AGE DISCRIMINATION IN EMPLOYMENT AND THE BENEFIT PLAN DEFENSE: TRENDS IN THE FEDERAL AND IOWA COURTS

I. INTRODUCTION

The Age Discrimination in Employment Act (ADEA)[1] was enacted by Congress in 1967 as a response to the problems of unemployment and premature forced retirement of older workers.[2] The Act purports to promote employment based on ability rather than age[3] and to eliminate arbitrary employment practices[4] adversely affecting persons between the ages of forty and seventy.[5] Under the Act,[6] an employer cannot discriminate against, refuse to hire or discharge an employee based upon the employee's age. Such actions constitute unfair employer practices.[7] However, an employer may still practice age discrimination if his actions fall within one of the statutory exemptions of the Act.[8] The statutory exemptions or defenses[9] to age discrimination in employment are: discipline for good cause;[10] differentiations

---

1. Age Discrimination in Employment Act, ch. 14, §§ 621-634, 81 Stat. 602 (1967)(current version at 29 U.S.C. §§ 621-634 (Supp. III 1979)).

2. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 2, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214 (message of President Johnson); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 22 (1967); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before Gen. Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 7 (1967); Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U.L. REV. 383, 384-88 (1966).

3. 29 U.S.C. § 621(b) (Supp. III 1979).

4. *Id.*

5. *Id.* § 631 (age limit was 65 in the original Act). *See also* H.R. REP. No. 805, 90th Cong., 1st Sess. 1 (1967).

6. 29 U.S.C. § 623 (Supp. III 1979). For a general discussion of the 1967 Act, see Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227 (1974); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976).

7. 29 U.S.C. § 623 (Supp. III 1979). If age is shown to be one of the factors involved in an employer's decision to discharge an employee, the plaintiff establishes a prima facie case of age discrimination regardless of the number or relative weight of other factors also considered. *See, e.g.*, Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

8. 29 U.S.C. § 623(f)(1)-(3) (Supp. III 1979).

9. Hereinafter, the term "defense" will be used to signify the employer's ability to discriminate against an employee based on age.

10. 29 U.S.C. § 623(f)(3) (1976). *See, e.g.*, Houghton v. McDonell Douglas Corp., 413 F. Supp. 1230 (E.D. Mo.), *rev'd on other grounds*, 553 F.2d 561 (8th Cir. 1976).

based on "reasonable factors other than age;"[11] use of age where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business;"[12] observance of a bona fide seniority system;[13] and *observance of the terms of a bona fide benefit plan such as a retirement, pension or insurance plan.*[14]

The benefit plan defense permits employers to restrict the benefits payable under company benefit plans on behalf of workers who are hired at advanced ages. This exception was enacted by Congress to encourage the hiring of older workers.[15] However, because of the adverse impact which this exception could have on the elderly,[16] the ADEA and its accompanying his-

---

11. 29 U.S.C. § 623(f)(1) (1976). The Secretary of Labor has set forth a relatively detailed description of reasonable factors other than age. 29 C.F.R. § 860.103-.104 (1979). The determination is made in light of the facts and circumstances of each case. *Id.* § 860.103(b). Also, for examples on permissible differentiation based on reasonable factors other than age, see 29 C.F.R. § 860.104 (1979).

12. 29 U.S.C. § 623(f)(1) (Supp. III 1979). The Secretary of Labor has interpreted this section in 29 C.F.R. § 860.102 (1979).

Compare Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) *with* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom.*, Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975) (different interpretations regarding the burden of proof in relation to the bona fide occupational qualification defense are discussed).

See also Comment, *Age Discrimination in Employment - The Bona Fide Occupational Qualification Defense - Balancing The Interest of the Older Worker In Acquiring And Continuing Employment Against The Interest In Public Safety*, 24 WAYNE L. REV. 1339 (1978).

13. 29 U.S.C. § 623(f)(2) (Supp. III 1979). The Secretary of Labor has interpreted this section in 29 C.F.R. § 860.105 (1979).

14. 29 U.S.C. § 623(f)(2) (Supp. III 1979). This section provides in part: "It shall not be unlawful for an employer, employment agency, or labor organization . . . (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . ." The Secretary of Labor interpreted this section in 29 C.F.R. § 860.120(a) (1979). *See also* 29 C.F.R. § 860.120(b)-.120(d) (regulations defining "bona fide employee benefit plan," "to observe the terms of a plan" and "subterfuge" respectively).

15. 29 U.S.C. § 623(f)(2) (Supp. III 1979), provides in part: "that no such employee benefit plan shall excuse the failure to hire any individual." Employers had feared that they could be forced to hire older workers and offer them the same pension benefits that they offered the younger workers. *See* Note, *Involuntary Retirement Under the Age Discrimination In Employment Act: The Bona Fide Employee Benefit Plan Exception*, 5 FORDHAM URBAN L.J. 509, 513 (1977). *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 4 (1967), *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2217: "This exception serves to emphasize the primary purpose of the bill - hiring of older workers - by permitting employment without necessarily including such workers in employee benefit plans," and 113 Cong. Rec. 31255 (1967) (remarks of Sen. Yarborough). *See also id.* at 34746 (remarks of Rep. D. Daniels): "The bill would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits;" and 29 C.F.R. § 660.120(a) (1979).

