CIVIL RIGHTS—A COMPANY'S POLICY REQUIRING THE RETIREMENT OF CERTAIN EMPLOYEES UNDER THE AGE OF SEVENTY FOR REASONS ALLEGEDLY ATTRIBUTABLE TO PUBLIC SAFETY MUST SATISFY THE TWO-PRONG TEST ESTABLISHED IN TAMIAMI BEFORE IT CAN QUALIFY AS A BONA FIDE OCCUPATIONAL QUALIFICATION UNDER THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT.—*Western Air Lines, Inc. v. Criswell* (U.S. Sup. Ct. 1985).

In July of 1978, Charles Criswell and Rulon Starley, both of whom were career pilots for Western Air Lines, Inc., celebrated their sixtieth birthdays.[1] According to the "Age 60 Rule," a regulation promulgated by the Federal Aviation Administration (FAA), certified air carriers are prohibited from utilizing pilots or co-pilots on commercial flights after they reach the age of sixty.[2] Accordingly, for both Criswell and Starley, their sixtieth birthdays meant mandatory retirement from Western Air Lines.[3]

Prior to their sixtieth birthdays, both pilots had sought to evade

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1. Criswell v. Western Air Lines, Inc., 514 F. Supp. 384, 387 (C.D. Cal. 1981). At the time of his sixtieth birthday, Criswell had been a pilot for Western for 37 years. *Id.* Starley had been with Western for 32 years as a co-pilot and pilot at the time of his sixtieth birthday and involuntary retirement. *Id.* at 388.

2. 14 C.F.R. § 121.383(c) (1985). The regulation states: "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations . . . if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations . . . if that person has reached his 60th birthday." *Id.* This regulation applies to all domestic, flag and supplemental air carriers and commercial operators of large aircraft which are commonly referred to as "Part 121 Operators." *Id.* This regulation, which was first adopted by the FAA in 1959, has remained unchanged inspite of coming under recent scrutiny. 49 Fed. Reg. 14,695 (1984). In 1982, the FAA invited public comment on whether the "Age 60 Rule" was still warranted for pilots flying for Part 121 operators. Notice No. 82-10, 47 Fed. Reg. 29,782 (1982). Two years later, after having reviewed all the material it received, the FAA concluded that:

> [T]o maintain the highest standards of safety for Part 121 operations, as airlines are required to do, airline pilots should not be permitted to serve past age 60. This is based on the findings made by the FAA in 1959 that were supported by the [National Institute of Aging] study and by a number of comments. Those findings are that advanced age does indeed adversely affect the level of safety for Part 121 operations and that currently no medical or performance tests are available which afford a sufficiently reliable basis for predicting or precluding those adverse effects in any individual case . . . .
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> Accordingly . . . the present age limit for air carrier pilots in command and seconds in command is being retained. While science and technology may at some future time develop accurate, validly selective tests which would allow a scientific study to be made to accurately determine whether the age 60 rule should be changed, safety cannot be compromised in the meantime for lack of such tests.

49 Fed. Reg. 14,693, 14,695 (1984). While this FAA regulation is not itself at issue in *Western*, its validity has been expressly upheld in circuit court decisions. *See, e.g.*, Keating v. FAA, 610 F.2d 611 (9th Cir. 1979).

3. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 388-89.

mandatory retirement by bidding on flight engineer positions[4] in accordance with applicable procedures contained in the bargaining agreement then in effect.[5] The position of flight engineer is not included under the FAA's "Age 60 Rule."[6] Flight engineers, however, were grouped with pilots and co-pilots in Western's retirement plan.[7] Accordingly, the company ultimately denied both Criswell's and Starley's downbids for reassignment on the grounds that all three classes of flight deck positions had to retire at sixty years of age.[8]

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4. *Id.* at 387-88. The flight deck crew on a wide-bodied aircraft such as a McDonnell-Douglas DC-10 or a Boeing-727 normally consists of three positions: the pilot (captain), the co-pilot (first officer) and the flight engineer (second officer). *Id.* In *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985), the Court described the duties of the position by noting that the flight engineer "usually monitors a side-facing instrument panel. He does not operate the flight controls unless the captain and the first officer become incapacitated." *Id.* at 618. The district court which first heard the charges filed by Criswell, Starley and a career flight engineer, Albert Ron, distinguished the duties of the flight engineer as follows:

> On a wide-bodied aircraft the flight engineer sits at his own instrument panel. His function during normal flight is to monitor and adjust a number of the systems which are necessary to the operation of the aircraft, such as the hydraulic and electrical systems. He does not manipulate the flight controls.

Criswell v. Western Air Lines, Inc., 514 F. Supp. at 390.

