APPENDIX

CONTENTS

Page

REPORT OF MARY DUNN BAKER, Ph.D.

AZEL P. SMITH, et al., vs. CITY OF JACKSON, MISSISSIPPI POLICE DEPARTMENT

In The United States District Court
Southern District of Mississippi
Jackson Division

Civil Action No. 3:01CV367BN

Economic Research Services
Tallahassee, Florida
April 5, 2002

I. INTRODUCTION

At the request of Counsel for the City of Jackson, Mississippi, Economic Research Services (ERS) was asked to review and critique Dr. Marcelo Eduardo's March 11, 2002 Expert Report. In addition, I was asked to prepare analyses to determine whether the data provide support for Plaintiffs' claim that Jackson Police Department (JPD) sworn officers in the protected age group (age 40 and older) were adversely impacted by the transition to the revised pay plan implemented in March 1999.

I am a labor economist with extensive experience in statistical analyses of employment practices and in the computation of economic loss estimates. I completed the Ph.D. in Economics at Florida State University in 1986. Since July, 1986 I have been employed by ERS in Tallahassee, Florida. ERS is a research and consulting firm whose professionals work with individuals, government agencies, colleges and universities, corporations and other organizations to analyze employment decision-making processes and to compute estimates of the value of alleged economic losses. I have testified in federal courts and other judicial settings about statistical analyses and economic loss estimates that I have prepared on behalf of both plaintiffs and defendants. For the

last several years, I, along with other ERS Ph.D. economists, have presented seminars on the economics and statistics of employment discrimination and the computation of the value of losses resulting from a variety of events and actions (e.g., wrongful termination). I have been invited by organizations such as the Florida Bar Association and the American Association of Affirmative Action to give lectures and conduct workshops on statistical analyses of employment issues and the valuation of economic losses. An outline of my credentials and the cases in which I have given testimony is provided at Exhibit 1.

II. DATA AND DOCUMENTS

In addition to Dr. Eduardo's March 11, 2002 report, I relied upon the following data and documents to prepare this report.

- Plaintiffs' Complaint;
- City of Jackson Performance Pay Plan, October 1, 1998;
- City of Jackson Pay Plan Revision, Sworn Police, January 19, 1999;
- Jackson Police Department Salaries as of 1-2-1999 which provides the name, rank, hire date, adjusted hire date and base salary for the Department's sworn officers;
- A document titled Implementation Dates, Police Department, 03/01/99 which provides the name, rank, step and pay rate as of that date;
- Payroll Information, Sworn Police and Dispatchers For 1999 that includes the name, rank, and date of birth, among other items for each officer; and
- Payroll information for sworn officers as of July 1, 1998 that includes the name, rank, and monthly pay rate, among other items for each officer.

III. ANALYSIS

Dr. Eduardo conducted two tests (80% Rule test and Z test) to determine whether the officers in the protected and unprotected age groups were similarly likely to receive double-digit (10% or larger) pay increases in March 1999. His analyses show that older officers were less likely than younger officers to receive double-digit pay increases. Based on the results of these analyses, he concluded that the transition to the new pay plan adversely impacted older officers. As discussed below, it is my opinion that Dr. Eduardo's results are misleading because his analyses assume that the ratio of ½/1999 pay and market pay was similar for older and younger officers. As demonstrated below, this is not the case.

Further, Dr. Eduardo analyzed the percentage increase in pay rates as of March 1, 1999, when the actual transition to the revised pay plan began in October 1998. Since the transition to the March 1, 1999 pay rates was a two-stage process, he should have analyzed the percentage increase in pay rates from the beginning of the transition through the March 1, 1999 increase in pay rates.[1]

According to the Performance Pay Plan, the purpose of implementing the new pay plan was, among other goals, to "attract and retain qualified people" and "maintain competitiveness with other public sector agencies." Exhibit 2 shows the March 1, 1999 semi-monthly pay rates for JPD sworn officers at each rank and step. It is my understanding that these rates were consistent with external market rates of pay.[2]

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[1] It is my understanding that the July 1, 1998 salaries were in effect at the beginning of the transition to the new pay plan.

[2] I have not conducted any studies to determine how the new pay plan rates compare to external market salaries.

