The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions?

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THE AGE DISCRIMINATION IN EMPLOYMENT ACT: WHITHER THE BONA FIDE OCCUPATIONAL QUALIFICATION AND LAW ENFORCEMENT EXEMPTIONS?

MARTIN SCHIFF*

TABLE OF CONTENTS

I. INTRODUCTION ........................................ 14
II. THE ANTECEDENTS OF THE LAW ENFORCEMENT EXEMPTION ............................................. 18
III. CASE LAW ON AGE LIMITS FOR PUBLIC SAFETY PERSONNEL AND THE BONA FIDE OCCUPATIONAL QUALIFICATION ............................................. 21
   A. The Two-Prong Test for Establishing a BFOQ . ............................................. 21
   B. Case Law on Age Limits for Law Enforcement Personnel .................................. 23
   C. BFOQ for the Airline and Bus Industries: A Reduced Standard ......................... 27
   D. Firefighters and the BFOQ Defense ............... 31
   E. Current Status of the Law Enforcement BFOQ ............................................. 32
IV. SUPREME COURT RULINGS ON PUBLIC SAFETY AND THE ADEA ............................................. 34
V. THE PROSPECTS FOR A LAW ENFORCEMENT BONA FIDE OCCUPATIONAL QUALIFICATION REBUTTAL TO AN ADEA CHARGE ............................................. 40
VI. THE INTERPLAY BETWEEN THE ADA AND ADEA ............................................. 43
VII. THE PUBLIC DEBATE OVER A LAW ENFORCEMENT EXEMPTION AND ITS PROSPECTS FOR EXTENSION ............................................. 44

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The views expressed in this Article are those of the author and not necessarily those of the New York City Police Department, its Legal Bureau, or the City of New York.
VIII. CONCLUSIONS AND FUTURE IMPLICATIONS ......... 52

I. INTRODUCTION

The Age Discrimination in Employment Act ("ADEA"), passed by Congress in 1967,1 made it illegal for an employer to discriminate against an employee between the ages of forty and sixty-five on the basis of age except "where age is a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age."2 The prohibitions of the ADEA were made applicable to private employers, labor organizations, and employment agencies. The Act as originally passed did not apply to the federal government, the states or their political subdivisions, or employers with fewer than twenty-five employees.3

The ADEA was amended in 1974 to cover federal, state, and local governments,4 in 1978 to raise the minimum age for mandatory retirement to seventy,5 and then again in 1986 to prohibit mandatory retirement for employees based on any chronological age with an exception for public safety officers6 and tenured college faculty.7 The exemption for public safety officers—the so-
called law enforcement exemption—was enacted after an extensive debate in Congress over whether public safety would be endangered by hiring or maintaining older police officers. Because the debate proved inconclusive, the law enforcement exemption was made temporary, to run from January 1, 1987 through December 31, 1993. It was assumed by Congress that the seven-year exemption would be sufficient time to allow the United States Equal Employment Opportunity Commission ("EEOC"), the agency responsible for administering the employment sections of the ADEA, to conduct and complete a study on the impact on public safety of the elimination of chronological age as a basis for either hiring or retiring police officers.

The ADEA amendments of 1986, as part of the temporary law enforcement exception, required the Secretary of Labor and the EEOC, within four years of passage of the amendments, jointly to complete a study "to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs" and, if so, (1) "to determine which particular types of tests most effectively measure such ability and competency," (2) "to develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy" and (3) to submit a report to Congress on their findings. The EEOC

(West Supp. 1990)).

* The 1986 ADEA Amendments which took effect on January 1, 1987 exempted the affected uniformed services from liability for those claims that arose after the effective date. The uniformed services exemption, in pertinent part, reads as follows:

   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 and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

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


10 Id. sec. 5(a)(1),(2) (codified as amended at 29 U.S.C.A. § 622 (West Supp. 1992)).
was also to propose testing guidelines by October 31, 1991 based on its findings.\footnote{Id. at secs. 5(a),(c), 100 Stat. 3342, 3343 (1986). The ADEA's enforcement provisions are contained in 29 U.S.C. § 626, and the Act was originally enforced by the Secretary of Labor. In 1978, President Carter's Reorganization Plan transferred enforcement of the Act to EEOC, and enforcement of the ADEA remains vested with EEOC today. See 3 C.F.R. § 321 (1978).}

In fact, none of the mandates of the 1986 ADEA amendments were met with respect to the four year time frame, the particular tests and standards necessary to measure job performance, or the EEOC testing guidelines to be proposed by October 31, 1991. The EEOC did, however, ask Penn State University's Center for Applied Behavioral Sciences to conduct such a study, which was completed in January 1992. The study recommended that the exemption of public safety officers from the provisions of the 1986 amendments be eliminated and that law enforcement positions be treated like all others covered by the ADEA. The study concluded that age is not an accurate predictor of either job performance or ability to perform; deficits in either of these that present a grave danger to public safety were only marginally associated with chronological age and much better predicted by available tests not based on age.\footnote{See CENTER FOR APPLIED BEHAVIORAL SCIENCES, PENN. STATE UNIVERSITY, ALTERNATIVES TO CHRONOLOGICAL AGE IN DETERMINING STANDARDS OF SUITABILITY FOR PUBLIC SAFETY JOBS: EXECUTIVE SUMMARY OF MEDICAL SECTION 8-18 (1992); see also Cheryl Anthony Epps, Legislative Alert: Penn State Study Recommends Elimination of ADEA Public Safety Exception, POLICE CHIEF, May 1992, at 14 (detailed analysis of study).}

The Penn State study, however, failed to put forth a definitive test for hiring or maintaining police officers that satisfied the mandate of the 1986 amendments or was job-related and thus able to withstand legal attack any better than the age standard. Although the study and its proponents maintained that there were better tests for law enforcement jobs than age, they presented no available test which, if challenged, would be upheld with certainty as sufficiently job and task related as a measure of an individual's fitness for a police job. In fact, in the absence of a court-approved test there is not even a legal consensus as to what constitutes the precise tasks that a police officer must perform and whether, once determined, such tasks must be measured by frequency, criticality, or some other measure. The EEOC's failure to propose testing guidelines was, thus, to be expected.

The absence of such a job task analysis and of a standard for
measuring job performance has been brought into sharp focus by
the passage in 1990 of the Americans with Disabilities Act
(“ADA”), which was directed at discrimination against the dis-
abled in employment and public accommodations. Under the
ADA, municipalities can no longer automatically disqualify appli-
cants for police employment because of a medical condition. Each
police candidate has to be given an “individualized assessment” to
determine whether or not he can do the tasks of a police officer
irrespective of his medical condition. Such an individualized as-
sessment, however, cannot be performed without a legal consensus
as to what police tasks are. Thus, in practice, police departments
are currently unable to disqualify anyone who is determined to be-
come a police officer, who qualifies as disabled under the ADA,
and who is willing to challenge his disqualification in the courts
based on the absence of a job task analysis and of a standard for
measuring job performance. The removal of the age standard
under the ADEA, therefore, would create sole reliance on an indi-
vidualized assessment standard for police employment and reten-
tion that cannot efficiently and reliably be applied at this time. It
is estimated that a job task analysis for police officers is still years
away from completion since this objective was not accomplished
by the EEOC and the Secretary of Labor as mandated by the 1986
ADEA amendments.

If the law enforcement exemption expires without renewal,
municipalities contend that they will have major difficulties in
complying with the ADEA’s anti-discrimination provisions while

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42 U.S.C. 12,102, 12,112).
14 The legislative history of the ADA makes clear that each qualified individual with a
disability must be treated with an individualized approach that does not result in segrega-
tion of the disabled and is free of stereotyping and generalizations. See S. Rer. No. 116,
15 “Disability” is defined in section 3 of the Act to mean “with respect to an individ-
ual—(A) a physical or mental impairment that substantially limits one or more of the major
life activities of such individual; (B) a record of such impairment; or (C) being regarded as
16 Interview with Deborah L. Zoland, Managing Attorney, Legal Bureau, New York
City Police Department in New York, N.Y. (Sept. 15, 1992); Interview with Lt. Chris Sulli-
van, Research Analyst, Personnel Bureau, New York City Police Department, in New York,
N.Y. (Sept. 16, 1992). Both Ms. Zoland and Lt. Sullivan are officials of the New York City
Police Department who are charged with the responsibility for implementing the ADA and
their individualized assessment has provided this estimate for completion of the job task
analysis.
seeking to employ and retain only those who can properly perform their public safety tasks. The absence of definitive, validated performance tests and a job task analysis for police officers means that each individualized assessment of a police officer for retirement or a police candidate for hiring is a potential source of litigation. Unless police departments can obtain an extension of the law enforcement exemption, they will have to make a renewed effort to establish that age is a BFOQ reasonably necessary to the normal operation of the law enforcement business.

In the light of these problems, this Article will first examine the antecedents of the law enforcement exemption. Next it will present and analyze the case law on age limits for public safety personnel and the BFOQ, culminating in a review of the United States Supreme Court rulings on the ADEA and public safety and an assessment of the prospects for a law enforcement BFOQ to the ADEA. Finally, this Article will examine the interplay between the ADA and the ADEA and the public debate over a law enforcement exemption and its prospects for extension, and conclude by analyzing the implications that may be inferred regarding the impact of the ADEA on state and local law enforcement activities.

II. THE ANTECEDENTS OF THE LAW ENFORCEMENT EXEMPTION

The concept of early retirement for law enforcement personnel was first implemented through an amendment to the Civil Service Retirement Act of 1930,17 passed by Congress in 1947, which allowed voluntary early retirement at age fifty, after at least twenty years of service, for Federal Bureau of Investigation ("FBI") personnel whom the Attorney General identified as no longer able to perform efficiently.18 The rationale for the early retirement was that it was an appropriate reward to those who had performed arduous and hazardous work.19 Presumably, the early retirement inducement sought to avoid possible "burnout" of these FBI personnel and the dangers posed to themselves and to the public if they persisted on the job while their physical abilities declined. Signifi-

18 Id.
cantly, the 1947 law *allowed* early retirement as an option rather than mandating it. In addition, the initial pension costs to the federal government were minimal as “only 36 agents would be eligible to retire at the time the law was passed and only 64 agents would become eligible during the following 5 years.”