5. *Id.* at 387-88. According to the bargaining agreement, all flight deck vacancies were to be filled according to strict seniority. *Id.* at 391. Pilots, co-pilots and flight engineers were all included in the same seniority list. *Id.* At the time their downbids were denied, both Criswell and Starley were at or near the top of the pilot seniority list. *Id.*

6. 49 Fed. Reg. 14,695 (1984). Flight engineers have never been included under the FAA's "Age 60 Rule" although at the request of Congress that agency did reconsider its position in regard to that particular flight deck class when it reviewed the rule in 1984. *Id.* at 14,692. After analyzing the data it received at that time, the agency stated it was:

> unable to determine that flight engineers should be subject to the same age limits as pilots in command and seconds in command. While a flight engineer has important duties which contribute to the safe operation of the airplane, he or she may not assume the responsibilities of the pilotin command. In the event of the incapacitation of the pilot in command, the second in command would be expected to assume command of the aircraft.

Id. at 14,694 (1984). The agency, furthermore, determined not to propose any specific age beyond which flight engineers should not be permitted to serve stating that "[a]vailable data is not sufficient in and of itself to support imposing a mandatory retirement age on flight engineers." *Id.* at 14,695.

7. Criswell v. Western Airlines, Inc., 514 F. Supp. at 388.

8. *Id.* In November, 1977, Criswell had made a bid for a flight engineer's position prior to his sixtieth birthday. *Id.* at 387. "[His] bid was rejected . . . solely because he was approaching age 60 and because Western had a policy which required all flight deck personnel to retire at age 60." *Id.* at 388.

Starley had made his request for reassignment in September, 1977 when he learned that a number of second officer positions would become available because of Western's having purchased a number of new planes. *Id.* Starley's bid was initially accepted; and he actually had some discussions with employer representatives regarding the training he would need before he would be prepared to assume his new responsibilities as a flight engineer. *Id.* Western withdrew its earlier bid of acceptance in February, 1978 saying that it had been granted in error and that Starley would be retired at the time of his sixtieth birthday in accord with the pilot pension

Similarly, Albert Ron, a career flight engineer for Western,[9] also reached his sixtieth birthday in 1978 and was retired from his position by his employer, in spite of his request to continue on past that time.[10] In a letter to Plaintiffs Ron and Starley, Western stated it was its "considered judgment after examining all of the applicable statutory law[11] that since you have been a member of our pilot retirement plan, that we cannot continue your employment beyond the normal retirement date of age 60".[12]

These three involuntary retirees joined together[13] in a common action

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plan which had been negotiated with the union. *Id.*

9. *Id.* The common career progression for flight deck personnel throughout the airline industry is for flight engineers to promote to co-pilot (first officer) positions and from there to pilot (captain) positions. *Id.* at 391. Plaintiff Ron was an exception to this general rule inasmuch as he had neither sought, nor had his employer required him, to advance upwards. *Id.* at 388. At the time of his sixtieth birthday in 1978, he had been employed by Western for thirty-three years and had been a flight engineer since 1954. *Id.*

10. *Id.*

11. While Western's letter does not precisely identify the "statutory law" to which it is referring, it is quite possible that it was referencing the original language of one section of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(f)(2) (1982). Until 1978, this section of the act did permit employers to mandatorily retire persons below the age of sixty-five (the maximum protected age limit in the original statute) if such actions were done in accordance with "the terms of a bona fide . . . employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this [act]." *Id.* That an airline could lawfully retire employees when they reached their sixtieth birthdays under this retirement plan exception had been specifically upheld by the Supreme Court in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977).

However, on April 6, 1978, three months before Criswell and Starley were to reach their sixtieth birthdays, Congress had acted to sharply limit the scope of the retirement plan exception to the ADEA by adding to the statutory provision the restriction that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2) (1982).

It is quite possible that when it mandatorily retired the plaintiffs in July, 1978, Western simply did not realize that the ADEA had changed and that its company policy that required flight engineers to retire at sixty years of age would have to be defended on another basis if it could be defended at all. *See* Trans World Airlines, Inc. v. Thurston, 105 S. Ct. at 616. A number of airline companies who had also previously grouped their second officer postions with pilots and co-pilots in their mandatory retirement plans did perceive immediately that the 1978 amendments affected that grouping and took steps to separate these classifications. *Id.* In any case, the record is clear that the basis for plaintiffs' involuntary separation from Western was solely "the provision in the pension plan regarding retirement at age 60." Western Air Lines, Inc. v. Criswell, 105 S. Ct. 2743, 2747 n.4 (1985).