16. One commentator has stated three possible results in which an employer might use a benefit plan to justify age discrimination:

(1) refusal to hire an older employee because actuarial and mathematic tables on

tory clearly permit the employer to utilize this exception only if the benefit plan is bona fide and not a subterfuge to evade the purposes of the Act.[17]

The benefit plan defense has been the subject of much litigation and the source of many conflicts. Prior to the 1978 Amendments to the ADEA, the conflicts centered upon whether or not, and under what circumstances, the benefit plan defense could be asserted by an employer to justify the compelled retirement of a worker where a benefit plan called for retirement prior to age seventy. Both the federal district courts and the circuit courts strained to delineate the scope and proper application of the benefit plan defense to the forced retirement issue. Finally, the Supreme Court in *United Air Lines, Inc. v. McMann*,[18] attempted to resolve the continuing conflict among the courts.[19] Unfortunately, this decision did little to clarify the forced retirement issue and Congress responded by enacting the 1978 Amendments to the ADEA.[20]

Although the 1978 Amendments clearly indicate that an employee can no longer be forced to retire pursuant to the benefit plan exemption, the application of this exemption is still unsettled. Arguably the "forced retirement cases" are still useful in determining the extent to which an employer may practice age discrimination without exceeding the bounds of the benefit plan defense. This Note will examine and discuss these cases and attempt to

---

which plan is based would be disrupted

(2) refusal to hire an older employee because of the inability to qualify for a pension due to length of service vesting requirements or if the older employee's health or retirement benefits were less or cost the employee more

(3) benefit plan might call for retirement of employee at an early age.

Player, *Defenses Under the Age Discrimination in Employment Act: Misinterpretations, Misdirection, and the 1978 Amendments*, 12 GA. L. REV. 747, 767 (1978).

17. Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970)(involuntary retirement was not prohibited by the ADEA where the company observed the terms of a bona fide employee retirement benefit plan); Grossfield v. Saunders Co., [1968] LAB. REL. REP. (BNA) (1 Fair Empl. Prac. Cas.) 624 (S.D.N.Y.) (employer did no more than observe the terms of the retirement plan; as such, the plan was not a subterfuge to evade the purposes of the Act).

18. 434 U.S. 192 (1977).

19. *See* text accompanying notes 45-57 *infra*.

20. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978). The 1978 amendments made both procedural and substantive changes to the ADEA. Most important, for the scope of this Note, is the amendment to section 623(f)(2) which provides in part that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual."

There were other changes concerning age and retirement. 29 U.S.C. § 631(a) (Supp. III 1979) (raising the upper limit of the protected class from 65 to 70 for all categories of employees); 29 U.S.C. § 631(d) (Supp. III 1979) (the protected class does not extend to those executives who are 65 and have been employed for the two year period immediately before retirement in a "bona fide executive or a high policy-making position" if they are entitled to an immediate nonforfeitable pension of at least $27,000 per year); 29 U.S.C. § 631(d) (Supp. III 1979)(the protected class of employees does not extend to instructors at institutions of higher learning who have attained 65 years of age but not 70 years of age and are under a contract of unlimited tenure, or a similar arrangement providing for unlimited tenure).

define current trends in ADEA interpretations. In addition, the federal age discrimination law under the ADEA will be compared to and contrasted with the Iowa age discrimination law under the Iowa Civil Rights Act.[21]

II. The Employee Benefit Plan Defense of the ADEA of 1967: The Early Interpretations

The ADEA of 1967 did not specifically address the issue of employee retirement prior to an employee reaching age seventy. Early on, however, the courts held that forced retirement was a prima facie violation of the Act.[22] Thus, the issue became the extent to which an employer could use a retirement plan to justify forced retirement.

A. The Department of Labor Interprets the ADEA

Initially, the Department of Labor interpreted the Act literally and found it permissible for an employer to compel the retirement of an employee under the age of sixty-five pursuant to a "bona fide" retirement plan.[23] The Department of Labor concluded that "the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 623(f)(2)."[24] According to the regulations pursuant to the ADEA, if a benefit plan was bona fide and not used as a subterfuge to evade the purpose of the Act, it would be applicable to forced retirement.

By 1975 the Department of Labor had modified its previous position.[25] The department stated that a benefit plan retiring employees is unlawful unless:

> [T]he mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) is essential to the plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the plan for the sole [p]urpose of moving out older workers, which purpose has now been made unlawful by the ADEA.[26]

---

21. Iowa Code Ann. § 601A.1-.16 (West Supp. 1980).

22. Hodgson v. American Hardware Mut. Ins. Co., 329 Supp. 225 (D. Minn. 1971). The employer could not mandatorily retire a 62 year old employee who did not participate in the company retirement plan. The case represents the first federal court opinion in which the language of the provision was evaluated in light of the stated purposes of the Act as set out in 29 U.S.C. § 621(b) (Supp. III 1979). Comment, *The Problem of Involuntary Retirement Before Age 65*, 60 Marq. L. Rev. 1053, 1068 (1977). *See also* 29 C.F.R. § 860.110(b) (1979).

23. *See, e.g.*, United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977).

24. 29 C.F.R. § 860.110 (1979).

25. Instead of revoking its prior interpretation, the Department of Labor "[d]irected its enforcement policy on an end run around that guideline." Player, *supra* note 16, at 770.

26. Dept. of Labor report pertaining to activities in connection with the Age Discrimination in Employment Act of 1967 at 17 (1975) *cited in* Zinger v. Blanchette, 549 F.2d 901, 908 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

In this respect, the department, although conceding that an employer could mandatorily retire an employee, virtually prohibited mandatory retirement under most plans by adding the economic and business factor requirement.

B. *The Early Federal Court Decisions*

Like the Department of Labor, the federal courts held that an employer could, under some circumstances, retire an employee who had not reached the statutorily defined age ceiling pursuant to a bona fide retirement plan. Unfortunately, the early decisions lacked any agreement as to the circumstances under which forced retirement could occur.