However, other employee groups whose personnel performed work similar to FBI personnel began demanding equal retirement benefits shortly after enactment of the early retirement provision. As a result of this pressure, Congress, in 1948, extended these benefits to all federal employees with duties involving investigation, apprehension, and detention of individuals suspected or convicted of committing federal crimes. Other extensions followed as coverage came to include certain federal correctional employees in 1956 and federal air traffic controllers and firefighters in 1972. Congress also extended coverage to employees in these occupations who subsequently transferred to supervisory or administrative positions.

It is noteworthy that when the ADEA was passed in 1967 there was no consideration given to creating a law enforcement exemption and mandating the voluntary early retirement previously made available to these federal employees. Clearly, as long as early retirement programs were optional on the part of the federal employee in question, there could be no conflict with the ADEA when that act was passed in 1967. In 1974, however, Congress established a mandatory retirement system for federal law enforcement officers and firefighters, effective January 1, 1978, that required automatic retirement at age fifty-five or after twenty years of service, whichever came later. The 1974 Act, in effect, exempted federal law enforcement officers and firefighters from ADEA coverage. All references to employee hazards—the original rationale for the op-

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20 **Myths and Realities**, supra note 19, at 1.
tional retirement benefit offered to certain FBI personnel in 1947—were deleted by the 1974 legislation. Benefits were liberalized for these mandated retirees, and the legislative history emphasized that the liberalized benefits would improve the quality of law enforcement and firefighting services by helping to maintain a young and vigorous work force. The assumption that the quality and vigor of law enforcement were directly related to age and youth was totally contrary to the assumptions underlying passage of the ADEA in 1967 and its subsequent amendments.

Under the 1974 Act many occupational groups became eligible for mandatory retirement, and when the law became effective in 1978 about 52,000 employees in various federal agencies and the District of Columbia government were covered. Therefore, the optional retirement program first legislated by Congress in 1947 to benefit a mere 36 FBI agents subject to hazardous duty had, by 1978, evolved into a mandatory retirement program and age-based hiring system covering 52,000 employees. The assumptions underlying the maximum age rules for hiring and retention of employees for federal law enforcement and firefighting positions became the basis for arguments in favor of a law enforcement exemption for state and local law enforcement and firefighting personnel when these positions were made subject to the ADEA in 1974. Although the ADEA had been amended in 1974 to extend to federal, state, and local governments, in practice the mandatory retirement program for federal law enforcement and firefighting personnel, also passed in 1974, restricted the ADEA's application to state and local law enforcement and firefighting personnel. Consequently, there is a glaring inconsistency in Congress's recognition of the need for federal law enforcement officers to be young and vigorous


while simultaneously imposing on state and local governments the ADEA’s requirements that may prevent these entities from maintaining their own young and vigorous police force. Although there is an absence of logic in justifying an exemption based solely on whether a law enforcement officer or firefighter is classified as federal as opposed to state or local, that is the current state of the law.

III. Case Law on Age Limits for Public Safety Personnel and the Bona Fide Occupational Qualification

A. The Two-Prong Test for Establishing a BFOQ

To establish a prima facie case of age discrimination under the ADEA, it is sufficient for the plaintiff to show that an employer utilizes a mandatory retirement policy or an age-based hiring policy, that he is forty or older, that he was denied employment on the basis of age, and that he otherwise met the job qualifications. In virtually all cases dealing with challenges to mandatory age requirements for jobs involving public safety, the defendant employer asserts as an affirmative defense that the age limitation is a BFOQ.

The BFOQ defense acknowledges that age is a determining factor in the challenged employment decision but asserts that the use of age is “reasonably necessary to the normal operation of the particular business.” A two-prong test for employers involved in public safety to establish a BFOQ was fashioned by the Fifth Circuit in Usery v. Tamiami Trail Tours, Inc. Under the first prong of this test, a safety factor is considered in determining if a particular job qualification is “reasonably necessary to the essence of [a] business.” The court noted that “[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of

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33 531 F.2d 224 (5th Cir. 1976).

34 Id. at 236.
that harm in the case of an accident, the more stringent may be the job qualification designed to ensure [safety]." The second prong requires that an employer show either that it has reasonable cause, i.e., a factual basis, for believing that all or substantially all of the older employees possess traits precluding safe and efficient job performance or that it would be impractical or impossible to test reliably, on an individual basis, an employee's ability to perform safely and adequately the duties of his position.

In Tamiami, a case involving intercity bus drivers, the Fifth Circuit concluded that the mere presence of a public safety factor did not require courts to drop or modify both components of its two-pronged BFOQ test. However, since the case involved the safety of large numbers of people on a continual basis, the court ruled against the Secretary of Labor and upheld the age forty hiring limit as a BFOQ.

The Tamiami two-pronged formulation of the employer's burden for a BFOQ is in accord with the approach taken by virtually every other circuit that has addressed the BFOQ defense and was adopted by the EEOC in its regulations. Section 1625.6(b) of these regulations provides:

[A]nyone asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait

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36 Id.
37 Id. The requirement that the age restriction be reasonably necessary to the essence of the business has generally not been treated as an independent requirement in cases involving employers such as law enforcement agencies. In practice, the courts have usually considered only whether such employers have met one of the two alternative requirements comprising the second prong of the Tamiami test. See EEOC v. County of Los Angeles, 706 F.2d 1039, 1042-43 (9th Cir. 1983), cert. denied, 461 U.S. 1073 (1984); Missouri Highway Patrol, 555 F.Supp. at 104; see also 29 C.F.R. 1625.6 (1992).
38 Tamiami, 531 F.2d at 238. The test in Tamiami was fashioned by the Fifth Circuit by using the criteria employed in Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971), and Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228 (5th Cir. 1969), two sex discrimination cases, and adapting them for the purposes of age ADEA.
40 See 29 C.F.R. § 1625.6 (1992)
that cannot be ascertained except by reference to age.\textsuperscript{40}

The EEOC regulation goes on to state that “[i]f the employer’s objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance or equally advance it with less discriminatory impact.”\textsuperscript{41}

B. Case Law on Age Limits for Law Enforcement Personnel

A review of subsequent cases shows that the BFOQ provision has been narrowly construed and may be invoked only if an employer proves clearly and unmistakably that its employment practice meets the terms and spirit of the ADEA.\textsuperscript{42} Thus, in \textit{EEOC v. Missouri State Highway Patrol},\textsuperscript{43} a case involving maximum hiring age,\textsuperscript{44} the United States District Court for Western Missouri determined that the Missouri State Highway Patrol had proven that its maximum hiring age of thirty-two was a BFOQ for troopers. The court reasoned that, upon being hired, the troopers spend almost all of their time in the field doing strenuous physical work which requires youth and vigor. When the troopers get older and achieve higher ranks, they spend almost all of their time doing administrative work. The court found a natural progression from field work to office work, as the troopers aged and youth and vigor diminished. The experience acquired in the field made a veteran patrolman an excellent administrator. Since it took about eleven years for a trooper to gain sufficient experience to become an effective administrator, the court reasoned, a maximum hiring age was necessary

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{44} Id. at 98. The court also found that the defendant’s mandatory retirement age of 60 for uniformed members of the Patrol and the defendant’s maximum hiring age of 32 for radio operators both violated the ADEA. \textit{Id.} On appeal, the Eighth Circuit reversed the holding. \textit{EEOC v. Missouri State Highway Patrol}, 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985). The Eighth Circuit reasoned that public safety and lives depended on the capabilities of Patrol members and radio operators, and found the age requirements justified for this reason. \textit{Id.} at 455, 457. Even though the Supreme Court denied certiorari, the reasoning of the Eighth Circuit has been completely rejected in similar cases. \textit{See infra} notes 59-72 and accompanying text.
to insure vigorous patrolmen in the field and experienced administrators in the office.\textsuperscript{46}

Likewise, in \textit{Beck v. Borough of Manheim},\textsuperscript{48} a former police officer sued the Pennsylvania borough of Manheim under the ADEA challenging an ordinance that forcibly retired him at the age of sixty. The district court upheld the ordinance as reasonably necessary to ensure that police officers were in adequate physical condition to protect the safety and welfare of citizens and property. The court noted that the physical condition of police in that case was particularly important "both because of difficulty in arranging substitute coverage and because small size of force made backup help to an officer responding to an emergency situation often unavailable."\textsuperscript{47} Thus, there could be serious consequences to fellow officers if a police officer were unable to perform.\textsuperscript{48}

Along with the above mentioned district court cases, there are a handful of federal circuit court cases in which the law enforcement employer's BFOQ was upheld to rebut an age discrimination charge under the ADEA. In \textit{Mahoney v. Trabucco},\textsuperscript{49} a state police officer was mandatorily retired upon reaching the age of fifty. He sued in district court under the ADEA and won.\textsuperscript{50} On appeal, however, the First Circuit held that a BFOQ exception to the ADEA "was to be analyzed in terms of recognized and discrete vocations rather than by" a particularized inquiry into an individual's specific duties and that, therefore, the state's BFOQ was justifiable even though the officer in question had nonstrenuous duties.\textsuperscript{51} Thus, the First Circuit reversed the district court, reasoning that an interpretation of a BFOQ "which permits a particularistic analysis of the actual duties performed to overcome an otherwise justified BFOQ for similarly classified employees, would raise immeasurable problems of morale, administration, litigation, and adjudication."\textsuperscript{52}

Similarly, in \textit{EEOC v. University of Texas Health Science Center},\textsuperscript{53} the EEOC challenged the University's refusal to hire

\begin{footnotes}
\item[46] \textit{Id.} at 456-57.
\item[47] \textit{Id.} at 926.
\item[48] \textit{Id.} at 926-27.
\item[51] \textit{Mahoney}, 738 F.2d at 39.
\item[52] \textit{Id.}
\item[53] 710 F.2d 1091 (5th Cir. 1983).
\end{footnotes}
campus police officers who were over the age of forty-five. The Fifth Circuit affirmed the district court's decision upholding the BFOQ rebuttal to the age discrimination charge, finding that there was convincing testimonial evidence by a doctor about the deterioration of age, sufficient to support the two prongs of the Tamiami test. The court also set great store in the University's efforts at fact-finding to support its position and concluded that since the trial court's findings were not clearly erroneous they must be upheld.