According to the data provided, as of March 1, 1999, all officers assigned to a given rank/step were paid the market salary for that rank/step. Exhibit 3 provides a comparison of the average 7/1/1998 salary and the 3/1/1999 market rate for each rank and step.[3] As Exhibit 3 shows, on average, generally the difference between the 7/1/1998 and the market rates was smaller for the higher ranks than the lower ranks. This indicates that, prior to the implementation of the new pay plan, officers in the higher ranks were less underpaid, relative to the market, than officers in the lower ranks. Consequently, to reach the market level, the requisite pay increase was smaller for higher ranks than lower ranks.

Exhibit 3 provides the average age of officers and the percent of officers who were at least age 40 at each rank/step. As Exhibit 3 illustrates, on average, officers in the higher ranks are older than those in lower ranks. Since higher rank officers are older, on average, than lower rank officers and higher rank officers were less underpaid (relative to the market) than lower rank officers, older officers received smaller percentage changes in pay than their younger counterparts. Hence, the data indicate that older officers received smaller raises than their younger counterparts, not because of their age, but because their 7/1/1998 salaries were closer to market rates than were the salaries of their younger counterparts. As Exhibit 4 shows, younger and older officers with the same rank/step and 7/1/1998 pay rate received the same pay increases on 3/1/1999.

/s/ Mary Dunn Baker — April 5, 2002

Name — Date

[3] Exhibit 3 excludes officers who had a change in job between 7/1/1998 and 3/1/1999 because they received other salary adjustments, as well as market adjustments. There is little difference in the figures shown on Exhibit 3 when officers who had a change in job are included.

Exhibit 2

March 1, 1999 Pay Rates by Rank/Step

Jackson Police Department
Sworn Officers

Rank	Step	Semi-Monthly Pay Rate March 1999	Total Number of Officers	Number Under Age 40	Number of Non-Plaintiffs Age 40 and Older	Number of Plaintiffs
Police Officer	Step 1	$1,103.63	103	95	8	0
	Step 1.5	$1,131.21	93	87	6	0
Master Police Officer	Step 1.5	$1,357.46	69	12	37	20
	Step 2.5	$1,426.17	2	0	1	1
	Step 3	$1,461.83	3	0	1	2
	Step 3.5	$1,498.38	1	0	0	1
	Step 4	$1,535.83	3	0	3	0
Police Sergeant	Step 1.5	$1,628.96	2	0	2	0
	Step 2	$1,669.67	32	5	26	1
	Step 2.5	$1,711.42	1	0	1	0
Police Lieutenant	Step 2	$1,878.42	3	0	2	1
	Step 3	$1,973.50	1	0	1	0
Deputy Police Chief	Step 1.5	$2,217.42	1	0	1	0

Source: Data provided by Jackson Police Department.

Note: These data do not include employees who changed jobs between 7/1/98 and 3/1/99. Plaintiff Haymer is not included in the number of plaintiffs because he was promoted from Police Officer to Master Police Officer.

Exhibit 3

Average Pay Rates and Age by Rank/Step

Jackson Police Department
Sworn Officers

Rank	Step	Number of Employees	7/1/98 Average Pay Rate	3/1/99 Average Pay Rate	Dollar Difference Between 7/1/98 and 3/1/99 Average Pay Rates	Percentage Difference Between 7/1/98 and 3/1/99 Average Pay Rates	Average Age	Percent Age 40 and Older
Police Officer	Step 1	103	$893.01	$1,103.63	$210.62	23.59%	32.0	7.77%
	Step 1.5	93	$930.72	$1,131.21	$200.49	21.54%	33.7	6.45%
Master Police Officer	Step 1.5	69	$1,091.24	$1,357.46	$266.22	24.40%	44.1	82.61%
	Step 2.5	2	$1,260.00	$1,426.17	$166.17	13.19%	46.4	100.00%
	Step 3	3	$1,294.62	$1,461.83	$167.21	12.92%	52.2	100.00%
	Step 3.5	1	$1,306.15	$1,498.38	$192.23	14.72%	48.7	100.00%
	Step 4	3	$1,365.38	$1,535.83	$170.45	12.48%	54.1	100.00%
Police Sergeant	Step 1.5	2	$1,466.77	$1,628.96	$162.19	11.06%	44.0	100.00%
	Step 2	32	$1,506.92	$1,669.67	$162.75	10.80%	45.2	84.38%
	Step 2.5	1	$1,511.08	$1,711.42	$200.34	13.26%	53.9	100.00%
Police Lieutenant	Step 2	3	$1,668.00	$1,878.42	$210.42	12.62%	55.9	100.00%
	Step 3	1	$1,758.46	$1,973.50	$215.04	12.23%	49.0	100.00%
Deputy Police Chief	Step 1.5	1	$1,962.00	$2,217.42	$255.42	13.02%	50.6	100.00%