The first significant federal case arose in the Fifth Circuit. In *Brennan v. Taft Broadcasting Co.*,[27] the Secretary of Labor brought an action on behalf of a worker who had been compelled to retire at age sixty pursuant to a profit sharing retirement plan. A clause in the plan empowered the company to permit employment beyond the retirement date, but the employer denied the employee's request for continued employment. The Secretary contended that the plan was not bona fide within the meaning of the statute because the compulsory retirement feature had not been adequately communicated to the participating employee. The court rejected the Secretary's argument, holding that a plan enacted prior to 1967 (the effective date of the ADEA) could not, as a matter of law, be considered a "subterfuge" to evade the purpose of the Act.[28]

In arriving at this decision, the court refused to look at the legislative history underlying the benefit plan defense because it found the statutory language clear and unambiguous.[29] This finding is quite inconsistent with the legislative history of the ADEA which clearly indicates that plans existing prior to the Act do not automatically satisfy the exception.[30]

---

27. 500 F.2d 212 (5th Cir. 1974).

28. *Id.* at 215. For the chronological analysis discussed in *Taft Broadcasting*, see Steiner v. National League of Professional Baseball Clubs, 377 F. Supp. 945, 948 (C.D. Cal. 1974).

29. 500 F.2d at 217. One commentator offers the different view that the Fifth Circuit adopted the wrong interpretation in that: (1) by exempting every plan before the Act's implementation, the *Taft* Court has misconstrued the pension plan exemption; and (2) under the legislative history of the Act, existing plans were not to satisfy the exception automatically, but had to be measured against the criteria which it set forth. The commentator further asserts that the court should not be too eager to except a benefit plan laden with age restrictions from the ADEA's coverage. Instead, it should consider whether the restrictions are intended to evade the purposes of the Act as well as whether they are in fact unrelated to the economic viability of the plan itself. Note, *Age Discrimination in Employment*, 50 N.Y.U.L. Rev. 924, 950-51 (1975).

In conclusion, the author states: "Since Congress expressly indicated its intent to benefit older workers; . . . it requires no extensive reading of the legislative history to conclude that Congress, in attempting to eradicate age discrimination, did not want to terminate the past gains achieved by older workers through the creation of pension and retirement plans." *Id.* at 951 n.142.

30. "It is important to note that [the employer benefit plan defense] applies to new and

Subsequently, the Fourth Circuit, in *McMann v. United Air Lines, Inc.*,[31] rejected the holding of *Taft Broadcasting Co.*[32] The court recognized that the language of the statute permitted the employer to discharge an employee pursuant to a bona fide plan, but held that such a plan would constitute a subterfuge to evade the Act unless the employer could show a legitimate economic or business purpose for the plan.[33] Thus, a pre-existing benefit plan could still be a subterfuge if it was not justified by an economic or business motive. The court failed to find a legitimate purpose in support of United Air Lines' benefit plan and found that the plan was a subterfuge.[34]

One year after *McMann* the Third Circuit reached a different result in *Zinger v. Blanchette*.[35] In this case an employee was involuntarily retired before the age of sixty-five pursuant to a bona fide retirement plan. Under a complicated pension scheme, Zinger could be retired at the company's option at any time between his attaining age sixty and his normal retirement date. Zinger conceded that the employer's plan was bona fide, but he insisted that his optional retirement was nevertheless a subterfuge. The court rejected Zinger's contentions and held that an involuntary retirement pursuant to a bona fide plan, which paid reasonable benefits to the retired employee, was not a subterfuge.[36]

In this decision, the court found that a plan which pre-dated the Act could be a subterfuge and that "subterfuge" contained an element of independent economic justification.[37] According to *Zinger*, Congress intended to distinguish between "retired" employees and "discharged" employees by permitting mandatory retirement pursuant to a plan paying meaningful benefits even though the employer did not establish a business justification for the early retirement.[38]

---

existing plans . . . ." H.R. REP. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2217.

31. 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977). In this case, McMann was involuntarily retired at age 60 pursuant to a retirement plan he voluntarily entered into in 1964, before the passage of the ADEA. After McMann gave notice to the Secretary of Labor, pursuant to 29 U.S.C. § 626(d) (Supp. III 1979), of his intent to sue the airline, the Department of Labor concluded that the airline's retirement plan did not violate the ADEA. The plaintiff then instituted a private action in federal district court. The federal court granted United Air Line's motion for summary judgment based on the bona fide benefit plan exemption, 29 U.S.C. § 623(f)(2) (Supp. III 1979).

32. It was the intent of Congress to make all employee benefit plans subject to the ADEA. 542 F.2d at 221. *See* H.R. REP. No. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213.

33. 542 F.2d at 221.

34. *Id.* at 222.

35. 549 F.2d at 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

36. *Id.* at 904-09.

37. *See* notes 27-29 *supra* and accompanying text.

38. The rationale that a bona fide employee benefit plan is not a subterfuge to evade the purposes of the Act if it pays substantial benefits to the employee first made its appearance in federal district court. *See* Dunlop v. Hawaiian Tel. Co. 415 F. Supp. 330 (D. Hawaii 1976). In

The circuit courts all seemed to conclude that an employee could be involuntarily retired. The problem with these decisions was determining a standard of consistency. *Brennan* held that any plan which was enacted prior to the Act could not as a matter of law be considered a subterfuge to evade the purposes of the ADEA.[39] *Zinger* held that involuntary retirement of an employee pursuant to a bona fide benefit plan when the plan paid meaningful benefits was permissible.[40] Like *Zinger*, but contrary to *Brennan*, *McMann* held that a plan which predated the Act could not be a subterfuge.[41] In addition, *McMann* diverged from *Zinger's* "meaningful benefit" criteria[42] and stated that an employee could not be retired absent a showing of a legitimate economic or business purpose.[43] These conflicting standards prompted the Supreme Court to review *McMann v. United Air Lines, Inc.*[44]