Another circuit court decision in the law enforcement field upholding a BFOQ defense was EEOC v. City of Janesville. In that case the Seventh Circuit upheld a mandatory retirement age of fifty-five for all employees in protective service occupations as applied against a police chief. Deferring to the Wisconsin legislature, much as the Fifth Circuit had deferred to the University of Texas, the court noted with approval the legislature's judgment that "being younger than age 55 is a BFOQ for the generic class of protective service occupations." The Seventh Circuit went on to reverse an order that had granted a preliminary injunction, holding that public safety is a legitimate state concern and sufficient justification for a BFOQ, and that the plaintiff was not likely to succeed at trial.

This handful of circuit court and district court cases are the rare and isolated victories for law enforcement agencies seeking the BFOQ exception to the application of the ADEA. For the most part, and especially in more recent cases, the BFOQ argument has not been upheld. The Eighth Circuit, for example, disagreed with the Seventh Circuit's reasoning in Janesville when confronted with similar facts concerning the city's fire chief in EEOC v. City of St. Paul. The Eighth Circuit affirmed the district court's consideration of different subclasses of firefighting personnel and its finding that age was not a BFOQ for the city's fire chief position. The court stated that the plain meaning of the phrase "bona fide occupational qualification reasonably necessary to the normal operation

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54 Id. at 1095.
55 Id. at 1094.
56 630 F.2d 1254 (7th Cir. 1980).
57 Id. at 1258.
58 Id. at 1259.
59 671 F.2d 1162 (8th Cir. 1982).
60 Id. at 1166-68. The district court did find that the mandatory retirement age of 65 was a valid BFOQ for firefighters, fire equipment operators and fire captains. Id. at 1167.
of the particular business" did not preclude consideration of a particular occupation within a particular business.\textsuperscript{61}

The \textit{St. Paul} court also examined the legislative history of the ADEA, finding that Congress intended employment decisions to be based on ability as opposed to age. The court decided that the ADEA's goal would be frustrated if employment decisions were based on a generic class as a whole rather than on separate consideration of the different occupations within a business.\textsuperscript{62} It would not be difficult to determine these occupations, the Eighth Circuit found, because a court would merely have to look at the parties before it. In a statement that has often been cited by federal courts striking down BFOQ defenses by law enforcement agencies, the Eighth Circuit concluded, "we cannot believe that the ADEA was intended to allow a city to retire a police dispatcher because that person is too old to serve on a SWAT team."\textsuperscript{63}

The Third Circuit has decided a number of cases which illustrate the extreme weakness of the BFOQ argument made by law enforcement agencies in defense against an ADEA charge. In \textit{EEOC v. County of Allegheny},\textsuperscript{64} the Third Circuit held that the county could not rely on a state statute as a basis for refusing to allow individuals over the age of thirty-five to take the police officer examination. The court concluded that the ADEA superseded the state statute and that the county had failed to satisfy either of the two prongs of the \textit{Tamiami} test required to establish a BFOQ. Under the Supremacy Clause of the Constitution, the court noted, a state statute which conflicts with a federal statute cannot stand.\textsuperscript{65}

In \textit{EEOC v. City of Altoona},\textsuperscript{66} the Third Circuit held that the Tenth Amendment did not prohibit Congress from applying the

\textsuperscript{61} Id. at 1165.
\textsuperscript{62} Id. at 1165-66.
\textsuperscript{63} Id. at 1166.
\textsuperscript{64} 705 F.2d 679 (3d Cir. 1983).
\textsuperscript{65} Id. at 682. In \textit{EEOC v. Pennsylvania State Police}, 768 F.2d 514 (3d Cir. 1985), \textit{cert. denied}, 485 U.S. 935 (1988), the Third Circuit vacated and remanded a district court decision which had improperly assumed that good health and physical strength were BFOQs reasonably necessary to the essence of state police business without first making a particularized factual finding to that effect. \textit{Id.} at 518. The case involved a challenge to a Pennsylvania law that required all state police officers to retire at age 60. \textit{Id.} at 516; \textit{see also EEOC v. Pennsylvania Liquor Control Board}, 565 F. Supp. 520 (E.D. Pa. 1983) (finding state agency's mandatory retirement policy of 65 for enforcement officers violated ADEA because agency failed to establish BFOQ required by \textit{Tamiami}).
ADEA to municipalities and that the city’s mandatory retirement of employees based on age violated the ADEA. In that case, those sixty-five or over who were pension eligible were singled out for mandatory retirement. However, the court concluded, economic considerations such as pension eligibility could not be used to justify age discrimination. The court found Allegheny controlling as precedent and refused to allow the BFOQ defense.

Similarly, the Fourth Circuit, in *Arritt v. Grisell*, considered the rejection, solely on grounds of age, of a forty-year-old applicant for a police position. The West Virginia municipality of Moundsville had a statutory upper age limit of thirty-five for new hires. The district court held for the municipality on the ground that age was not a suspect classification such as race and ethnicity under Title VII and so required no strict scrutiny. Thus, the district court had held that the municipality merely had to establish a minimal increase in harm to its police function by having to hire those over thirty-five in order for the age restriction to be upheld as reasonable. The justification that the age restriction was conducive to providing a police force comprised of physically fit members was accepted at face value.

The Fourth Circuit reversed, pointing out that the lower court had erred in requiring the municipality to demonstrate only a minimal increase in harm by employing the applicant and in not giving him an opportunity to rebut the stated rationale for the BFOQ argument. The circuit court framed its analysis in terms of the two-prong *Tamiami* test, which requires more than mere reasonableness, while avoiding a Title VII analysis of suspect classifications and fundamental rights.

C. BFOQ for the Airline and Bus Industries: A Reduced Standard

The Fourth Circuit’s decision in *Arritt* is especially significant for its rejection of the minimal standard established three years earlier by the Seventh Circuit in *Hodgson v. Greyhound Lines*,

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67 Id. at 7.
68 Id.
69 567 F.2d 1267 (4th Cir. 1977).
71 Id. at 803.
72 *Arritt*, 567 F.2d at 1271.
In *Hodgson*, the Seventh Circuit found in favor of the Greyhound company's age thirty-five hiring limit for bus drivers. The court noted that, since in intercity bus trips the economic and human risks were great, the burden of establishing a BFOQ for bus drivers was lighter than for other occupations. The court then used a minimal standard of reasonableness by requiring the employer to show only a rational basis in fact for the employer's belief that increased age increased the risk of harm. The court found sufficient rationale for the age requirement in the fact that the human body undergoes physical and sensory changes beginning at around age thirty-five and that such degenerative changes have a detrimental impact on driving skills.

The *Hodgson* standard, allowing a BFOQ defense based on an employer's mere belief in increased harm, has been upheld in public safety cases involving bus drivers and airline personnel, but not in cases involving law enforcement and firefighting personnel. Thus, while *Hodgson* was similar to *Tamiami* in its facts and its result, it effectively reduced the two-prong BFOQ test established in *Tamiami* to a mere reasonableness test.

A district court in the Second Circuit also dealt with the issue of a BFOQ for bus drivers in *Maki v. Commissioner of Education*. In that case, the district court upheld a maximum age of sixty-five for private school bus drivers as a BFOQ defense to an ADEA complaint. The *Maki* court cited evidence that psychological and physiological changes occur due to age that cannot be reliably tested in school bus drivers after age sixty-five. Citing further the overwhelming concern for the safety of transported school children, the court concluded that it could not be said that the age requirement was not reasonably necessary to the essence of the business of school bus transportation. Rather than insisting on the individual ability test required by the ADEA and *Tamiami*, the *Maki* court fell back on a *Hodgson* standard of reasonableness for bus drivers.
Cases involving the question of age and public safety in the airline industry have generally followed the Hodgson line of reasoning even while ostensibly using the Tamiami two-prong test. In Murnane v. American Airlines, for example, the District of Columbia Circuit allowed the use of the BFOQ defense to uphold the airline’s maximum hiring age of forty, stating, “the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely.” The D.C. Circuit held further that the maximum age hiring rule for pilots was justified since the best experience for flight captains was experience with the same airline in a lower-level flight job.

In Johnson v. American Airlines, airline employees sued the airline under the ADEA on its policy requiring flight officers to retire or transfer to non-cockpit positions upon reaching age sixty. The airline argued that its policy was a BFOQ since flight officer positions were considered a training ground for pilot positions which required retirement at age sixty. The Fifth Circuit affirmed the district court and upheld the policy as a BFOQ by deferring to the expertise of the airline industry in its judgment as to how best to perform with the highest degree of safety. The Fifth Circuit cited the two-prong Tamiami test but then essentially based its decision on Murnane, stating, “courts simply do not possess the expertise with which to supplant their judgment in the best manner airlines can obtain that highest degree of safety for that of the airlines.”

