carrier.

H.R. 3438.
168 See Office of Technological Assessment, Medical Risk Assessment and the Age 60 Rule for Airline Pilots (1990) [hereinafter OTA Report], at fig.3. The study compared the number of accidents per 100,000 pilot hours for pilots in the age intervals of 17-19, 20-29, 30-39, 40-49, 50-59, 60-69, and 70 and over. Id. Then the report graphed the accident rates varying with three varying levels of pilot flight experience: 51-100 hours/year; 101-400 hours/year; and 401 hours and above. Id. The data showed that there is a beneficial effect of flying experience existing at all levels (supporting the pilot-petitioners' claim). However, there is no interaction with age in pilots flying fewer than 100 hours per year. Thus, for pilots flying more than 100 hours per year, increasing age (likely accompanied by increasing total experience) and increased flying time have beneficial effects on those pilots' abilities. After the age 60, however, accident rates increase even if pilots continue to fly over 400 hours per year. Id.
170 311 Aviation Daily 341 (1993). The OTA suggested that any medical certification standard changes made should be determined by balancing a number of factors: public safety, costs of a more complete medical examination, risks to pilots in screening and value of screening tests predicting future degeneration or disease. OTA Report, supra note 168.
nation's airline pilots with no medical evidence to support action." Lightfoot, backing the September 29-30, 1993 hearing, now anxiously awaits further Congressional discussion of a change for the Age Sixty Rule. However, for now, discussions concerning the rule have been suspended until new technological battery tests are made available.

B. The National Institute on Aging Challenge

The National Institute on Aging (hereinafter NIA) also found no medical justification for the rule. The NIA recommended to the FAA a program to allow pilots who are fifty-five to volunteer for participation in a comprehensive study where if they remained healthy, they could fly until age sixty-five. To participate, these pilots would have to agree to the risk of being retired before age sixty if the study predicted that their health could compromise their performance or the carrier’s safety. This plan, with its ten-year age span, would help alleviate some of the arbitrary blanket coverage of the randomly selected Age Sixty Rule. When the FAA would not allow the study, the NIA agreed with the Rule opposition that it is time to do away with this arbitrary, non-scientific rule that is potentially harmful to both the public and the airline industry.

The OTA report required cognitive function neuropsychiatric tests given by skilled, clinical psychologists. Id., n.59 at 10. But the OTA found that because the majority of failures in pilot performance result from pilot error, not pilot impairment or incapacitation due to medical illness, suggested screening improvements (a battery of tests predicting the risk of developing medical illnesses) would have little impact on accident rates. Id. Finally, the OTA study revealed that an estimated additional cost of $714 per pilot for individual screening tests and almost double that amount for follow-up testing. Id. at 12. These costs do not, the OTA concluded, include training, higher salaries for older pilots, labor contract re-bargaining, and legal actions arising from the new screening processes. Id.

172 139 CONG. REC. E. 813, 814 (1993).
174 Id.
175 Id.
C. THE DISCUSSION AT THE MOST RECENT HEARING

At the September 29, 1993, hearing, FAA Administrator David R. Hinson alerted the flying community that the FAA was open to a potential change in the rule as long as allowing pilots over age sixty to fly did not compromise passenger safety in any way.176 Reasserting old challenges, former pilots again maintained that they were being discriminated against based on age while emphasizing that their skills and experience offset any infirmities.177 Moreover, these pilots acknowledged that other industrialized nations allow pilots to fly commercially until sixty-five or seventy, or beyond, and also emphasized the inconsistency that the ban does not extend to pilots of small charter and cargo planes or even the FAA's own pilots.178 In addition, the pilots contend that economics and not passenger safety is behind the rule.179

The FAA claims the rule is based on "medical principles," two of which are "indisputable."180 One pilot disputed this FAA claim when he stressed that all commercial airline pilots are grounded for physical and psychological testing every six months for several days to determine the states of their health and skills.181 During this time, decisions are made individually on what, if any, modifications are needed in training and scheduling for each aviator.182 For pilots under sixty, this process determines who flies and who does not. Because pilots under sixty are tested on an individual basis, the pilots argue that testing sixty-year old pilots individually is not impossible either.183 This grounding process could make the same determinations for pilots age sixty