C. *The McMann Decision: Resolution or More Confusion*

Although the United States Supreme Court had an avowed intent to reconcile the conflicts between the circuits, the overall impact of *United Air*

Hawaiian Telephone, the court noted that using the plain reading of subterfuge as defined in the statute and then interpreted in *Taft* (automatic grandfathering of all pre-ADEA plans to fall within the section 623(f)(2) defense) would render the employer defense meaningless. The district court interpreted subterfuge "[a]s denying [an employer] the protection of [623(f)(2)] only if the employer uses a retirement plan as a subterfuge to retire an employee without the payment of substantial benefits." *Id.* at 331. The court relied heavily on the regulations promulgated by the Secretary of Labor. 29 C.F.R. § 860.110(a) (1979). "The Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of Section [623(f)(2)]." *Accord*, Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 838 (3d Cir. 1977); Steiner v. National League of Professional Baseball Clubs, 377 F. Supp. 945 (C.D. Cal. 1974). *But see* Sexton v. Beatrice Foods Co., [1978] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 717, 721-23 (7th Cir. 1980; Marshall v. Kimberly-Clark Corp., [1977] LAB. REL. REP. (BNA) (15 Fair Empl. Prac. Cas.) 690, 692 (N.D. Ga.) (courts rejected employer's contention that payment of substantial benefits pursuant to a benefit plan was enough to apply the section 623(f)(2) defense).

In regard to the *Zinger* court's rejection of the economic and business justification for early retirement, the Third Circuit also rejected the Secretary of Labor's revised interpretation of the ADEA because: (1) it conflicted with the department's original interpretation of the Act, which was made contemporaneously with the consideration and passage of the Act and (2) the Department failed to recognize the obvious and important distinction between discharge without pay and retirement with a pension. 549 F.2d at 908. Recognizing that there were many cogent and persuasive arguments against involuntary retirement before age 65, even with adequate pension, the court chose to base its decision on statutory interpretation: "An exemption's merits are properly matters of legislative concern and evaluation. Congress has chosen to exclude retirements pursuant to bona fide retirement plans so long as the plan is not a subterfuge. That choice is binding on us." *Id.* at 909.

39. 500 F.2d at 215.
40. 549 F.2d at 909-10.
41. *See* text accompanying notes 27-29 *supra*.
42. *See* note 38 *supra* and accompanying text.
43. *See* text accompanying notes 33-34 *supra*.
44. 429 U.S. 1090 (1977).

Lines, Inc. v. McMann[45] was to create more confusion. Without reviewing *Brennan v. Taft Broadcasting Co.*,[46] the Court's majority opinion embraced the Fifth Circuit's reasoning, thereby reversing the Fourth Circuit's holding in *McMann*.[47]

Writing for the majority, Chief Justice Burger found that there was "nothing to indicate [that] Congress intended wholesale invalidation of retirement plans instituted in good faith before [the Act's] passage or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing [benefit] plans."[48] In addition, the court defined subterfuge as a "scheme, plan, strategem or artifice of evasion"[49] and held:

> To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer. We reject any such *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act.[50]

Finally, the Supreme Court found the ADEA clear on its face,[51] and held that the bona fide benefit plan defense permitted the involuntary retirement of an employee prior to age sixty-five pursuant to the terms of a bona fide

---

45. 434 U.S. 192 (1977).

46. 500 F.2d 212 (5th Cir. 1974).

47. 542 F.2d 217, 221-22 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977).

48. 434 U.S. at 203.

49. *Id.* The Supeme Court stated that the definition of subterfuge was an ordinary dictionary term.

50. *Id.* (footnote omitted). "[A] plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later." *Id.*

In a concurring opinion, Justice White stated that the inquiry should not terminate with the observation that the plan existed prior to the Act, but rather, should also focus on the maintenance of the plan after the Act. *Id.* at 204-07. (White, J., concurring). The central issue according to Justice White was whether the exception permitted the involuntary retirement of an employee pursuant to a bona fide plan before he or she reached age 65. He concluded that it did. Justice White then adopted the approach of the Third Circuit in *Zinger v. Blanchette* and argued that a retirement plan should qualify as bona fide, thereby triggering the employer defense, if the benefit plan paid substantial benefits to the retirees.

See also Player, *supra* note 16, at 772-74. The author contends that economic and business necessity should be an appropriate factor, but as an objective element it should be analyzed under the bona fide aspect of the benefit plan defense. On the other hand, subterfuge is a subjective element as it carries connotations of intent, motive and purpose. A plan will be a subterfuge, although objectively reasonable, if the employer uses it for improper reasons or to secure an improper goal. Therefore, the Fourth Circuit had an insurmountable burden for the employer to bear when an employee conceded that a plan was bona fide; for imposed on the subjective term subterfuge was the objective element of business necessity. In this sense, the Supreme Court could have concluded that subterfuge required a business necessity.

51. 434 U.S. at 201. The Supreme Court stated that reference to the legislative history of the statute was unnecessary, but did turn to it to conclude that it merely reinforced the Court's decision.

plan.[52]

Unlike the majority, the dissent maintained that both the language and legislative history could support another interpretation of the Act. Relying upon the House and Senate committee reports and statements made by the bill's sponsors during congressional debate, Justice Marshall suggested that section 4(f)(2) was merely meant to allow employers to exclude newly hired older workers from employee benefit plans.[53] Justice Marshall further attacked the majority holding by stating that it provided an "unduly narrow interpretation" of the Act.[54]

By resolving the main issue presented in *United Air Lines, Inc. v. McMann* broadly, the Supreme Court neglected to answer the narrow issues which later surfaced to haunt the decision. These questions include whether the holding applies only to mandatory retirement plans,[55] whether the payment of meaningful benefits acts as a deterrent to a finding of subterfuge,[56] and whether an economic or business necessity is required.[57]

Thus, since the *McMann* decision, the federal courts have been the center of a large quantity of litigation in these areas, and the holdings of the cases decided have offered little in the manner of consistency.