Similarly, in a federal age discrimination case, Starr v. Federal Aviation Agency, the Seventh Circuit rejected the arguments of an airline pilot seeking an exemption from the federal agency’s “age 60 rule” mandating retirement for pilots at age sixty. The court upheld the mandatory retirement on the basis of reasonableness. Noting the plaintiff’s claims that he was very fit and in excellent health, the court pointed out that it did not matter how immune he personally was to the impairments of age. As long as the reasonableness test had been met, the court felt it proper to
defer to the judgment of the federal agency as presumably intended by Congress. 99

The airline cases generally have followed a pattern of deferring to the discretion of federal agencies that had existed prior to the passage of the ADEA. 99 By comparison, although the courts deferred to the discretion of the airlines in Johnson and Murnane, where no issue of federal regulation was involved, the public safety question with respect to pilots has not been resolved in favor of the employer nearly as consistently as in the bus cases. Thus, in Houghton v. McDonnell Douglas, 91 the Eighth Circuit upheld an age discrimination complaint by a test pilot. The court found that, based on the facts, no BFOQ had been demonstrated by the company. 92 The company had made only general assumptions about the aging process and when a test pilot was too old to fly; these assumptions were held to violate the ADEA. 93

In Smallwood v. United Air Lines, 94 the Fourth Circuit upheld an age discrimination complaint brought by a forty-eight-year-old airline pilot who was refused employment because he was over the company's age limit for new hires of thirty-five. The court found that the airline had failed to meet its burden of establishing a BFOQ because it failed to satisfy either prong of the Tamiami test. 95 Moreover, addressing the airline's argument that hiring older pilots would be economically burdensome, the court held that economic considerations could not be the basis of a BFOQ, 96 just as a cost-justification defense is not available in a Title VII case. 97

Similarly, in Tuohy v. Ford Motor Company, 98 the Sixth Circuit reversed a district court ruling of summary judgment in favor of Ford Motor Company, which had terminated the plaintiff as a pilot because he had reached the age of sixty. The Sixth Circuit ruled that under the ADEA the district court could not simply

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99 Id. at 313.
91 553 F.2d 561 (8th Cir. 1977), cert. denied, 434 U.S. 966 (1977).
92 Id. at 564.
93 Id. at 563-64.
95 Id. at 308.
96 Id. at 307.
98 675 F.2d 842 (6th Cir. 1982).
conclude, as it had, that age seemed a reasonable basis for retire-
ment and thus qualified as a BFOQ.99 The court held that a com-
pany policy does not qualify as a BFOQ simply because it seems
reasonable; it is required to be “reasonably necessary,” a more dif-
ficult standard which is employed by the two-prong Tamiami
test.100

D. Firefighters and the BFOQ Defense

The difficulty faced by law enforcement employers in estab-
lishing a successful BFOQ rebuttal to an ADEA complaint has
been encountered by firefighter employers. In Orzel v. City of
Wauwatosa Fire Department,101 a case concerning a firefighter
who had been promoted to the position of assistant fire chief, the
Seventh Circuit upheld the district court’s ruling striking down the
city’s mandatory retirement age of fifty-five for firefighters. The
Seventh Circuit specifically rejected the city’s argument that its
age fifty-five limit was justified because of the Federal firefighters
mandatory retirement age.102 The court stated that the federal
limit could not automatically be applied to “a wholly different
group of employees, operating under different working conditions,
and performing significantly different job functions.”103 With re-
spect to the city’s BFOQ claim, the court stated that, while public
safety might be a valid local goal, the ADEA still required a “par-
ticularized inquiry” into the facts concerning the age limitations in
accordance with the two-prong Tamiami test.104

The Orzel court distinguished Hodgson,105 with its reasonableness standard, on the ground of demonstrated evidence regarding
the rigors of the bus driver’s job, “the degenerative and hard-to-
detect physical and sensory changes which begin in a person’s late
thirties and progress steadily thereafter,” and the fact, docu-
mented statistically, “that Greyhound’s safest driver is one who
has sixteen to twenty years of driving experience with Greyhound
and is between fifty and fifty-five years of age, an optimum blend

99 Id. at 845.
100 Id. at 843, 845-46.
102 Id. at 749, 760.
103 Id. at 749.
104 Id. at 753.
105 Hodgson, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); see also supra notes 73-76 and accompanying text (discussing Hodgson).
of age and experience with Greyhound which could never be attained in hiring an applicant forty years of age or older."

Two district court cases concerning ADEA claims by firefighters follow the same line of reasoning as Orzel. In Aaron v. Davis, the district court held that the mandatory retirement, pursuant to a local Arkansas ordinance, of an assistant fire chief and a district fire chief at age sixty-two violated the ADEA. The Aaron court, in rejecting the municipality’s BFOQ defense, specifically distinguished the job of firefighter from that of an airline transport pilot or bus driver: “The risk is far greater that a slight error in judgment, or a slight physical defect, in a person who is piloting a jetliner or driving a bus would produce ‘magnified’ tragic results than would in the case of one participating in a joint effort to extinguish a fire.” In another district court case, Popko v. City of Clairton, decided in the same year as Orzel, it was found that age-based retirement of firefighters pursuant to a state civil service code nevertheless violated the ADEA. The district court compared the plaintiff to a Title VII plaintiff and analyzed the case using disparate treatment theory.

E. Current Status of the Law Enforcement BFOQ

Two Ninth Circuit cases are also significant in identifying the parameters for the BFOQ in ADEA cases involving law enforcement officers. In EEOC v. County of Los Angeles, the Ninth Circuit held that the county’s maximum hiring age for helicopter pilots in the sheriff’s and fire departments was in violation of the ADEA. The court found no BFOQ, reasoning that claims that older persons would become unfit in a shorter period of time than younger persons did not justify a maximum hiring age for “economic considerations cannot be the basis for a BFOQ.” The
Ninth Circuit also pointedly noted that the federal statutory provisions requiring mandatory retirement at age fifty-five for federal law enforcement officers and firefighters in no way diminished the ADEA’s application to state and local governments since the United States Supreme Court in *EEOC v. Wyoming* had considered that statute and then ignored it in its decision.

In another Ninth Circuit case, *EEOC v. County of Santa Barbara*, the court held that the county had not demonstrated a BFOQ for its mandatory retirement system at age sixty for correction officers. The Ninth Circuit noted that the county had merely asserted that the job involved safety considerations without putting forth a factual foundation for its claim as required by the ADEA. The court also made clear that in any conflict between federal and state law, the ADEA must prevail under the Supremacy Clause of the Constitution.

With the above cases as background, two district court cases are excellent indicators of the general thinking of the federal courts on the matter of BFOQ’s to the ADEA charges against law enforcement employers. In *Hahn v. City of Buffalo*, the court held that a New York law limiting police candidates to twenty-nine years of age or under violated the rights under the ADEA of those applicants who were forty or older. The court found unpersuasive a law enforcement expert’s testimony about the deterioration of age and would not uphold a BFOQ on that basis. Also inadequate as a basis for a BFOQ was an employer’s desire for a youthful work force in order to maximize cost-effectiveness since the state could not establish that age was otherwise a BFOQ. The court also noted with approval the Ninth Circuit’s decision in *County of Los Angeles* and its conclusion that “moment to moment physical vitality of a police officer” is not as urgent as in situ-

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113 5 U.S.C. § 8335 (1988); see supra notes 26-29 and accompanying text (discussing federal mandatory retirement).
115 *County of Los Angeles*, 706 F.2d at 1041-42; see also infra notes 125-39 and accompanying text (discussing Wyoming).
116 666 F.2d 373 (9th Cir. 1982).
117 Id. at 376, 378.
118 Id. at 378.
120 Id. at 954. Other expert testimony indicated that many officers in their forties were as strong and physically fit as those in their twenties. Id. at 949-52.
121 Id. at 953.
ations involving intercity bus drivers.122

In \textit{EEOC v. City of Minneapolis},123 the EEOC sued the city on its age sixty-five mandatory retirement for police captains, and the district court held for the EEOC, finding no BFOQ. The court noted that age was not a BFOQ for police captains since they did not spend great amounts of time responding to field emergencies, were not required to pass medical or physical fitness tests on a routine basis, and could not be reliably tested on their ability to handle certain aspects of general police work.124

Where safety is the essence of a particular business such as the transportation of passengers by bus or airplane, most courts have held that the presence of such an overriding safety factor minimizes the level of proof required to establish a BFOQ. Thus, when the degree of risk to the public or fellow employees inherent in the duties of a job is high, the fixing of a mandatory age may be more arbitrary. These same courts, however, have not generally considered the law enforcement and firefighting businesses to involve a similar high risk or danger to public safety or fellow employees. It is necessary, therefore, to examine how the Supreme Court has analyzed the ADEA in terms of public safety to determine whether this distinction drawn by the federal courts is correct and whether there are any prospects for a law enforcement BFOQ to rebut an ADEA charge being upheld in the future.

IV. SUPREME COURT RULINGS ON PUBLIC SAFETY AND THE ADEA

The ADEA amendments of 1974 that made the Act applicable to state and local governments, including state and local law enforcement and firefighting personnel, were litigated before the Supreme Court in \textit{EEOC v. Wyoming}.125 In \textit{Wyoming}, the Court upheld the ADEA's application to all employees of state and local governments. In that case a supervisor for the Wyoming Game and Fish Department was retired involuntarily at age fifty-five pursu-

\begin{itemize}
\item 122 Id. at 946 (quoting EEOC v. County of Los Angeles, 706 F.2d 1039, 1141 (9th Cir. 1983), cert. denied, 464 U.S. 1073 (1984)).
\item 123 537 F. Supp. 750 (D. Minn. 1982).
\item 125 460 U.S. 226 (1983).
\end{itemize}
ant to Wyoming’s mandatory retirement law. He complained to the EEOC, alleging a violation of the ADEA, and the EEOC sued the state of Wyoming on his behalf in federal district court. The district court found for Wyoming, dismissing the suit on the ground that insofar as the ADEA regulated Wyoming’s employment relationship with its game wardens and other law enforcement officials, it violated the doctrine of states rights, recently revived from near obscurity by the Supreme Court in *National League of Cities v. Usery*. The district court held, therefore, that the ADEA as applied to the age restriction on Wyoming game wardens was unconstitutional.