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176 U.S. Considers Lifting Ban on Older Pilots, N.Y. TIMES, Sept. 30, 1993, at A23 [hereinafter Lifting Ban], see also Arguments on FAA's Age 60 Rule Continue to Turn on Medical Evidence, 313 AVIATION DAILY, 501 (1993) [hereinafter Arguments].
177 Id.
178 Lifting Ban, supra note 176.
179 Arguments, supra note 176.
180 Id.
181 Id.
182 Id.
183 Id.
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and over at a lower economical cost.\textsuperscript{184} Even if this individual testing for pilots age sixty and over is rejected outright, it could be invaluable for collecting data for solving questions pertinent to the FAA's decision on its mandatory retirement rule.\textsuperscript{185} When this data is gathered, then an informed decision "can be made based on fact, not on a whim and a premise."\textsuperscript{186}

V. FUTURE PROJECTIONS FOR THE RULE AS IT CURRENTLY READS

The Age Sixty Rule as it now reads creates various problems in the future. The first of these is a projected drop in the number of experienced pilots: Nearly one-third of all U.S. pilots will be forced to retire over the next decade.\textsuperscript{187} The longtime source of pilots — the military — is training fewer pilots, thus requiring the airlines to rely on the open market to fill the gaps.\textsuperscript{188} Statistics show that about 23,000 pilots will retire over the next ten years, and another 4,500 new pilots could be needed each year when

\textsuperscript{184} Pilots Protest Mandatory Retirement at Age 60, \textit{Legal Intelligencer}, Sept. 30, 1993, at 5.

\textsuperscript{185} \textit{Arguments}, supra note 176. The data from individualized testing for pilots under age 60 could be used to indicate areas of decline for pilots approaching age 60. If this testing were extended, the pilots argue, then it could also indicate areas for pilots over age 60 at little additional cost as this data for pilots nearing age 60 is already being gathered now. The data could be used to test the FAA's hypothesis that incapacitation risks and unacceptable decrements in pilot performance increase at accelerating rates with age. As pilots are already being tested as they approach age 60, then a mere extension of this testing to pilots over 60 could document the areas of decline (or even catch individual risks) for little cost. At odds with this argument is the FAA claim that medical science has no accurate tests to identify aging pilots who are at risk for incapacitation or whose performance will decline at an unacceptable level. However, the pilots find this argument flawed as these very pilots are being tested at age 59 for performance level and there is no medical principle showing that pilots age 60 as opposed to age 59 or 61 or 62 are not able to be measured accurately. At the least, the pilots want the individualized testing data for pilots approaching age 60 to be used to develop an accurate test. \textit{Id.}


\textsuperscript{188} \textit{Id.}
the industry rises out of this current slump.” The “mil-
tary[, ] once the major supplier of experienced pilots[,] no
longer trains the numbers needed.” Where once 85% of
airline crews learned to fly in the military, by the end of this
decade only one-third will have done so. That huge
group of post-Korea and Vietnam-era pilots who joined the
commercial ranks in the 1960’s as airlines expanded into
large jetliners is now approaching the mandatory retire-
ment age of sixty.

The result of this pilot shortage will be a compromise in
pilot experience and training. Airlines are accepting pi-
lots meeting much lower standards “where a company used
to want [a newly hired pilot] to have 3,500 [hours] total time
and 500 hours jet time.” If the rule persists “as-is,” pilots
will continue to resort to booking with pilot brokers to fly
with foreign airlines or these older pilots may fly for the rest
of their lives smaller planes carrying less than thirty passen-
gers; planes in which they work longer hours, and may
make more dangerous take-offs and landings than the aver-
age airline pilot.

Another alternative to this training shortage will be a
movement from college aviation programs to individual
flight instruction programs. Many foreign airlines use
this approach by providing their own training, hiring peo-
ple with little or no flight experience to become pilots. Ja-
pan Air Lines (JAL) has been forced to accept this
approach because of little private aviation, limited air space,
and a small military supply from which to select pilots.