12. *Id.*

13. In addition to filing a joint action in district court, Criswell and Starley filed a union grievance over the issue of their employer's refusal to accept their downbids under the terms of their bargaining agreement since they had been the most senior bidders. Criswell v. Western Air Lines, Inc., 709 F.2d 544, 547 (9th Cir. 1983). An arbitration board eventually ruled for the company. *Id.*

The board's decision was heavily influenced by Western's testimony that downbidding was neither envisioned by the employer nor discussed at the negotiations table as being a concept included within the contract provisions. *Id.* Moreover, Western testified that its past practice

in California federal district court against their former employer and alleged that Western's grouping of flight engineers together with pilots and co-pilots in its mandatory retirement policy was violative of the Age Discrimination in Employment Act (ADEA).[14] In addition to the common complaint they filed together with Ron, Criswell and Starley alleged that Western's refusal to accept their downbids for flight engineer positions to which they were entitled by seniority was also discriminatory on the basis of age.[15] All three plaintiffs sought monetary damages as well as equitable relief including reinstatement in permanant flight engineer postions.[16]

While conceding that plaintiffs had established a *prima facie* case of age discrimination,[17] Western maintained that its mandatory retirement policy was justified under the bona fide occupational qualification (BFOQ) exception[18] which is an affirmative defense specifically provided for in the ADEA itself.[19] It was Western's contention that the mandatory retirement

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in this area was to allow downward transfers only "in rare and carefully defined circumstances." *Id.* This testimony was subsequently refuted by the plaintiffs in district court. *See infra* note 18.

Once it learned of the arbitration board's decision, Western made a motion for summary judgment to the district court, claiming that the board's finding should be given the same weight as a statutory, bona fide occupational qualification (BFOQ) exemption. *Id.* at 547-48. The district court overruled the motion, concluding "that material questions of fact remained on the question of whether age was a substantial and determinative factor in the denial of the downbids." Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2747 n.3. On appeal, the Ninth Circuit sustained this ruling, stating that arbitral rulings are not conclusive in a court of law but are to be weighted "as the trial court deemed appropriate." Criswell v. Western Air Lines, Inc., 709 F.2d at 548. Western's contention in the lower court that the arbitration board's ruling be given presumptive weight is not addressed by the Supreme Court in its decision.

14. 514 F. Supp. at 386. The plaintiffs' specific allegation was that Western's age-sensitive policy violated an explicit prohibition of the ADEA: "It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623 (a)(1) (1982).

15. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 391 n.13.

16. *Id.* at 387. In addition, all three plaintiffs sought preliminary injunctions, *pendente lite*, which would allow them to work as flight engineers. *Id.* The application of Ron, who had been a flight engineer at the time of his sixtieth birthday and forced to retire, was granted. *Id.* He continued to work as a second officer throughout the entire judicial proceedings "without any complaint from flight operations management respecting his job performance." *Id.* at 388. The applications for the preliminary injunctions on behalf of retired pilots Criswell and Starley were denied. *Id.* at 387.

17. *Id.* at 388.

18. *Id.*

19. 29 U.S.C. § 623(f)(1) (Supp. 1984). The relevant language provides: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under . . . this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ." *Id.* In addition to the BFOQ defense, this section of the ADEA lists two other exceptional situations in which employees under the age of seventy may be involuntarily retired: 1) section 623(f)(2), which deals with retirement and pension plans, *see supra* note 7; and 2) section 623(f)(3), which excludes employer actions taken to "discharge or otherwise discipline an individual for good cause." *Id.* at § 623(f)(3) (1982).

of flight engineers was a defensible policy in light of the company's responsi-

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While the Supreme Court explicitly granted certiorari in *Western* to hear arguments centering on the BFOQ defense, that affirmative defense was not the only one the company presented at the trial court level. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 388-389. Western had also sought to defend its policies on the basis of the last clause in 29 U.S.C. section 623(f)(1), the same paragraph in which the BFOQ provision is found, which provides for an exception "where the differentiation [in treatment] is based on reasonable factors other than age" (RFOA). *Id.*

In this regard, the airline company presented arguments attempting to show that all three classes used in the flight deck formed a logical training progression. *Id.* at 391. With the exception of a handful of career flight engineers such as Plaintiff Ron, see note 8 *supra*, the company contended that all second officers were expected to bid on co-pilot postions as these came open. *Id.* Co-pilots were expected to become pilots after a certain period of time. *Id.* Employees who refused to advance when higher postions were available were, according to the company's testimony, terminated under the company's "up-or-out system." *Id.* To a large extent, the system itself provided the impetus for the required upward progression inasmuch as each promotion involved more salary and prestige for the employee. *Id.* Western emphasized that these elements of upward mobility and upward movement were directly related to safety, since this progression logically resulted in having the company's most senior and best trained staff members rising to the most responsible positions in the company's largest aircraft. *Id.* In other words, Western postulated that a policy which would generally allow demotions such as plaintiffs were seeking would be detrimental because downbidders would, in effect, be blocking positions which ideally would have been filled by less senior, but upwardly mobile, personnel for training purposes. *Id.* Western insisted that from a long range perspective, this policy would mean, the company would be forced to fill future, key co-pilot and pilot vacancies with less qualified transferees than it might otherwise have had available. *Id.* Such a situation might logically affect the company's safety record. *Id.*