Source: Data provided by Jackson Police Department.

Note: These data do not include employees who changed jobs between 7/1/98 and 3/1/99.

REPORT OF JAMES E. PEARCE, Ph.D.

AZEL P. SMITH, et al., vs. CITY OF JACKSON, MISSISSIPPI POLICE DEPARTMENT

In the United States District Court
Southern District of Mississippi
Jackson Division

Civil Action No. 3:01CV367BN

Welch Consulting
College Station, TX
April 5, 2002

Qualifications.

I am a Senior Economist at Welch Consulting, a firm specializing in economic and statistical research. I received training in economics and statistics at the University of California at Los Angeles, where I earned a Ph.D. in economics in 1980. Prior to joining Welch Consulting I was Vice President and Director of Research at the Federal Home Loan Bank of Atlanta. I have also served as Vice President and Associate Director of Research at the Federal Reserve Bank of Dallas, and I have taught economics and finance at Southern Methodist University and the Georgia Institute of Technology. I have also served as a consultant for the Department of Housing and Urban Development and for Freddie Mac. My resume is attached as Exhibit 1 and a list of my prior testimony is attached as Exhibit 2. My hourly rate is $275.

Assignment

Beginning in October 1998 the city of Jackson, Mississippi implemented a new compensation and appraisal system for city employees, including police officers. In the transition from the former system to the new one, all police officers received a one-time pay increase of 2.0% or more. Plaintiffs' claim that the implementation had a disparate impact on older

officers in that increases granted to officers age 40 and older were, on average, smaller than the increases granted to officers under age 40. Counsel for the City of Jackson has asked that I evaluate the business justification underlying the implementation of the new pay plan.

In the course of my review I have relied on the following documents:

- The Plaintiffs' complaint;
- City of Jackson, Performance Pay Plan (October 1, 1998);
- City of Jackson, Police/Fire Pay Plan Revision (March 1, 1999);
- All City of Jackson Full Time Employees, Joyce Scott (July 8, 1998) (Printed copy of spreadsheet with Employee Number, Name, Range, Title, Current Salary, and other information on Jackson employees);
- City of Jackson Performance Pay Plan, Semi-Monthly Rates-Police Ranks, March 1,1999;
- City of Jackson, Salary Survey Results, Southeastern Region (June 26, 1998);
- *Dramatically Reducing Crime in Jackson, Mississippi: A Plan of Action for the Jackson Police Department* (May 27, 1999);
- Electronic copy of spreadsheet from Mary Baker containing hire date and semi-monthly pay rates for police officers as of ½/99 and 3/1/99;
- Discussions with Ms. Marilyn Hetrick, former Deputy Personnel Management Director for the City of Jackson.

Background

In the late 1990s the city of Jackson, Mississippi developed programs to address two issues of concern to the citizens and leadership of the community. One issue was a relatively high

crime rate and an understaffed police force. Another was a pay system for city employees that was viewed as a handicap in attracting, retaining, and motivating city employees, including police officers and fire fighters. The system did not include formal performance appraisals, scheduled pay increases, or a linkage of pay increases to measured performance.

The city reformed its system for setting pay rates for its civilian, police, and fire employees in 1998 and 1999. The new system included regular performance appraisals, pay ranges with nine pay rates (or "steps"), and regularly scheduled pay increases tied to performance ratings. The city also adopted a program to reform its police department, as described in *Dramatically Reducing Crime in Jackson, Mississippi: A Plan of Action for the Jackson Police Department,* produced by the Linder/Maple Group of New York. The reform of the pay system for police was an important component of the program to make the police department more effective.