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189 Fred Bayles, Pilot Crunch Expected Within 3 to 5 Years, L. A. TIMES, June 20, 1993, at A18.
190 Id.
191 Replacing Pilots, supra note 187.
192 Id.
193 Id.
195 Id. see also Replacing Pilots, supra note 187, at A1.
197 Id.
Air France, Lufthansa and Iberia have also used this type of training program for its pilots. These programs use an "ab initio" approach, meaning "from the beginning." Potential pilots undergo detailed physical and psychological testing to determine if they meet the school’s requirements. Those satisfying the rigorous qualifications are then paid generously during the three and a half years of schooling, an investment JAL makes to receive pilots trained to specification and who will likely stay with the company for thirty years or more. This standardized and concentrated training closely parallels that which pilots undergo in U.S. military programs. Upon graduation, JAL students have 400 flight hours and are considered ready to assume the second seat of a jumbo jet. While FAA regulations require 235 flight hours for a commercial pilot’s license, most U.S. airlines require pilots to have a few thousand hours before flying their planes. With fewer military pilots, the Age Sixty Mandatory Retirement Rule, and the predicted shortage of commercial pilots, U.S. airlines may have to study the JAL pilot academy and reconsider their strict flight hour requirements.

A. NEEDED ADJUSTMENTS FOR A PROPOSED CHANGED RULE

If the proponents of an age rule succeed and the age sixty prohibition for pilots is extended, many adjustments will be required. For many pilots, a change in this rule may disrupt pension plans and lead to many complete renegotiations; a change could hurt retirement reliance for pilots who knew when they started that they would have to retire at sixty.
On the other side, the PPF stated that a change in the rule will not harm pilots who have planned their careers with the expectation of retiring at sixty.\textsuperscript{204} A change in the rule would simply allow pilots the option to fly longer and not force them to retire.\textsuperscript{205} In rebuttal, ALPA replied by stating that negotiations deal not only with airlines but with government.\textsuperscript{206} These negotiated deals, concerning pension and retirement, are based on age sixty retirement. However, if the rule were to be changed, the special provisions, such as "full social security benefits starting at sixty," might be lost.\textsuperscript{207}

**B. FURTHER ECONOMIC CONSEQUENCES OF A RULE CHANGE**

Raising the age for mandatory retirement would add benefits and greater expenses for airlines.\textsuperscript{208} For instance, a carrier might receive more years of service from its pilots before starting pension payouts to pilots.\textsuperscript{209} Medical plan costs for carriers paying benefits to both active pilots and retirees would be reduced as fewer people altogether would receive coverage.\textsuperscript{210} In a rough balance, total wage costs would rise, as senior pilots who receive more pay remain in their positions longer.\textsuperscript{211} Also, less experienced pilots in general would not gain promotions, but would instead gather seniority, thus creating an older and more expensive work force, one with more vacation time and substantially more sick time.\textsuperscript{212} Moreover, a rule change could disrupt the whole pension system, creating the need for renegotiations and bargaining.\textsuperscript{213}

\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Reingold, supra note 10, at 184.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Reingold, supra note 10, at 184.
\textsuperscript{212} Id.
\textsuperscript{213} Id. Some airlines may have trouble charting retirement plans. Some offer "pensions made up of 'defined benefit' only." A defined benefit formula is "based
Although many pilots over sixty possess the ability and physical condition to continue flying, the Age Sixty Rule should not be eliminated. At this particular point, medical technology has not developed a battery of tests to predict exactly when pilots should retire. Therefore, this blanket age limit, while admittedly overinclusive, serves the public's best interest by eliminating potentially dangerous pilots whose age makes them more likely to experience incapacitating trauma.

Understandably, the pilots who oppose the rule have excellent grounds for demanding more testing. With the three-person pilot support crew in the cockpit, incapacitating trauma for one pilot might not affect the safety of passengers. However, this area needs further testing to assure that first officers and flight engineers know and follow emergency procedures. Because of the rule's existence, emergency proceedings have been infrequent and few studies have been dedicated to the examination of in-flight emergency procedure where a pilot experiences an incapacitating trauma.

Pilots in opposition to the rule have offered a new battery of tests. However, proponents of the rule find this a flawed solution if put into effect immediately. These new tests would expose currently flying pilots to continuous intrusion. Moreover, there is some fear that the flight simulation testing might swell the industry ranks with "cocky [ten]."
year-olds skilled at Super Mario Brothers Nintendo."\(^{216}\) Creating a test that serves as an accurate predictor of the dangers of aging seems a monumental task. A test must exist that balances the acuity necessary to fly jumbo jets safely and the maturity and responsibility necessary to assume such a duty. At this time, the FAA has not perfected such a test. Until it does, the rule should remain.