III. The 1978 Amendments To The ADEA

As a result of the *McMann* decision, Congress, wishing to clarify the ADEA of 1967, passed the 1978 Amendments.[58] The 1978 Amendments made both substantive and procedural changes in the original ADEA.[59] The

---

52. *Id.* at 201-02.

53. *Id.* at 213-14 (Marshall, J., dissenting). *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 2 (1967). *See also* 113 Cong. Rec. 31255 (remarks of Sen. Yarborough and Sen. Javitts).

54. 434 U.S. at 208 (Marshall, J., dissenting).

55. 542 F.2d at 219. The plan was voluntary and McMann did not join it until 1964 after he had worked 20 years at United. In practice, the plan's normal retirement age for McMann was 60. The employee had no discretion whether to continue beyond the normal retirement age but legally United could retain any employee past 60. United had never done so; its policy was to retire all employees at the normal age. As a result, the Fourth Circuit concluded "that for *purposes of this decision*, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer." *Id.* (emphasis added) (footnote omitted).

56. Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

57. McMann v. United Airlines, Inc., 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977).

58. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978) (amending 29 U.S.C. §§ 621-634 (1976)). *See* Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980). The effective date of this amendment for noncollectively bargained plans was the date of enactment, April 6, 1978. Collectively bargained plans, in effect as of September 1, 1977, were not to be subjected to this amendment until the termination of such agreement, or on January 1, 1980, whichever came first. 29 U.S.C. § 635 (Supp. III 1979).

59. Except as to the addition to § 623(f)(2) (that no employee may be forced to retire on account of age until he is 70 years old because of an employee benefit plan), a discussion on

language added to section 623(f)(2)[60] made it clear that forced retirement of an employee within the protected age group pursuant to a bona fide employee benefit plan violated the Act. Rejecting the Supreme Court's interpretation in *United Air Lines, Inc. v. McMann*,[61] the House-Senate Conference Report specifically stated that plan provisions in effect prior to the date of enactment were not exempt merely because they predated the Act.[62] As the Report stated: "[T]he purpose of the amendment to [623(f)(2)] is to make absolutely clear one of the original purposes of this provision, namely that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age."[63] Congress left unresolved, however, whether or not an employee states a cause of action under the ADEA if he alleges to have been forced to retire pursuant to a bona fide plan prior to the effective date of the 1978 Amendments.[64] Because of the ADEA's maximum four year statute of limitations, time will settle this issue by April 6, 1982.[65]

IV. Current Trends: Aftermath of the McMann Decision and the 1978 Amendments

Presently, under the ADEA an employer must base an employee's mandatory retirement prior to age seventy upon "cause, factors other than age, or a bona fide occupational evaluation."[66] An employer clearly may not use a benefit plan to force retirement. The 1978 Amendments, however, did not address the extent to which an employer may utilize a benefit plan to justify age based discrimination among employees.[67] This issue can not be resolved without defining "bona fide" and "subterfuge" as used in the Act. Congress failed to address this problem when it enacted the Amendments to the ADEA, however, and pre-amendment discrimination cases are still relevant in defining these terms. The standards developed in the pre-amend-

---

these amendments is beyond the scope of this Note. For such a discussion see Player, *supra* note 16; Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 Cath. L. Rev. 767 (1978); Note, *The Age Discrimination in Employment Act: Procedural and Substantive Issues in the Aftermath of the 1978 Amendments*, 1979 Ill. L. Forum 665 [hereinafter cited as The Age Discrimination Note].

60. *See* note 20 *supra* and accompanying text.

61. *See* text accompanying notes 45-57 *supra*.

62. H.R. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Ad. News 528, 529; H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8 (1978).

63. H.R. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Ad. News 528, 529.

64. The courts which have addressed this issue have reached inconsistent results.

65. However, one commentator has noted: "Because of the vast number of workers who are potentially affected by this amendment . . . the magnitude of this issue for this brief period of time is great. Moreover, litigation can be expected to continue through the appellate process for many years." The Age Discrimination Note, *supra* note 59, at 696.

66. 29 U.S.C. § 623(f) (Supp. III 1979).

67. Player, *supra* note 16, at 776.

ment discrimination cases will ultimately be those used to delineate the extent to which employees will be able to discriminate against employees pursuant to the benefit plan exception.

A. *A Bona Fide Employee Benefit Plan*

An employee benefit plan is considered bona fide when "it is genuine or authentic—a plan which has truly existed and has actually paid substantial benefits to employees retiring under it."[68] Other additional factors include that the plan must be continuous[69] and that it not withold information or produce deception.[70] The Department of Labor has offered a similar interpretation of the bona fide employee benefit plan:

> A plan is considered "bona fide" if its terms . . . have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them.[71]

Very simply, there is little interpretation as to the definition and treatment of bona fide employee benefit plans and their relation to section 4(f)(2). One thing is certain, without such a plan the benefit plan defense to age discrimination is outside the bounds of the Act.[72]

B. *Subterfuge to Evade the Purposes of the Act*

The term "subterfuge" was defined in *United Air Lines, Inc. v. McMann* as "a scheme, plan, strategem or artifice of evasion."[73] However, no mention was made of the economic or business purpose requirement.[74] In addition, this definition has clearly been limited to any plan that was in effect prior to the enactment of the ADEA.[75]