The Supreme Court, however, in a 5 to 4 decision, ruled that the extension of the ADEA to cover state and local governments was a valid exercise of Congress’s powers under the Commerce Clause, both on its face and as applied in the *Wyoming* case, and was not precluded by virtue of constraints imposed upon such powers by the Tenth Amendment. The Court noted that Congress’s powers under the Commerce Clause were buttressed by its power under section five of the Fourteenth Amendment.

The Court took note of the federal statute establishing a mandatory age-based retirement system for federal law enforcement officers and firefighters, and of other Congressional enactments imposing mandatory retirement ages on certain classes of federal employees. However, the Court nonetheless reversed on the basis of Congress’s powers, ignoring the federal mandatory retirement systems in its decision.

The Court stressed that the ADEA did not necessarily make

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126 *Id.* at 234-35.


129 *Id.* at 243.

130 *Id.* at 243 n.18.

131 *Id.* at 233, 240.
all age limitations unlawful since an employer can use an age limitation where he can prove that age is a BFOQ.\textsuperscript{132} The BFOQ standard for a rebuttal to an ADEA complaint was interpreted strictly, however, in a manner similar to the strict scrutiny standard applied in Title VII cases involving race, national origin, sex, or religious discrimination.\textsuperscript{133} The Court noted that in applying the BFOQ standard to remove game wardens and other law enforcement employees as unfit the ADEA "requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals."\textsuperscript{134} The Court added that what the ADEA forbids is arbitrary age distinctions based on stereotypical assumptions rather than analysis or determinations based on individual merit.\textsuperscript{135}

The Wyoming Court also rejected the argument that the abolition of age restrictions for law enforcement positions would be financially burdensome for government. In refusing to consider such an argument a valid BFOQ to an ADEA complaint, the Court stated:

In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances. Older workers with seniority may tend to get paid more than younger workers without seniority and may by their continued employment accrue increased benefits when they do retire. But these increased costs, even if they were not largely speculative in their own right, might very well be outweighed by a number of other factors: Those same older workers, as long as they remain employed, will not have to be paid any pension benefits at all, and will continue to contribute to the pension fund. And, when they do retire, they will likely, as an actuarial matter, receive benefits for fewer years than workers who retire early.\textsuperscript{136}

While technically leaving the door open for a law enforcement agency to establish a BFOQ that was empirically justified and indi-

\textsuperscript{132} Id.
\textsuperscript{133} 42 U.S.C. § 2000 e-2(e) (1988). This section provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." \textit{Id.}
\textsuperscript{134} \textit{Wyoming}, 460 U.S. at 239 (quoting \textit{FERC v. Mississippi}, 456 U.S. 742, 771 (1982)).
\textsuperscript{135} \textit{Id.} at 241-42.
\textsuperscript{136} \textit{Id.} at 241.
vidualized for the employee or applicant in question, the Court, in reality, made it virtually impossible to justify a BFOQ in support of an age-based employment standard. Thus, in his dissent in Wyoming, Chief Justice Burger, discussing how difficult it was for the employer to meet his burden in establishing a BFOQ, stated that "[g]iven the state of modern medicine it is virtually impossible to prove that all persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis."

The Court in Wyoming, in effect, left state and local law enforcement agencies to the vagaries of a case-by-case BFOQ analysis, but with little hope of success. The Wyoming case itself was remanded to the district court to determine whether the state could establish that its age limitation for game wardens was a BFOQ in the light of the Supreme Court's decision. The district court, surprisingly, held that Wyoming's statute for mandatory retirement at age fifty-five for Game and Fish Department employees and members of the Highway Patrol was indeed a BFOQ.

Two other Supreme Court decisions, two years after Wyoming, were even firmer in negating the practical effect of the BFOQ exception to the ADEA for law enforcement personnel and firefighters. In Johnson v. Mayor and City Council of Baltimore, the Court overturned the Fourth Circuit and restored a district court decision that struck down retirement ages of fifty-five and sixty as not constituting a BFOQ for firefighters under the Tamiami two-prong test. The Court, this time unanimously, held that the Federal civil service statute requiring federal firefighters to retire at age fifty-five did not establish that retirement before age seventy was a BFOQ for Baltimore's firefighters.

The Fourth Circuit had based its ruling on a phrase in the Supreme Court's Wyoming decision suggesting that state statutes instituting a mandatory retirement age should be tested "against a reasonable federal standard." Seizing upon this phrase, the
Fourth Circuit went on to cite the federal mandatory retirement statute for federal law enforcement employees and firefighters as a "reasonable federal standard," even though the Court in Wyoming had already pointedly ignored this statute in applying the ADEA to the Wyoming state government. The Fourth Circuit held that, even absent a factual showing that firefighters over fifty-five could not adequately perform their duties, the City of Baltimore had made out a BFOQ for age under the ADEA as a matter of law since its statute was similar to the federal one mandating retirement based on age.

The Supreme Court made clear that the Fourth Circuit had misconstrued Wyoming and taken the phrase "reasonable federal standard" out of context. In reversing the Fourth Circuit the Supreme Court held that a "reasonable federal standard," as described in Wyoming, was the ADEA itself and not the federal mandatory retirement statute. The Court noted that in adopting the federal mandatory retirement age for firefighters, Congress had not acted out of considerations of safety or fitness. The Court concluded that "the history of the civil service provision . . . makes clear the decision to retire certain federal employees at an early age was not based upon BFOQ's for the covered employment." Therefore, the Court reasoned that the Fourth Circuit had erred in giving any weight to the federal firefighters statute and held that the federal firefighters statute did not operate to validate Baltimore's mandatory retirement statute under the ADEA.

In Johnson, the Court also stated that stereotypical assumptions about the effects of aging on employee performance were inadequate to demonstrate a BFOQ. Instead the Court held that employers are required to make a "particularized factual showing" that its age limitations meet the two-prong test set forth in Tamiami.

On the same day as the Johnson case, the Supreme Court, in Western Air Lines v. Criswell, decided another ADEA case along the same lines. Western Air Lines required its flight engi-
neers to retire at age sixty. A group of these flight engineers, forced
to retire at age sixty, sued the company for violation of the
ADEA.\textsuperscript{152} At trial in the district court, a jury found for the plain-
tiffs, rejecting the defendant's BFOQ defense, and the verdict was
affirmed first by the Ninth Circuit and then by the Supreme
Court.\textsuperscript{153} The Court held that the BFOQ exemption to the ADEA
was intended to be "an extremely narrow exception to the general
prohibition of age discrimination contained in the ADEA."\textsuperscript{154} The
Court concluded that in order for an employer to demonstrate that
its age-based mandatory retirement rule was valid, it had to satisfy
the two-prong test set forth originally by the Fifth Circuit in
\textit{Tamiami} and then adopted in the EEOC's regulations and by
other circuits.\textsuperscript{155} Therefore, to establish that age is a BFOQ under
the ADEA, the Court held that an employer must first prove the
existence of a job qualification "reasonably necessary to the es-
sence of [its] business";\textsuperscript{156} it was insufficient to prove mere reason-
ableness.\textsuperscript{157} Second, the employer must show that it has "reasona-
ble cause, that is, a factual basis, for believing that all or
substantially all persons [over the age qualifications] would be un-
able to perform safely and efficiently the duties of the job in-
volved," or that it is "impossible or impractical" to accurately test
and predict the capabilities of individuals in the excluded group.\textsuperscript{158}

The Court duly noted the airline's argument that the Federal
Aviation Act requires that airlines operate with the "highest de-
gree of safety" and that because flight engineers (navigators) are
essential to flight safety, the airline should be permitted to termi-
nate flight engineers when they reach the age of sixty.\textsuperscript{159} The air-
line claimed that after that age a flight engineer's performance be-
comes dangerously unpredictable.\textsuperscript{160} In light of its paramount duty
to ensure passenger safety under the Federal Aviation Act, the air-
line maintained that a mandatory retirement rule prohibiting flight

\begin{footnotesize}
\textsuperscript{152} \textit{Id.} at 402-06.
\textsuperscript{153} \textit{Id.} at 408.
\textsuperscript{154} \textit{Id.} at 412 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1977)).
\textsuperscript{155} \textit{Id.} at 413-16. The Court also recognized that Congress had implicitly endorsed the
two-prong \textit{Tamiami} test in its 1978 amendments to the ADEA. \textit{Id.} at 415.
\textsuperscript{156} \textit{Id.} at 413 (quoting Usery v. Tamiami Trial Tours, Inc., 531 F.2d 224, 236 (5th Cir.
1976)).
\textsuperscript{157} \textit{Id.} at 414, 419 (quoting \textit{Tamiami}, 531 F.2d at 235).
\textsuperscript{158} \textit{Id.} at 414 (quoting \textit{Tamiami}, 531 F.2d at 235) (alterations in original).
\textsuperscript{159} \textit{Id.} at 420-21.
\textsuperscript{160} \textit{Id.} at 414.
\end{footnotesize}
engineers from flying after age sixty was necessary.\textsuperscript{161}

In rejecting the airline's argument, the Court noted that the language and the history of the ADEA supported the concept of an individualized assessment of employee fitness.\textsuperscript{162} While the Court in \textit{Western Airlines} recognized that the safe transportation of passengers is the primary purpose of an airline's business, it found that recent advances in medical testing made it possible to have individualized determinations of whether a particular flight engineer can safely continue to perform his duties after age sixty.\textsuperscript{163} Therefore, the Court concluded that the airline had failed to satisfy the second prong of the \textit{Tamiami} test because a broad age-based retirement policy for flight engineers was not reasonably necessary to ensure the safety of passengers and the public.\textsuperscript{164} Even in cases involving public safety, the Court determined, the ADEA does not permit the trier of fact to give complete deference to the employer's decision.\textsuperscript{165}

V. THE PROSPECTS FOR A LAW ENFORCEMENT BONA FIDE OCCUPATIONAL QUALIFICATION REBUTTAL TO AN ADEA CHARGE

The prospects for a law enforcement BFOQ in view of these Supreme Court decisions and the overwhelming body of case law in the federal courts are not encouraging. While it is possible that a court might find a law enforcement BFOQ, the law enforcement community certainly cannot count on a BFOQ being upheld by federal courts when the law enforcement exemption ends in 1993.