Pilots argue that they are being unfairly targeted by an overinclusive age discrimination rule. However, the courts have upheld similar rules as applied to government employees, such as police officers, fire fighters, and postal inspectors.\(^{217}\) Again, the age cut-off may be arbitrary, but until hard medical evidence identifies an appropriate cut-off, the FAA should remain reluctant to move the age cut-off upwards.

The rule should not be changed to apply retroactively. Too many pilots rely economically on a retirement complete with benefits beginning at age sixty. The retirement age was known when these pilots began their careers and, while extending the retirement age might economically benefit these pilots, rethinking the rule will satisfy all their initial expectations. Similarly, many of the rule’s proponents emphasize that airlines generously compensate pilots for this early retirement throughout their active career in salaries and benefits, and through carefully constructed pension plans. In addition, by extending the rule’s age cut-off, many pilots who favor the early retirement plan may experience additional testing, restructured pension agreements, and career pressure to fly longer.


\(^{217}\) See, e.g., Patterson v. United States Postal Serv., 901 F.2d 927 (11th Cir. 1990) (upholding the Postal Service policy of refusing to appoint anyone older than 35 to position of Postal Inspector as within the ADEA exception authorizing agencies to set maximum limits for appointment as a law enforcement officer); EEOC v. University of Tex. Health Science Center, 710 F.2d 1091 (5th Cir. 1983) (holding maximum hiring age of 45 for campus police officers justified as BFOQ under ADEA); Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979) (upholding FAA’s rule prohibiting the use by commercial airlines of pilots older than 60).
While these considerations discuss why an extension of the mandatory retirement age for pilots might not be immediately desirable or even available, there are too many valid arguments as well as changing medical technology and evidence showing that the Age Sixty Rule should undergo drastic study. At present, the Age Sixty Rule seems like the best alternative to insure passenger safety. However, those opposed to the rule have presented quite reliable data showing that pilots approaching sixty possess additional flight experience that may serve to counteract any evidence the FAA might offer showing an increase in accident rates for older pilots.\footnote{Armstrong, supra note 9; Aman, 856 F.2d at 949.}

Older pilots have responded strongly to the argument that they cannot compete in the modern technological world of aviation. One American Airline pilot, fifty-four-year-old Thomas S. Corboy, claims learning to fly new models “has something to do with individual pilot motivation, but nothing to do with age.”\footnote{David Field, Learning New Tricks, New Planes, WASH. TIMES, November 7, 1993, at A8.} Corboy mastered his first sophisticated autopilot type, the McDonnell Douglas MD-80, at age forty-six, completing the course on time and with no more difficulty than that faced by the younger pilots. He attributes that accomplishment to a smarter industry.\footnote{Id.} Corboy’s point makes as much sense as any other made in the thirty-year fight over a mandatory retirement age for pilots. An industry concerned with the safety of its pilots should assume the responsibility not for removing pilots arbitrarily from the cockpit, but instead for creating tests and training programs, maintaining in-flight supervision, and conducting studies on the aging effect as it changes with today’s lifestyle. Therefore, while today a change in the rule might create too great a risk for passenger safety and airline liability, the FAA and the airline industry should pour their money and energy into more studies, so that in
the near future the FAA can extend the rule’s age limit to represent more fairly the actual conditions of its pilots.

VI. CONCLUSION: A PREDICTION OF THE AGE SIXTY RULE’S STATUS IN THE FUTURE

Although proponents of an extension of the Age Sixty Rule avidly presented their data and arguments at the September 30, 1993, hearing, the FAA has made no disclosure on their decision concerning the rule. Instead, the FAA officials will sort through the thousands of pages of hearing transcript and then make a decision on the rule’s status.\(^{221}\) The FAA plans to evaluate the arguments of both sides with an open mind to determine if the medical technology available today can safely assess and predict the effects of aging on pilots.\(^{222}\)

According to Anthony Broderick, FAA Associate Administrator for Regulation and Certification, the FAA could decide to preserve the current rule.\(^{223}\) However, if officials decide to raise the age limit, a rulemaking proceeding would be needed.\(^{224}\) This rulemaking process would allow for additional public comment.\(^{225}\)

Presently, there is broad speculation concerning the likelihood that the United States, after its latest hearing, will remain the only nation to practice this kind of age discrimination.\(^{226}\) At this point, it is argued that the FAA has the ability to recertify pilots on an individual basis as shown by the continuation to employ hundreds of victims of alcohol-

\(^{221}\) Telephone Interview with Dan Meier, Regulatory Branch Flight Standards Services, Federal Aviation Administration, in Washington, D.C. (Oct. 15, 1993); see supra note 1.