In *Smart v. Porter Paint Co.*[76] an employee was involuntarily retired at age sixty pursuant to a bona fide employee plan that had been in existence since 1959. In 1976, the year that Smart was retired, the plan was amended, lowering the age from sixty-five to sixty. The Seventh Circuit distinguished *McMann's* subterfuge definition stating that when a pension plan is

---

68. Smart v. Porter Paint Co., [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 764, 767 (7th Cir.); Minton v. Whirlpool Corp., 569 F.2d 1012, 1013 (7th Cir. 1978).
69. Strattman v. N.L. Indus., Inc., [1980] LAB. REL. REP. (BNA) (21 Fair Empl. Prac. Cas.) 1633 (D.N.J.).
70. Marshall v. Hawaiian Tel. Co., 575 F.2d 763, 766 (9th Cir. 1978).
71. 29 C.F.R. § 860.120(b).
72. 29 U.S.C. § 623(f)(2) (Supp. III 1979).
73. 434 U.S. at 203.
74. *Id.*
75. *Id.*
76. [1980] Lab. Rel. Ref. (BNA) (23 Fair Empl. Prac. Cas.) 764 (7th Cir.).

amended after the 1967 Act the employer must state some nondiscriminatory economic or business purpose for its actions and whether it "wishes to avail itself of the 4(f)(2) exemption."[77] The court rejected the employer's contention that the determining factor as to whether an amendment to a benefit plan was a subterfuge was whether the benefit plan, as amended, continued to pay out substantial benefits. The Seventh Circuit reasoned that the determinative factor was whether the amended plan was bona fide.[78] In finding the employer outside the protection of the Act, the court stated that the Porter Paint Company failed to offer the proper evidence to create issues of fact showing purpose or motive to establish a 623(f)(2) defense.[79]

Thus, one of the trends that has emerged is the rejection of the *United Air Lines, Inc. v. McMann* subterfuge definition beyond its application to pre-ADEA plans.[80] The case law suggests a business and economic purpose requirement which the employer must prove when he wishes to avail himself of the section 623(f)(2) defense, whether under the 1967 Act or the 1978 Amendments to the ADEA. In addition, this position seems to be the one taken by the Secretary of Labor.[81] As a result, the employer's standard of proof has become a difficult one to sustain.

C. *Attempts To Distinguish McMann*

Much of the post-*McMann* litigation has attempted to distinguish this Supreme Court decision. The courts have sidestepped the broad sweep of *McMann* by differentiating between a mandatory retirement plan and a discretionary optional type.[82] This has enabled the federal courts to examine

---

77. *Id.* at 768. The court further stated that:

> [W]here a post-ADEA amendment lowering the 'normal' or 'mandatory' retirement age below 65 is the subject of inquiry, an employer's motion for summary judgement requires a prima facie showing that subterfuge is not present. This in turn requires some evidence of the purpose or purposes which the amendment in question is intended to serve.

Id.

78. *Id.* at 769.

79. *Id. See* Marshall v. Eastern Airlines, 474 F. Supp. 364 (S.D. Fla. 1979) (employer failed to provide evidence to show that the plan had any business purpose other than arbitrary age discrimination). *But see* Marshall v. Atlantic Container Line, 470 F. Supp. 71 (S.D.N.Y. 1979) (clear and direct business purpose supported a finding that plan was not a subterfuge). *See also* Strattman v. N.L. Indus., [1980] LAB. REL. REP. (BNA) (21 Flair Empl. Prac. Cas.) 1633, 1634 (D.N.J.); Karjolic v. Illinois Bell Tel. Co., [1978] LAB. REL. REP. (BNA) (21 Fair Empl. Prac. Cas.) 515, 516 (N.D. Ill.), *cert. denied*, ___ U.S. ___, 100 S. Ct. 733 (1980).

80. *See id.* at 768.

81. 29 C.F.R. § 860.120(d)(7) (1979).

82. *See* McMann v. United Air Lines, Inc., 542 F.2d at 219. The Fourth Circuit declined to decide the issue of a discretionary retirement plan, limiting its decision to United's mandatory plan. The Supreme Court reversed the Fourth Circuit, but never broadened the scope of its holding to discretionary retirement plans. *See* notes 47-52 *supra* and accompanying

other case law decided prior to *McMann* without necessarily being limited to the holding of the *McMann* decision.

Litigation has also arisen to determine if an employer has "observed" the terms of the benefit plan. The term "observe" has been described as "a type of passive acquiescence."[83] An employer observes the terms of the retirement plan by complying with its substantive instructions. As such, it is not unlawful for an employer to "enforce" or to "carry out" the terms of the plan. Thus, prior to the 1978 Amendments, an employer "observed" the terms of the plan when the plan forced him to retire an employee through a mandatory retirement plan, or through a plan granting the employer the right to force retirement through an appropriate age of his choosing.[84] The terms to be followed must be expressly written into the plan[85] or be pursuant to the pension plan's design.[86] If these conditions are not observed, courts will not recognize that an employer observed the terms of the plan.

Recent case law such as *EEOC v. Baltimore & Ohio Railway,*[87] held that an employer is not observing the terms of a benefit plan, and not subject to the defense of section 623(f)(2), if age is the determining factor in his or her discrimination.[88] In another case, *Thompson v. Chrysler Corp.,*[89] a

---

text. *Accord,* Jensen v. Gulf Oil Ref. Co., [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 790, 795 (5th Cir.); Cowlishaw v. Armstrong Rubber Co., 450 F. Supp. 148, 150 (E.D.N.Y. 1978). *See also* Langman v. Western Elec. Co., 488 F. Supp. 680, 684 (S.D.N.Y. 1980); Marshall v. American Motors Corp., 475 F. Supp. 875, 880 (E.D. Mich. 1979).