As the case law indicates, in order to determine whether a challenged age limitation is a BFOQ, the relevant "occupation" must first be defined by a "particularized inquiry."\textsuperscript{166} Courts have been almost unanimous in concluding that the "occupation", not be

\textsuperscript{161} Id. at 418, 420.
\textsuperscript{162} Id. at 422. The preamble to the Act states that its purpose is "to promote the employment of older persons based on ability rather than age." Age Discrimination in Employment Act, § 2(b), 29 U.S.C. § 621(b) (1988).
\textsuperscript{163} \textit{Western Air Lines}, 472 U.S. at 406.
\textsuperscript{164} Id. at 414.
\textsuperscript{165} Id. at 423. The Court stated that where experts can disagree as to one's ability at a certain age, employers cannot be permitted to automatically resolve the issue in a conservative manner. \textit{Id}.
\textsuperscript{166} Compare EEOC v. City of St. Paul, 671 F.2d 1162, 1165-66 (8th Cir. 1982) (employment decisions may not be based on generic classes) \textit{with} Mahoney v. Trabucco, 738 F.2d 35, 42 (1st Cir. 1984) (BFOQ should be based on discrete vocations not particular individual's duties), \textit{cert. denied}, 469 U.S. 1036 (1984).
AGE DISCRIMINATION

defined by a generic class of employees currently doing the job.

In cases dealing with law enforcement, the courts have also demanded a rationale based on "reasonable necessity" to do the job as part of the strict two-prong standard of review embodied in Tamiami and the EEOC regulations. A defense based on mere "reasonableness" is clearly insufficient, as is citation to the federal retirement statute for federal law enforcement personnel and firefighters. Additionally, contentions that state legislative determinations regarding a mandatory retirement age are entitled to a statutory presumption of correctness are given little weight. Generally, the courts have found a greater danger to public safety in the employment of older pilots, flight engineers, and bus drivers than older police officers and firefighters and have eased the application of the two-prong test for airlines and bus companies, making it easier for them to prove that age is a BFOQ.

Specifically, the first prong of the BFOQ test is concerned with the relationship between the underlying job qualifications and the essence of the business. For a police department, the essence of the business is the operation of an efficient police department for the protection of the public, and the primary function of a police officer is to "protect persons and property and to maintain law and order." Thus far, police departments have been unable to meet their burden of empirically satisfying either element of the second prong of the Tamiami test for an age-based BFOQ. First, they have been unable to prove that all or substantially all persons over age forty could not perform the duties of a police officer safely and effectively. Second, they have been unable to show that it is impractical or impossible to test reliably, on an individual basis, a police officer's or applicant's ability to perform safely and adequately the duties of the job.

The EEOC, in its regulations, has added a further requirement to the Tamiami two-prong test, namely, that "the employer must prove that the challenged practice does indeed effectuate [the] goal [of public safety] and that there is no acceptable alternative which could better advance it or equally advance it with less discriminatory impact." Although this last requirement is rarely mentioned

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167 See EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980).
168 See supra notes 73-100 and accompanying text (discussing BFOQ defense for pilots and bus drivers).
in the case law,\textsuperscript{171} it increases a police department's burden under the two-prong standard significantly.

The EEOC's additional regulatory requirement means that the age restriction must be the least discriminatory means of promoting the goal of public safety. If it is determined that individualized testing could promote public safety as well as the mandatory age requirement, then, under the regulation, the age restriction is illegal even if the police department has shown that substantially all of the older employees cannot perform adequately.

Therefore, any renewed effort to obtain a BFOQ must utilize new approaches based on recent medical evidence on aging or new testing procedures on the disabilities of age that obviate the need for an individualized assessment. The new medical evidence or testing procedures would have to show that all or nearly all individuals beyond a certain age share a common disqualifying trait because of their age—rather than their age \textit{per se}—that makes them unfit for law enforcement work. Even such evidence would not guarantee a BFOQ, however, since it could be argued that individualized testing would promote public safety as effectively but in a less discriminatory fashion. In the absence of such new approaches, nonetheless, a renewed effort to obtain a BFOQ would appear fruitless. The body of case law in support of a BFOQ to rebut an ADEA complaint is not only small in number but of meager precedential value as well.\textsuperscript{172} In the absence of a BFOQ, it remains to analyze the interplay between the ADA and the ADEA and to examine the public debate over a legislated law enforcement exemption and the prospects of its extension.


\textsuperscript{172} See supra notes 42-58 and accompanying text. The 8th Circuit with cases such as EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982), upholding the district court's finding of BFOQ's for firefighters, fire equipment operators and fire captains, and EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984), \textit{cert. denied}, 474 U.S. 828 (1985), were perhaps best for the uniformed services arguing for a BFOQ. However, they were not controlling in subsequent cases and were superseded by the Supreme Court cases discussed in the text. See supra notes 124-164 and accompanying text. Even, arguably, the best case for proponents of a law enforcement BFOQ, Beck v. Borough of Manheim, 505 F. Supp. 923 (E.D. Pa. 1981), is of limited precedential value because it relied heavily on the fact that the small size of the Manheim police force (one chief and five officers) imposed unusual burdens on the officers. These burdens included the unavailability of backup help when responding to emergencies and the difficulty in arranging substitute coverage. \textit{Id. at} 926. The \textit{Beck} court apparently took these considerations into account in assessing the demands of the job, thereby raising the physical standards against which the older officers' performance was evaluated under the first prong of the \textit{Tamiami} test. See \textit{id.} at 925-26.
VI. THE INTERPLAY BETWEEN THE ADA AND THE ADEA

The ADA,\textsuperscript{173} which was signed into law on July 26, 1990 and took effect in 1992, broadly extended the scope of the federal civil rights protection against discrimination on the basis of disability.\textsuperscript{174} It bans discrimination not only in the area of employment but also in public transportation,\textsuperscript{175} public accommodation,\textsuperscript{176} and telephone services and communications.\textsuperscript{177}

The legislative history of the ADA makes clear that each individual with a disability otherwise qualified for employment must be treated with an individualized approach that does not result in separation of the disabled from the mainstream of employees or applicants and is free of stereotyping and generalizations.\textsuperscript{178} Thus, the ADA parallels the ADEA in the requirement for employers that they make employment decisions based on facts applicable to individual applicants or employees and not on the basis of presumptions as to what a class of individuals can or cannot do. An employer under the ADA may not make employment decisions by stereotyping a class of individuals with disabilities, just as an employer under the ADEA may not make such decisions by stereotyping a class of older individuals. Under both the ADA and the ADEA, it would be a violation to deny employment to an applicant based upon generalized fears about the safety of the applicant or about higher rates of absenteeism without demonstrating that the individual poses the threat to be avoided.\textsuperscript{179}


\textsuperscript{174} Disabled Americans were first protected by the Rehabilitation Act of 1973, which applied to certain federally funded entities or activities. Pub. L. No 93-112, § 503, 87 Stat. 355, 393 (1973) (codified at 29 U.S.C. §§ 701-796 (1988). For example, § 503 covers federal contractors or subcontractors having contracts in excess of $2,500., 29 U.S.C. § 793, while § 504 covers programs conducted by a federal executive agency or by the U.S. Postal Service, and programs or agencies receiving federal financial assistance. 29 U.S.C. § 794 (1988).

\textsuperscript{175} Americans with Disabilities Act, §§ 201-205, 221-222, 241-246, 304. 42 U.S.C.A. §§ 12,131-34, 12,141-42, 12,161-65, 12,184 (West Pamph. 1992). The ADA’s application to employers is found in §§ 101(2), (5) and 102(a). Id. § 12,111(2),(5), 12,112(a) (West Pamph. 1992).

\textsuperscript{176} Id. §§ 301(2),(7), 302(a), 303(a). 42 U.S.C.A. §§ 12,181(2),(7), 12,182(a), 12183(a) (West Pamph. 1992).

\textsuperscript{177} Id. § 401.

\textsuperscript{178} See supra note 14. Section 102(b)(1) of the ADA specifies that the term “discriminate” includes “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.” 42 U.S.C.A. 12,112(b)(1) (West Pamph. 1992).

\textsuperscript{179} For the legislative history of ADA, see S. Rep. No. 116, supra note 14, at 28; see
The ADA's individualized assessments of applicants and employees has created a very difficult burden for law enforcement employers in the absence of physical and mental fitness standards that are job-related and allow for a meaningful individualized assessment, yet would withstand a collateral attack based on disparate treatment due to race, sex, etc. With no legal consensus on what police tasks are, a job task analysis defining physical and mental fitness standards that are job-related for the law enforcement community remains unobtainable. In the long run, once adequate standards are developed, individualized assessment will become a realistic possibility in the hiring and retaining of older employees (as well as disabled employees under the ADA), and the need for a law enforcement exemption from the ADEA will diminish. Meanwhile, in the short run, with the individualized assessment process already being implemented under the ADA pursuant to law, faulty as it may be in the absence of validated, job-related physical and mental fitness standards, the prospects for a law enforcement BFOQ or a continued law enforcement exemption under the ADEA become bleaker. The argument is clear: if the law enforcement community can obey the ADA mandate for individualized assessment and develop physical and mental fitness standards for that purpose, or at least the perception or appearance of such standards, then there is no reason not to extend that mandate under the ADEA to older Americans who wish to work in the law enforcement field.