Pay Increases at Implementation of the New Compensation Program

Table 1 shows the age distribution of officers in the major police ranks just prior to the beginning of the implementation of the new pay system. The largest number of officers was in the lowest rank, Police Officer. Over 90% of the officers in this rank are under age 40. The next rank, Master Police Officer, includes a mixture of younger and older officers, with about 25% under age 40. In ranks above Master Police Officer, a high percentage of officers are 40 and over.

Table 1

Age Distribution of Police Ranks, July 1998

Rank	Officers	Age <40	Age 40+
Police Officer	207	91.7%	8.3%
Master Police Officer	87	19.5%	80.5%
Police Sergeant	42	17.1%	83.3%
Police Lieutenant	7	0.0%	100.0%

The implementation of the new system involved two steps: (1) Setting the new ranges and (2) positioning the pay rates of incumbent officers in the new ranges. The minimums of the new ranges were set on the basis of a survey of comparable communities in the Southeast. Locating officers' pay rates within the new ranges was determined by a simple rule: each officer's pay rate was set at the bottom of the range (Step 1) or the next highest point (Step 1.5), depending on the officer's seniority. If the resulting pay rate was not at least 2% above the pre-implementation pay rate, the officer's pay rate was moved to the lowest point in the range that would provide a 2% pay increase.

The minimums of the old and new ranges are shown in Table 2. The table indicates that the bottom of the range for the Police Officer rank, which has the highest percentage of younger officers, was shifted upward by 20%, while the other ranges were shifted up by larger amounts. Thus, the range containing the most of the officers under age 40 was shifted upward by a smaller amount than the ranges in which 75% or more of the officers were 40 or older.

Table 2
Range Minimums Under Former and Revised Systems
(Semi-Monthly Rates)

Rank	Former	Revised	Increase
Police Officer	$924	$1,104	19.5%
Master Police Officer	$1,020	$1,324	29.8%
Police Sergeant	$1,228	$1,589	29.4%
Police Lieutenant	$1,424	$1,788	25.6%

The relationships between pre-implementation pay rates and the minimums of the new ranges are shown in Table 3. The average pre-reform pay rate for the Police Officer rank was 10% below the new minimum, while the averages for the Sergeant and Lieutenant ranks were slightly above the new minimum. For these ranks the average pay rates were unrelated to age or seniority. The average pre-reform pay rate for the Master Policeman rank increased with age, but for each age group the average was below the new minimum (Table 4). The implication of Tables 3 and 4 is that pre-reform pay rates for officers under age 40 were much more likely to below the minimums of the new ranges by 10% or more than were the pre-reform pay rates for officers 40 and older.

Table 3 Pre-Reform Average Pay Rates and Minimums of New Pay Ranges			
Rank	**New Minimum**	**Pre-Reform Average Pay**	**Average Relative to New Minimum**
Police Officer	1,104	991	-10.2%
Master Police Officer	1,324	1207	-8.8%
Police Sergeant	1,589	1640	3.2%
Police Lieutenant	1,788	1828	2.2%

Table 4 Master Police Officer Pre-Reform Pay Rates			
	Age Group		
	<40	**40-44**	**45+**
Average Pre-Reform Pay Rate	$1,105	$1,175	$1,286
Average Relative to New Minimum	-16.5%	-11.4%	-2.9%
Number of Master Police Officers	17	34	36

Under the procedure for setting initial pay rates under the new system, the fact that pre-implementation pay rates for officers under age 40 were more likely to be below the minimum of the relevant range by 10% would likely result in larger average increases for officers under age 40.

Implementation Alternatives

The prospect that average pay increases at implementation would differ by age could have been moderated by changing some of the parameters of the new system. However, any

changes that would have had that effect would have sacrificed important objectives of the reform or increased city payroll expense. One possible approach would have been to shift all the salary ranges up by smaller amounts than those shown in Table 2. This would have reduced the increases for most officers under age 40 without impacting the increases for most officers 40 and older. However, this alternative would have compromised the city's efforts to increase the size and quality of the police force, an unattractive alternative given the city's high crime rate and low ratio of officers to population.