On the other hand, some courts have not tried to differentiate between a mandatory retirement plan and a discretionary optional one. *See* Carpenter v. Continental Trailways, [1980] LAB. REL. REP. (BNA) (24 Fair Empl. Prac. Cas.) 875, 876 (6th Cir.); Gonsalves v. Caterpillar Tractor Co. [1980] LAB. REL. REP. (BNA) (22 Fair Empl. Prac. Cas.) 967 (C.D. Ill.) (rejects mandatory/discretionary distinction); Minton v. Whirlpool Corp., 569 F.2d 1012, 1013 n.2 (7th Cir. 1978) (plaintiff could not differentiate between his optional retirement plan, earlier optional retirement plans, and the mandatory retirement plan in United Air Lines, Inc. v. McMann); Conforti v. Western Elec. Co., [1979] LAB. REL. REP. (BNA) (22 Fair Empl. Prac. Cas.) 925-26 (D.N.J.) (because Western Electric had an existing right to involuntarily retire Conforti, there was no perversion under the ADEA to give him the option of taking a demotion or voluntary retirement).

Finally it has been said that the ADEA never was intended to apply strictly to mandatory retirement. "Serious objections have been made against sanctioning pre-age sixty five requirements at the company's option. However, the statute as written does not limit its exception to bona fide plans that mandatorily require retirement." 5 OHIO N.U.L. REV. 531, 536 (1978).

83. Hannan v. Chrysler Motors Corp., 443 F. Supp. 802, 804 (E.D. Mich. 1978).

84. Smart v. Porter Paint Co., [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 764, 767 (7th Cir.); Sexton v. Beatrice Foods, Inc., [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 717, 720-21 (7th Cir.).

85. Sexton v. Beatrice Foods, Inc., [1980] LAB. REL. REV. (BNA) (23 Fair Empl. Prac. Cas.) 717, 720 (7th Cir.).

86. EEOC v. Baltimore & Ohio Ry. Co., [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 1381, 1383 (4th Cir.).

87. [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 1381 (4th Cir.).

88. *Id.* at 1383-84.

89. 569 F.2d 989 (6th Cir. 1978).

post-*McMann* decision decided under the ADEA of 1967, the Sixth Circuit found that the employer observed the terms of the plan, and upheld the dismissal of the age discrimination claim because the benefit plan contained "other factors"[90] that supported early termination. Since the employee fell within these other factors, age was not the qualifying reason for the early retirement.[91]

Both *Thompson* and *EEOC v. Baltimore & Ohio Railway* project the beginning of a standard that can be used with the revised ADEA. An employer fails to observe the terms of a benefit plan, thereby forfeiting the defense of section 623(f)(2), when his actions are based upon the factor of age.[92]

The major issue which remains concerns the importance of the business and economic justification for retirement in light of the position taken by Congress in relation to the 1978 Amendments. The question has been raised: "must economic or business necessity justify benefit and retirement plans applicable to current employees?"[93] Judging by the current case law, the answer should be "yes."

---

90. *Id.* at 993.

91. *Id.* at 992. *See* Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978). In order for the plaintiff to make out a prima facie case, he must prove more than that he was within the protected age group and that he was adversely affected by a decision of management relating to conditions of employment; he must also prove discrimination based on age. The employer then must meet the burden of going forward with evidence tending to show that its actions were not motivated by the employee's age, but by economic realities of the time. *Id.* at 815. *Accord*, Moses v. Falstaff Brewing Corp., 550 F.2d 1113 (8th Cir. 1977); Bittar v. Air Canada, 512 F.2d 582 (5th Cir. 1975).

92. Another approach that could have some future bearing on employer benefit plan defenses is discussed in *Langman v. Western Elec. Co.*, 488 F. Supp. 680 (S.D.N.Y. 1980). Langman, as an employee for Western Electric, was retired pursuant to the company's pension plan that gave them the discretion to retire an employee after the individual had totalled 30 or more years of service.

The decision was unique because of the interpretation given to Western Electric's benefit plan by the federal district court. It distinguished the plan from the one described in *McMann* because of its optional character, stating that Western Electric's benefit plan gives the employer the discretion to retire or continue the employment of an employee who was employed 30 or more years. The plan did not direct Western Electric to retire an employee, for the employer had the option to continue the employment of the employee. Thus, according to the court, the employer was not caught between choosing to observe the anti-age discrimination measures of the ADEA and observing the terms of the employer benefit plan. Instead, the employer could honor both, "by exercising his discretion in the employee's favor." *Id.* at 684-85. This result gives the employee an exception to the section 623(f)(2) defense, whether it be the 1967 Act or its 1978 Amendment.

93. Player, *supra* note 16, at 777. Player further compounds the question by inquiring whether an employer is still discriminating in violation of section 623(f)(2) by inducing early retirement by paying employees full maximum benefits at age 65 and then denying the employee any further increase in benefits paid out in future years. If this method of benefit payment lacks economic or business justification, then the employer should not be allowed to apply the plan in such a manner. *Id.*

In this sense, the concepts of business and economic necessity should be included as an element in determining whether a plan is bona fide. Should a benefit plan discriminate against an older worker, either directly or indirectly, it is only bona fide if it has the support of an objective justification. Without an economic or business justification an action is arbitrary and not bona fide.[94]

V. The Employer Benefit Plan Defense in Iowa

As of 1980, forty states, Puerto Rico and the District of Columbia had some type of age discrimination law pertaining to the hiring and discharging of workers.[95] Some of the state laws are patterned after the ADEA while others are token age discrimination statutes. The state acts patterned after the federal law offer varying degrees of protection for the older worker; the Iowa act offers a considerable amount of protection.[96]

The Iowa statute, like its federal counterpart, has an employer benefit plan exemption which allows the employer to discriminately retire older workers. The statute reads: "The provision of this chapter relating to discrimination because of sex or *age shall not be construed to apply to any retirement plan or benefit system* unless such plan or system is a mere subterfuge adopted for the purpose of evading the provisions of this chapter."[97] In 1979, the Iowa Civil Rights Act was amended to include the following: "[A] retirement plan or benefit system shall not require the involuntary retirement of a person under the age of seventy because of a person's age."[98]

---

94. *Id.*

95. These jurisdictions are: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Pureto Rico, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia and Wisconsin.