VII. The Public Debate over a Law Enforcement Exemption and Its Prospects for Extension

In 1986 there was a vigorous public debate over whether public safety would be endangered by hiring or maintaining older police officers pursuant to the mandates of the ADEA.180 The debate proved inconclusive but resulted in a legislated law enforcement exemption to run for seven years from January 1, 1987 through December 31, 1993. During this period the law enforcement community generally maintained its opposition to abolishing age-based

restrictions on hiring and retention but failed to develop any new data to support either a BFOQ or a permanent law enforcement exemption. Meanwhile, the EEOC put forth and commissioned a study contending that age is not an accurate predictor of suitability for public safety jobs and that better alternatives were available to measure such suitability. In late 1992 some local police departments initiated an effort to mobilize support in favor of a renewed legislative extension of the law enforcement exemption.

In the original 1986 public debate, police departments lobbied Congress with position papers that relied largely on non-empirical, anecdotal data to support the law enforcement exemption. Generally the law enforcement position was a stereotypical feeling that older police officers will experience more physical and medical problems, more injuries, and more lost time to the police department and, consequently, will be less able than younger police officers to protect the public. It was precisely such anecdotal testimony that the Supreme Court and most federal courts found inadequate in striking down the BFOQ defenses to the ADEA of state and local governments. While all involved in the public debate generally acknowledged that the time involving strong physical effort in police work is small, proponents of the law enforcement exemption emphasized that when such physical effort is needed the difference between a younger and an older police officer can be the difference between life and death to the officer, a fellow officer, or a citizen.

Proponents of the law enforcement exemption also pointed

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161 See, e.g., Epps, supra note 12, at 16 (criticising plan to eliminate mandatory retirement policies).

162 CENTER FOR APPLIED BEHAVIORAL SCIENCES, supra note 12; see also supra note 12 and accompanying text (discussing study).

163 See Epps, supra note 12, at 16. The New York City Police Department in consultation with smaller police departments in New York State and the International Association of Chiefs of Police was at the forefront of this effort.


165 See id. at 156.

166 Supporters included, among others, the International Association of Chiefs of Police, the National Trooper Coalition, the International Association of Firefighters, the National Sheriffs Association, the International Brotherhood of Police Officers, National Governors Association, National Association of Attorneys General, National League of Cities, National Association of Counties, National Public Employer Association, and Labor Relations Association. See Retirement Policies for Public Safety Officials, 1988 Hearing Before
to studies indicating a steady decline in police officers' physical activities as they get older and noted that those police officers who are no longer able to perform, regardless of age, are involuntarily retired with a pension. For example, a New York City Police Department study indicated that the percentage of retirements due to disability increases steadily and dramatically from 34.9% in the 44-48 year old age group to 73.0% in the 59-63 age group. Moreover, proponents argued for parity with the federal mandatory retirement program and warned of the extra costs and limits on employment and advancement for younger workers that older workers would create, even though the Supreme Court in Wyoming, and other federal courts, had long made clear that such arguments were unacceptable when made in support of a BFOQ.

Perhaps the strongest argument made by proponents of the law enforcement exemption was that just as there were no tests or studies that would satisfactorily establish a BFOQ to rebut an ADEA complaint, there were no tests or studies available that would efficiently and effectively measure individual fitness for a police job or even put forth a consensus as to (a) what constitutes fitness and whether adaptations have to be made for age, sex, and disability and (b) what is the police job and how are its tasks to be evaluated in terms of frequency, criticality, or some other measure. Complicating the fitness question today is the required implementation of the ADA under which the measure of fitness is ability to do the job, with or without “reasonable accommodation,” and not the appearance of physical and mental fitness or medical and psychological diagnoses.

The absence of definitive tests and studies for police departments to use to establish job tasks and measure fitness to perform those tasks was of no avail when these departments argued for a

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the Subcommittee on Labor at the Senate Commn. on Labor and Human Resources, 99th Cong. 2d Sess., 54-89, 94-142, 197 (1986) [hereinafter Policies].

187 Clarence Robinson, The Case For Maintaining the N.Y.C.P.D.’s Present Mandatory Age of Retirement at Age Sixty-Three Years (1986) (Clarence Robinson was Supervising Chief Surgeon of New York City Police Department) (on file with author).


189 See id. at 6; Robinson, supra note 187, at 4-5.

BFOQ in the federal courts. The ADEA, the Tamiami two-prong standard, and the EEOC regulations clearly put the burden of proof on the police departments in all litigation. In 1986, however, at the congressional level, police departments were more successful, at least to the extent of obtaining the seven-year law enforcement exemption in order to allow time to determine the best means of testing police ability to do the job. As it turns out, the EEOC will fail to put forth a definitive test for hiring or maintaining police officers that satisfies the mandate of the 1986 amendments when the seven-year exemption expires in 1993. The EEOC’s failure was in its reliance on a compilation of data that largely discredited the age standard while not providing performance fitness standards that would definitively withstand legal attack as not job-related. The EEOC’s failure, while of no help to police departments in seeking a BFOQ, is perhaps the best argument in 1993 for an extension of the law enforcement exemption beyond its expiration in 1993.

During the debate over the 1986 amendments, the opponents of the law enforcement exemption from the ADEA argued that age was simply too arbitrary a standard to justify hiring or retirement policies and that any exemption for law enforcement agencies would simply permit them to discriminate against older workers able and willing to do the job. They noted that age affects each individual differently, and that there were tests available to measure the effects of age on individuals, including those that measure general fitness, cardiovascular condition, and reaction time. They cited research on the performance of older law enforcement officers and firefighters indicating that job performance does not invariably decline with age. They also cited research that indicated that there were accurate and economical ways to test physical fitness and predict levels of performance for law enforcement occupations. Overall, they saw no problem in the ADEA require-

191 Opponents included the American Association of Retired Persons, the EEOC, and the National Institute of Aging of the National Institutes of Health. See Policies, supra note 186, at 33-46, 164-69.
193 See id. at 38-40.
194 See id. at 38-39 (citing research of Los Angeles Fire Department’s physical fitness
ment for individualized assessments to test for ability and fitness to perform police and fire work.\textsuperscript{195}

One study cited by opponents was performed by Professors Silver and Flynn\textsuperscript{196} and observed that age does not determine who can safely and effectively perform the duties of a law enforcement officer or firefighter and that the absence of hiring age limits for law enforcement officers had no bearing on the future success of applicants.\textsuperscript{197} Professors Silver and Flynn noted that most law enforcement work is not generally arduous or hazardous but rather consists of performing services with only an occasional dangerous event. Additionally, they found that, rather than physical strength, presence of mind, maturity, good judgment, and even self-esteem were important factors in predicting a successful police career.\textsuperscript{198}

They concluded that the stereotypes about hiring or maintaining older persons with respect to their physical decline were false. To support this assertion, they explained that older police officers have a lower rate of civilian complaints, absenteeism, and turnover; cities with no maximum hiring limit do not have higher crime rates; and prior work experience, especially military experience possessed by many older officers, is a good indicator of a successful police career.\textsuperscript{199}

The Silver-Flynn study also took issue with the argument by proponents of the law enforcement exemption that the age limitation is necessary to maintain fit police officers. They noted "that police personnel frequently are overweight, have ulcers, bad backs and cardiac problems" and that "these physical problems do not stem from constant fear of danger or from strenuous activity, but rather from the basically sedentary nature of the work and the stress involved in the internal workings of the criminal justice sys-

\textsuperscript{195} See id. at 44-45. They found that any increased costs resulting from physical fitness testing and training programs are outweighed by collateral benefits. \textit{Id.}


\textsuperscript{197} \textit{Id.} at 41.

\textsuperscript{198} \textit{Id.} at 38-40; \textit{see also} Aaron v. Davis, 414 F. Supp. 453, 459 (E.D. Ark. 1976) (older officers possess superior judgment, skill and knowledge commensurate with life experience).

\textsuperscript{199} Silver & Flynn, supra note 196, at 40-42; \textit{see also} Memorandum from Constance L. Dupree, Associate General Council, EEOC to Leroy D. Clark, General Council, EEOC, at A9 (Aug. 14, 1980) (on file with author) (citing Silver & Flynn, supra note 196) [hereinafter EEOC Memo]. The Silver-Flynn study rebutted presumptions that older persons "are previous occupational failures, unstable, hard to train, incapable of accepting discipline and physically sub-par." \textit{Id.}
Another conclusion of the study was "that the arguments used to justify age restrictions do not relate to the physical requirements of the occupation but rather to bureaucratic concerns about the type of recruit [coming into the department] (i.e., that young and malleable recruits are desirable) and various pension considerations."

Another study of the suburban Minneapolis police departments similarly concluded "that the skills of observation, analysis of information, decision-making, and oral and written communication were critical to successful law enforcement work" with only a slight demand for physical activity.

Two other studies cited by the EEOC yielded similar results. One found that while there was a correlation between advancing age and declining performance, the decline was more accurately attributable to such factors as increased weight and tobacco consumption rather than to age. In any event, individualized testing was found to be a far more accurate and efficient means of weeding out the unfit than an age standard. The other study found that age was a poor predictor of acceptable police performance and that there was often a positive correlation between the older police applicant and positive performance.

When the law enforcement exemption to the ADEA was enacted in 1986, a number of senators testified that the seven-year exemption for police and fire departments did not reflect their feelings in favor of the exemption on the merits but rather their desire that these departments should be permitted a "grace period" in which to adjust to the likely application of the ADEA in the future. The whole thrust of the 1986 amendments to the

Silver & Flynn, supra note 196, cited in EEOC Memorandum, supra note 199, at A10-11.

Id.

Retirement Policies, supra note 192, at 41.

EEOC Memorandum, supra note 199, at A10-11.

See EEOC Memorandum, supra note 199, at A12.