Another possibility would have been to move the salaries of senior officers to higher points in the new salary ranges. This alternative would have required additional money, and it would have undercut the plan to make advancement through the new ranges contingent on continued satisfactory performance. Furthermore, the city's procedure in this matter was somewhat more generous to older, more senior employees than the procedure typically followed by other employers in similar circumstances. I have ten years' experience in analyzing pay histories of workforces involved in litigation, and these histories frequently include adjustments to salary ranges–sometimes for individual jobs and sometimes for many positions at once. In my experience employers generally limit pay adjustments associated with increases in salary ranges to bringing below-range salaries up to the new minimum.[1]

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[1] Plaintiffs' complaint implies that Jackson had made a practice of relating pay increases to seniority. However, Ms. Hetrick indicated that this was not the case, and my review of the data shows no relationship between pay prior to implementation and seniority for any rank other than Master Policeman. Thus, there does not seem to be any basis for the officers to expect that those with more seniority would receive larger increases at implementation.

Conclusion

In my opinion, the city of Jackson, Mississippi could not have eliminated the likely age difference in pay increases granted on implementation of the new compensation system in 1998 and 1999 without compromising key city objectives or substantially increasing city expenditures. This opinion is based on the information available to me at this time and the review I have conducted to date. I may need to supplement this report if I receive additional information or have the opportunity to conduct a further review of the material I have.

/s/

James E. Pearce, Ph.D.

April 5, 2002

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

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

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

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

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

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

§ 622. Education and research program; recommendation to Congress

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

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

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

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

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

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

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

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

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

(b) Employment agency practices

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

(c) Labor organization practices

It shall be unlawful for a labor organization--

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

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise

adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

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

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

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

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

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

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

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

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

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

(g) Repealed. Pub. L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this

paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event

that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv)If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A)paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary

retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include--

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power--

(a) Delegation of functions; appointment of personnel; technical assistance

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

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

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

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and

to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

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

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

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

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

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

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

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective

defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not

be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

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

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any

or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however*, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter--

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

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

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

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

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

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

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking

to represent employees of employers within the meaning of paragraph (1) or (2); or

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

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

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

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

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2- year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not

contribute and under which no rollover contributions are made.

§ 632. Omitted

§ 633. Federal-State relationship

(a) Federal action superseding State action

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

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out

its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal

or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age

Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

* * *

29 C.F.R. § 860 (1970):

§ 860.1 Purpose of this Part.

This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

[33 F.R. 9172, June 21, 1968]

* * *

§ 860.103 Differentiations based on reasonable factors other than age.

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

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

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

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

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

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

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

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors

such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

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

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

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

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as

a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation — an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 F.R. 9173, June 21, 1968]

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

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

(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's

condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

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

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

[34 F.R. 322, Jan. 9, 1969, as amended at 34 F.R. 9709, June 21, 1969]

44 Fed. Reg. 68,858 (Nov. 30, 1979):

29 C.F.R. Part 1625

Proposed Interpretations; Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission

ACTION: Proposed Interpretations.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978) responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, (ADEA) as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. The Commission proposes to adopt, except as modified herein, certain of the interpretations of the Department of Labor with respect to the enforcement of the Age Discrimination in Employment Act of 1967, as amended. The Department's interpretations currently appear at 29 CFR Part 860.

The age discrimination interpretations of the Department of Labor, issued in 1968 and amended several times thereafter, have been revised to reflect the statutory changes made in 1974 and 1978 as well as to reflect both the impact of judicial decisions and the past experience of the Department of Labor and the Commission. It is the Commission's position that these proposed interpretations be interpreted in a manner which is consistent with Title VII of the Civil Rights Act of 1964. The Commission has deleted many of the examples contained in the Department of Labor Interpretations. In some instances the deletions were made for stylistic purposes while in other instances examples were deleted because they were inconsistent with current law or because the Commission needed to accumulate expertise in certain areas.

* * *

1625.7 Differentiations based on reasonable factors other than age.

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

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

(c) A factor, upon which a differentiation is based, is not a valid defense, however, if age discrimination comprises any element of the employment decision adverse to the applicant or employee, either expressly or by implication.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the ground that it is a "factor other than age," and such a practice has an adverse impact on persons in the protected age group and cannot be shown to be related to job performance, such a practice is unlawful. A vital factor in employee testing as it relates to the 40-70 age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older

applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling.