\(^{223}\) Reingold, supra note 10, at 184.

\(^{224}\) Id.

\(^{225}\) Id.

\(^{226}\) 139 CONG. REC. E813-814. Italy went to 65. Japan went to 63. Only a few remain below 60. The ICAO standard age is 60 for the pilot in charge and a recommendation for the same rule for the next in charge.

In Europe, the JAA proposed that airlines allow one pilot per crew to fly until 65, as long as the others are below 60. Reingold, supra note 10, at 184.
ism, heart attacks, and strokes. However, the FAA seems unwilling to repeal or extend this overinclusive law and is, instead, exploring ways to replace the blanket retirement rule with a test battery that would determine when each individual reaches the oldest “functional age” for that specific individual. Both sides of this debate have been working to find a suitable battery of tests. At the FAA’s Civil Aeronautical Institute in Oklahoma City, several neurophysical tests have been considered for this purpose.

However, an immediate change is not likely as the finished product would not be available until early next decade. Additionally, these proposed FAA tests and a subsequent rule change can create new problems. One such criticism is that new tests might identify numerous pilots younger than sixty who should not be flying either.

The proponents for a rule change have taken yet another approach by claiming that the FAA is overconcerned with sudden incapacity. These pilots argue that if a reaction by a pilot or auxiliary crew member takes one second rather than 500 milliseconds to respond, there is no safety hazard as almost nothing in an airplane cockpit requires that time-critical response. Responding as a neutral party, the National Institutes of Health has also worked on a proposed battery of tests. Like the other tests proposed, this bat-

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227 Serrill, supra note 13, at 45.
228 Reingold, supra note 10 at 184.
229 Id. In this project, pilot test subjects have performed a session flying a Boeing 727 simulator after taking the test battery to evaluate whether these tests are valid predictors of flying performance. Id.
230 Id.
231 Id. Thus, the FAA’s test alone offends ALPA and the pilots it represents who fear overintrusive and overreaching testing and flying standards. Id.
232 Id. These pilots prefer a simple cardiovascular stress test which, they argue, can determine with a high degree of probability who is likely to suffer a heart attack in the near future. In addition, they advocate cockpit simulators and in-flight observation to test pilots’ cognitive skills. Shari Roan, How Old is Too Old to Work?, L.A. Times, May 7, 1991, at El.
233 14 C.F.R. § 121 (1994). The NIH developed a comprehensive proficiency test instead of a basic standard proficiency test. This comprehensive test includes:
   i) collecting quantitative objective performance data under conditions of stress and fatigue in a Line-Oriented-Flight-Training simulation under conditions of fatigue;
tery also attracts criticism. Primarily, the criticism addresses who will bear the costs of modifying the simulators and of the needed additional staff, and who will fund for consultants in both medical and operational areas in which the FAA is not presently staffed to address adequately the results of such a comprehensive and special study program.234

Through the concerted efforts and studies of the FAA and the Age Sixty Rule opponents, a suitable and effective comprehensive testing battery will be developed. This comprehensive testing battery will lead to the change in the Age Sixty Mandatory Retirement Rule.

However, with the development of such a battery and the resulting extension, if not a total elimination of the mandatory retirement age for pilots, several new concerns will emerge. The foremost question is when the rule change will take place. Presently, more than one-third of U.S. pilots will reach sixty over the next decade, so pilots desire a timely extension.235 Among other questions: Who will fund the tests enabling such a change in the rule? Who will administrate, assess, develop, and manage the tests? At what age will these tests be implemented? To what age could retirement for pilots be safely extended? And finally, will these intrusive tests detrimentally affect the job safety of younger pilots whose skills may be questionable, but not because of age? Will a new law intrude with a new application of an age limit to Part 135 crews or other pilots?

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ii) assessing vigilance, handling of workload, and complex decision-making situations; and

iii) evaluating ability to coordinate crew performance effectively and the management of cockpit and ground support resources.

234 Id.

235 Foreign Airlines, supra note 196, at A20.