See, e.g., 132 Cong. Rec. H11,283 (1986). Congressman Jeffords stated, "My feelings are very strong that through the utilization of BFOQ's we do not need to have exemptions, we need only transition periods. We have provided the necessary transition periods for the respective groups that are included in this amendment." Id. Congressman Hawkins also testified, "We have provided 7-year transition periods to allow tenured faculty and police and firefighters time to adjust to the requirements of this new law .... We are confident that these university and law enforcement institutions will ultimately benefit from the requirement that they begin basing hiring and retirement decisions on an individual's qualifications and job performance." Id. at 411,281. But see H.R. Rep. No. 756, supra note 8, at 16-17
ADEA was in favor of ending mandatory retirement for all employment with only a grudging grant of the seven-year exemption. Following passage of the ADEA amendments of 1986, the EEOC commissioned, pursuant to the legislation, a study to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs. The study was completed in 1992 by an advisory team from Penn State University’s Center for Applied Behavioral Sciences. Frank Landy, who chaired the team, found that chronological age was not a good predictor of abilities or performance for police, firefighters, or correction officers. The study, conducted over a sixteen-month period, concluded that there was no scientific basis to support mandatory retirement for such public safety personnel and urged Congress to eliminate the exemption that these occupations had under the ADEA.

The Penn State study focused particularly on concerns that age correlated with sudden physical incapacitation or accumulated deficits in abilities and found only a marginal correlation with chronological age. It was noted that the risk of an officer experiencing a catastrophic medical event that would compromise public safety was so small—about one such event every twenty-five years—as to eliminate this factor in the debate regarding age-based retirement. The study’s review of public safety duties also found that the responsibilities of public safety officers only occasionally involved a direct threat to the well-being of citizens or fellow officers. Moreover, the study determined that many of the changes associated with aging were more accurately the results of illness, injury, and lifestyle variables rather than aging per se.

(individual views of Congresswoman Roukema advocating exemption to ADEA for police and firefighters).


Id. at 17-18. Chronological age limits do not, by themselves ensure functional competency of police officers. Aging effects and corresponding implications on job performance are complex. As age increases, it is possible that there is a decline in some abilities, however, “[a]n older person may be able to maintain high levels of performance even though aging has a detrimental influence on some abilities that contribute to performance.” Id. at 4. Successful physical performance is dependant upon the relationships among the sensory, motor, and central nervous system. Id. “Factors such as task complexity, experience, practice, and physical fitness . . . affect . . . performance decline.” Id. at 4-5. Age limitations do not ad-
This study in many respects echoed the themes raised in the earlier studies commissioned by the EEOC and used in the 1986 public debate on the law enforcement exemption.\footnote{See supra notes 196-204 and accompanying text (discussing prior EEOC reports).}

The positions taken on the Penn State study were similar to those taken in 1986, but with some break in the ranks of the public safety community.\footnote{See 138 Cong. Rec. S6,485-85 (daily ed. May 12, 1992).} As in 1986, the International Association of Chiefs of Police, the International Association of Firefighters, the National League of Cities, and the Fraternal Order of Police, among others, opposed the recommendation to end the law enforcement exemption.\footnote{Id. Police and firefighter organizations argued that the conclusion to end the law enforcement exemption was unrealistic. These groups supported the ADEA and efforts to ban discrimination, however, they argued that a mandatory retirement age is critically linked to competent job performance in positions involving public safety. Id.} However, the American Association of Retired Persons, a perennial opponent of the exemption, was joined in 1992 in support of the study’s recommendation by two small law enforcement groups, the American Correctional Association and the National Sheriffs Association, many of whose members opposed mandatory retirement.\footnote{Id. at S6,486. The Executive Director of the American Association of Retired Persons (AARP), Horace B. Dects, maintained that “[r]etirement policies based on chronological age do not take into account individual differences and are discriminatory on their face.” Id.}

The critics of the Penn State study focused on the fact that it was not independent research but rather a survey and compilation of the existing literature which was essentially critical of age-based standards. In addition, the study concentrated on larger police departments serving populations of 50,000 to 100,000 and above where there was substantial police back-up capability. Yet over eighty percent of police departments in the country were located in areas with less than 50,000 people where there would be little or no police back-up for a police officer who could not fully perform. Critics also argued that the enormous changes necessitated by the application of the ADEA to state and local police departments required an extension of the law enforcement exemption until a better assessment could be made of how best to make the transition to a new policy while protecting public safety.\footnote{See Epps, supra note 12, at 16.}

In view of the fact that a seven-year exemption had been given...
previously, it is unlikely that Congress will provide another extension unless somehow it could be convinced that the EEOC had failed to fulfill its mandate under the 1986 amendments. This appears unlikely, since the Penn State study supported the EEOC's earlier determination that the law enforcement exemption should be terminated. In any event, Congress need not act to amend the ADEA to eliminate the exemption since the exemption automatically terminates under its sunset provision on December 31, 1993.

VIII. CONCLUSIONS AND FUTURE IMPLICATIONS

As Chief Justice Burger noted in his dissent in Wyoming, the interpretation of the ADEA by the EEOC has been so restrictive that the BFOQ exception based on age has effectively ceased to exist.\(^{214}\) In fact the EEOC has never accepted a BFOQ exception for law enforcement. However, it was not only the EEOC but also the Supreme Court, and the overwhelming body of federal case law, that supported the EEOC analysis. Clearly, it is futile for the law enforcement community to pursue the BFOQ possibility based on the currently available medical evidence on aging and fitness testing procedures. They have no convincing, empirically-based data supporting age restrictions in hiring and retirement policies, and the age standard remains an arbitrary one. Even if it could be shown that age limitations further the goal of a fit public safety department, state and local governments have an obligation to use the least discriminatory means available to further that goal.\(^{215}\) This limitation is similar to the standard a law enforcement employer would have to meet under Title VII of the Civil Rights Act of 1964 if it had a policy or practice that had an adverse impact on women or minorities. Thus, in reality, law enforcement agencies could not show that the age limitations were "reasonably necessary" rather than merely "reasonable" and so would still have to find an alternate means of creating a fit public safety department.

Yet, the critics of the age standard, while ably and amply demonstrating its arbitrariness, have not set forth a definitive test or standard that state and local governments can use that would withstand legal attack. They have set forth a number of available tests that can accurately measure physical and mental fitness through individualized testing; however, they have presented no


available physical or mental fitness test that, if challenged in the courts as not job-related, could be upheld, for mental and physical fitness do not necessarily mean fitness to do the police job. There is not even a legal consensus as to what constitute the precise tasks that a police officer must perform. Without such a job task analysis it is impossible to measure fitness to do the job as opposed to mere physical or mental fitness in the abstract. Without such a job task analysis a standard based on mere physical or mental fitness is every bit as arbitrary as an age standard. Even if or when a job task analysis is completed, the tasks would have to be evaluated in terms of criticality and frequency, or some other measure, before fitness to perform these tasks could be measured. Since it is estimated that a job task analysis for police officers is still years away, an individualized assessment of a police officer's physical or mental fitness as of now serves the law enforcement community and the public no better than the age standard.

There are other problems with an individualized assessment of physical and mental fitness without a legal consensus on job tasks. Mere physical or mental fitness as a standard without a job task analysis would be violative of the ADA which prevents discrimination against those with physical or mental disability unless it can be shown that they cannot perform. A physical fitness test without a job task analysis might also have a disparate or adverse impact on the employment of female police officers and thus be violative of Title VII of the Civil Rights Act of 1964. A fitness test can be "normed," of course, for sex differentiation so that the paradigm of fitness for males and females will be different. However, the problem with "norming" fitness standards by sex is that it takes the standard for policing even further away from the tasks to be performed in favor of some type of sex parity in hiring. Even if "norming" fitness standards for sex differences could be defended to withstand a Title VII attack, it would still not withstand an attack under the ADA as discriminatory due to the absence of validated job tasks.

In the long run there is no escaping the need to complete a job task analysis. This conclusion was reached from reviewing the study commissioned by the EEOC pursuant to the 1986 ADEA Amendments, which presented no physical or mental fitness test with the assurance that it would withstand a court challenge as job-related. Moreover, interviews with responsible officials of the New York City Police Department reveal that development of such tests are years away from completion. See supra note 16.

19931
task analysis so that those fit to do the job can be hired and retained. Such is the only hiring and retirement standard that can be ultimately successful in the face of the ADA and Title VII challenges. The age standard is ultimately doomed to extinction, even in the unlikely event that the law enforcement community obtains another extension of the law enforcement exemption to the ADEA by emphasizing the EEOC’s failure to propose testing guidelines.

In the short run, police agencies will face prohibitive costs in testing all police candidates and all police incumbents, not just officers approaching retirement age, for physical, mental, and physiological fitness. For in the absence of another law enforcement exemption at the end of 1993, there will no longer be such a thing as a “retirement age” for police officers. The ADA’s existing individualized assessment standard will be buttressed by the ADEA. These costs in money and manpower will be in addition to the costs of developing and completing a job task analysis. As indicated, the cost outlay will not yield the intended results until the job task analysis is completed since the fitness measured will not be a true indicator of fitness for duty.

There will also be increased litigation costs as each individualized assessment that results in a determination that someone is unfit will potentially result in litigation. Moreover, settlement costs will be high because each plaintiff will learn quickly that his litigation will be successful since it cannot be proven that the “unfit” litigant cannot do the job. The litigant has only to show the court that his job tasks have not been validated and that, therefore, there is no legal consensus on what constitutes “the job.”

Since in this time of budgetary constraints the massive public expenditure required for individualized assessments is not likely to be fully authorized in any event, the likelihood is for the age standard to be replaced by a largely standardless hiring and retirement policy under which the only individuals deemed unfit will be that small number for whom irrefutable evidence was already available that they were a danger to themselves or members of the public rather than to the criminal.