(e) The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the Section 4(f)(2) exception of the Act. (See also § 1625.10)

* * *

46 Fed. Reg. 47,724 (Sept. 29, 1981):

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 C.F.R. Part 1625

Final Interpretations: Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Interpretations; Rescission of Interpretations.

EFFECTIVE DATE: Since the following final agency interpretations are interpretative rules or statements of policy, the 30-day delay in effective date as prescribed in section 553(d) of Title 5 U.S. Code does not apply. Accordingly, these interpretations are effective upon September 29, 1981.

FOR FURTHER INFORMATION CONTACT: John Pagano, Office of the General Counsel, Legal Counsel Division, Equal Employment Opportunity Commission, 2401 E Street, NW, Room 2254, Washington, D.C. 20506, telephone 202-634-6595.

* * *

§1625.7 Differentiations based on reasonable factors other than age.

The Commission received numerous comments on this section and has decided to modify paragraphs (c), (d), and (e) of this section to clarify its position regarding the section 4(f)(1) exception of a reasonable factor other than age.

Paragraph (c) has been rewritten to illustrate that where an employment practice uses age as a limiting criterion, the defense that the practice is justified by the section 4(f)(1) exception of a reasonable factor other than age is unavailable. *See Marshall v. Goodyear Tire & Rubber Co.*, 19 EPD ¶8973

[W.D. Tenn. 1979]. Considerable confusion was generated on the proposed section from the apparent misunderstanding that, as originally written, it applied to the employer's burden of rebutting the *prima facie* case. That was incorrect. The section refers to the use of the Section 4(f)(1) defense of "a reasonable factor other then age," and has been clarified to indicate when that defense is unavailable. c.f. *City of Los Angeles, Department of Water and Power, et al. v. Manhart*, 435 U.S. 702, 712-13 (1978).

Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. *See Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The final interpretation also contains a reference to the Commission's Guidelines on Employee Selection Procedures, 29 CFR Part 1607.

Paragraph (e) of 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

* * *

Signed at Washington, D.C., this 18th day of September 1981.

For the Commission,

J. Clay Smith, Jr.,

Acting Chair, Equal Opportunity Commission

* * *

1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

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

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to

employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

* * *

CASE SCHEDULED FOR ORAL ARGUMENT ON

MAY 17, 1988

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5361 & 87-5362

CLYDE J. ARNOLD, JR., *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

CHARLES R. NETHERTON, *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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ARGUMENT

I. The District Court Erred In Applying Disparate Impact Analysis In An ADEA Case

The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA. 649 F. Supp. at 676. The Supreme Court has never approved such an extension of the effects test to age discrimination cases (*see Geller v. Markham*, 451 U.S. 945, 947-48 (1981) (Rehnquist, J., dissenting from the denial of certiorari)), and neither the language nor the purpose of the ADEA supports such an interpretation. Although several courts of appeals have applied disparate impact analysis in ADEA cases,[1] this Court has not done so and should not do so in this case.[2]

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[1] *See Holt v. The Greenwald Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Monroe v. United Air Lines, Inc.*, 736 F. 2d 394, 404 n.3 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Heward v. Western Electric Co.*, 35 FEP Cases 807, 810 (10th Cir. 1984); The Fifth Circuit has expressly left the question open. *Adkins v. South Central Bell Telephone Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984); *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 643 n.13 (5th Cir. 1985). Decisions in the Third and Eleventh Circuits discuss disparate impact analysis in the context of ADEA actions but have not applied it. *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (3rd Cir. 1987); *Allison v. Western Union*, 680 F.2d 1318, 1321-22 (11th Cir. 1982).

[2] Two ADEA decisions of this Court have made reference to disparate impact analysis. *Schmid v. Frosch*, 680 F.2d 248, 250-51 (D.C. Cir. 1982); *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). However, both cases were analyzed and decided under disparate treatment analysis, and neither addressed the question of whether disparate impact analysis should be applied under the ADEA.