96. Iowa Code § 601A.6(1)(a) (1979).

> 1. It shall be an unfair or discriminatory practice for any:
>
> (a) *Person* to refuse to hire, accept, register, classify or refer for employment, to *discharge any employee*, or to otherwise discriminate in employment against any applicant for employment or any employee *because of the age*, race, creed, color, sex, natonal origin, religion or disability *of such* applicant or *employee*, unless based upon the nature of the occupation . . . .

Id. (emphasis added).

97. Iowa Code § 601A.13 (1979)(emphasis added).

98. Iowa Code Ann. § 601A.13(1) (West Supp. 1980). The differences between the Iowa Act and the ADEA should be noted. The Iowa Act pertains to *any* retirement or benefit system while the ADEA pertains to a bona fide benefit plan. The Iowa Act originally had no age limitation while the ADEA initially had an age ceiling of 65 which was later amended to 70. Finally, both amended versions prohibit involuntary retirement, but the Iowa Act only states that the plan "shall not require the involuntary retirement of a person under the age of seventy" based on a person's age while the ADEA will not "require or permit the involuntary retirement of an

This amendment, like the 1978 Amendments to the ADEA, is effective only as to discrimination occurring after the effective date of the amendments.[99]

The leading case in Iowa concerning the employer benefit plan defense is *Loras College v. Iowa Civil Rights Commission*[100] which involved discrimination prior to the Iowa amendments. This case is particularly interesting because it involved an employee who was mandatorily retired pursuant to a pension plan in which he was not a participant.[101] In this case the court found that Loras College did have a retirement plan which was not a subterfuge and that the benefit plan exception allowed involuntary retirement pursuant to the benefit plan.[102] The Commission agreed with these findings but contended "that the exception did not apply to the retirement of an employee not included in the plan."[103]

After a long explanation of the true intent of the legislature to determine the meaning of the language in Iowa Code section 601A.15 as it related to the Iowa Civil Rights Act, the Iowa Supreme Court held:

> that when an employer's "retirement plan or benefit system" offers an employee the option to participate in the benefits from such a plan and the plan requires the retirement of the employee at a given age, the conscious decision by the employee not to participate in the retirement benefits from the plan does not entitle the employee to be retained beyond the mandatory retirement age established by the plan. Such an option does not render the plan a "mere subterfuge adopted for the purpose of evading the provisions of" the Iowa Civil Rights Act.[104]

In reaching this decision the court flatly rejected the federal law which had held that a non-participating employee in a benefit plan could not be involuntarily retired pursuant to the ADEA.[105] The end result of the *Loras College* decision is to broaden the scope of permissible discrimination available to an employer under the Iowa Act which severely limits the Act's primary purpose to prevent age discrimination in the hiring and firing of workers.[106] This does not, however, place employees at the mercy of the employer. The 1979 Amendments establish that an employee cannot be mandatorily retired

---

individual" between the ages of 40 and 70 based on a person's age.

99. *See* Loras College v. Iowa Civil Rights Comm'n, 285 N.W.2d 143 (Iowa 1979).

100. 285 N.W.2d 143 (Iowa 1979).

101. *Id.* at 145.

102. *Id.* at 149-50.

103. *Id.* at 146-47. *See* Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971).

104. 285 N.W.2d at 146-47.

105. *See* note 103 *supra*. In rejecting the *American Hardware* case, the Iowa Supreme Court stated two reasons: The decision interpreted a federal statute exempting a "bona fide employee benefit plan," whereas the Iowa statute exempted "any retirement plan"; and the Iowa courts are not bound by a federal case construing a federal statute when the issue is an Iowa statute that must be construed by the Iowa court. *Id.* at 147.

106. *See* IOWA CODE ANN. § 601A.7 (West 1975).

before the age of seventy.[107] Since neither the Iowa Civil Rights Act pertaining to age discrimination nor the 1979 Amendments is concerned with whether non-participants of a benefit plan were covered by the exception, *Loras College* would indicate that they are covered.[108] Thus, an employer may practice age discrimination against a non-participant if the employer's conduct is pursuant to a benefit plan available to the employee. The better view is that age discrimination against a non-participant is a subterfuge to evade the purposes of the Act. Even assuming that a non-participant in an employee benefit plan can be subject to the plan's terms, the employer should at least be required to show an overriding business purpose or economic justification to subject a non-participant to discrimination under the plan.

VII. Conclusion

Amendments to the Age Discrimination in Employment Act and the Iowa Civil Rights Act have attempted to remedy the evils of involuntary retirement via the employer benefit plan defense. Unfortunately, these clarifications have not fulfilled this purpose. Many of the problems that were supposed to be remedied still remain. Definitions of the terms "bona fide" and "subterfuge" lack the conclusiveness needed for definiteness. Even though involuntary retirement per se may have been legislatively removed, the question still remains as to how an employer can discriminate through the benefit plan defense short of involuntarily retiring the employee. At this time there is only one absolute limit; discrimination can not be based solely upon an employee's age.

Craig M. Heller

---

107. *See id.* § 601A.13(1) (West Supp. 1980).
108. *See* 285 N.W.2d at 149.