Section 4(f)(1) of the ADEA provides that it "shall not be unlawful for an employer . . . to take action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).[3] A similar defense is found in the Equal Pay Act,[4] but not in Title VII. The Supreme Court has stated that the presence of this defense in the Equal Pay Act distinguishes that statute from Title VII and would preclude the application of the effects test in Equal Pay Act cases:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination . . . . Equal Pay Act litigation therefore has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on bona fide use of "other factors other than sex."

Washington County v. Gunther, 452 U.S. 161, 170 (1981) (citations and footnotes omitted); *see also Los Angeles v.*

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[3] While section 4(f)(1) is not directly applicable to federal employees (*see* 29 U.S.C. § 633a(f)), this Court has nonetheless looked to it in delineating the burdens of proof in federal sector ADEA cases (*Schmid v. Frosch*, 680 F.2d 248, 250 n.7 (D.C. Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982)), and has held that the same substantive standards should be applied for establishing a violation of the ADEA in federal as in private sector cases (*Id.* at 856). Of course, it would have been very odd for Congress to have intended to curtail disparate impact analysis in private, but not federal, employment.

[4] The Equal Pay Act allows "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

Manhart, 435 U.S. 702, 710-11 n.20, 713 n.24 (1978); *Geller, supra*, 451 U.S. at 949 (Rehnquist, J., dissenting).

As Judge Easterbrook argues in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), the "reasonable factors other than age" defense in the ADEA "impl[ies] strongly that the employer may use a ground of decision that is not age, even if it varies with age . . . . 'The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact.'" *Id.* at 1220 (Easterbrook, J., dissenting) (citation omitted).[5]

Moreover, the policy considerations underlying the use of disparate impact analysis in Title VII cases are simply not present in age discrimination cases. In *Griggs v. Duke Power Company*, 401 U.S. at 424, 429-30 (1971), the seminal case for disparate impact analysis under Title VII, the Supreme Court held that Title VII was enacted "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, facially neutral practices that "operate to 'freeze' the status quo of prior discriminatory employment practices" were deemed to be prohibited unless job related. *Id.* at 430. In reaching this conclusion, the Court emphasized the inferior, segregated educational opportunities available to blacks, as well as prior discrimination in employment. *Id.*

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[5] *Accord* Blumrosen, *Interpreting the ADEA: Intent or Impact in the Age Discrimination in Employment Act* (1982); Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53 (Aut. 1986); Stacy, *A Case Against Extending the Adverse Impact Doctrine to the ADEA*, 10 Empl. Rel L.J. 437 (1985); Callile, *Three Developing Issues of the Federal Age Discrimination in Employment Act of 1967*, 54 Det. J. Urb. L. 431 (1977).

This need to avoid perpetuation of past discrimination has no applicability in the age discrimination context.[6] Unlike a facially neutral test which may have a disproportionate effect on minority applicants because of past discrimination in educational opportunities, a neutral practice which disadvantages older workers is not the product of prior discrimination against workers in the protected age group. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis,* 59 Neb. L. Rev. 345, 353-57 (1980). Rather, older workers are confronted with a different type of bias. As Senator Javits, one of the sponsors of the Act, noted:

> [T]here is simply a wide-spread irrationality that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.

113 Cong. Rec. 31253 (1967).

The ADEA was enacted to protect older workers against intentional bias as a result of stereotyping them as less able to perform because of their age. Of course, the aging phenomenon permits all to attain this unique and limited protection from intentional discrimination only when the age of 40 is reached — reflecting the mutability of the characteristic encompassed by the ADEA. (DX 55A-C; A 129). Thus, in this context, the ADEA was designed to protect workers by precluding discrimination *because* they aged, not,

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[6] Then Secretary of Labor Wirtz issued a report in 1965 in response to the direction of Congress in Section 715 of the Civil Rights Act of 1964 that he conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age . . . ." The report recognized at the outset the differences between age and race discrimination. "The Older American Worker: Age Discrimination In Employment" (June 1965), in Legislative History of the Age Discrimination in Employment Act (Washington: U.S. Government Printing Office, 1981), p. 2.

as in the *Griggs* context, to break down barriers to advancement of the protected group even in the absence of intentional discrimination. Accordingly, it would be "inappropriate simply to transplant [Title VII] standards in their entirety into a different statutory scheme having a different history." *See Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring).

* * *