For these reasons, Western testified, its past practice had been to allow downbids "only in a few and carefully controlled circumstances." *Id.* at 392. Therefore, Western's position before the district court was that even if it did not prevail in its BFOQ affirmative defense, its ROTA argument, in the alternative, would justify its policy of retiring flight engineers at the age of sixty. *Id.* at 391.

Plaintiffs were able to refute the company's contentions by providing evidence that Western had, in fact:

> permitted, and in some cases even required downbidding in hundreds of instances in a wide variety of circumstances and almost without exception by younger pilots. The only circumstances in which Western has consistently denied downbids is by captains nearing age 60. During the period 1972 to 1979, Western has permitted downbids by or involuntarily downgraded more than 400 pilots.

Id. at 392. Given this unrefuted evidence, the district court concluded that Western's "downbid policy was administered in such a way as to have a disparate impact on pilots nearing their sixtieth birthday." *Id.*

As noted above, the Supreme Court did not reach the company's RFOA defense in its decision. Western Air Lines, Inc. v. Criswell, 105 S. Ct. 2743 (1985). Given Western's past practice of allowing extensive downbidding, it is somewhat questionable whether its claims could have prevailed in any case in this regard. In a recent case, however, the Fifth Circuit found in favor of American Airlines, which had defended its policy of mandatory retirement of flight engineers at age sixty along precisely these same RFOA lines. Johnson v. American Airlines, Inc., 745 F.2d 988 (5th Cir. 1984) *cert. denied*, 105 S. Ct. 3500 (1985). In *Johnson*, American Airlines had an "up-or-out" policy that basically required all crew members to continually train towards qualifying for the next higher flight deck position. *Id.* at 991. A person who could not progress towards a higher position had to either tranfer to a non-flight deck position, resign, or

bility as a commercial air passenger carrier charged by law to deliver its services "with the highest possible degree of safety in the public interest."[20] Contending that all cockpit positions were constantly engaged in carrying out critical responsibilities, Western's primary defense was that passenger safety would be endangered if a flight engineer were to suffer a suddenly disabling medical emergency such as a heart attack and that the likelihood of such an event happening increased with a person's age.[21] Plaintiffs countered that the medical evidence offered by Western in support of its retirement policy was not conclusive and contested it by presenting medical experts of its own.[22] Plaintiffs also demonstrated that Western frequently had

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be terminated. *Id.* Plaintiffs in *Johnson* were twenty-two former flight engineers who had been forced to leave their positions at age sixty because of American's policy. *Id.* The airline's RFOA argument was that because these employees could never qualify to become first or second officers because of the FAA's "Age 60 Rule," they in effect would be blocking seats needed for training purposes which would potentially, in turn, "endanger the safety of American flights by disrupting crew coordination . . . in times of emergencies." *Id.* The company also argued that former pilots who had been allowed to remain in the flight deck as engineers might also "endanger the safety of American flights . . . by reverting to captaincy behavior." *Id.* Sustaining the lower court's holding for the defendant company in this case, the Fifth Circuit Court of Appeals specifically held that American had presented sufficient evidence to establish a RFOA defense. *Id.* at 325.

20. 49 U.S.C. § 1421(b) (Supp. 1985).

21. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 389. During the presentation of its case, Western's expert witness argued that the science of medicine has not advanced to the point where it is able to predict, with any degree of accuracy, the likelihood that a given individual would experience a "precipitous decline in . . . faculties . . . especially . . . the possibility of a 'cardiovascular event' such as a heart attack." Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2748. Even though the second officer (flight engineer) is never called upon to pilot the plane, Western pointed out that the position of second officer does have a number of important functions to perform during flight which would have to absorbed by the other officers; and, in any event, there would be considerable disruption caused in the cockpit should the flight engineer suddenly become medically disabled. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 390. The credibility of Western's expert was somewhat diminished, however, in the opinion of the trial judge who noted that the witness, a former FAA Deputy Federal Air Surgeon, "had never recommended or advocated" that the "Age 60 Rule" be extended to flight engineers when he was with that agency. *Id.* at 390. The Supreme Court took note of this seeming inconsistency on the part of the witness as well. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2748 n.8.

22. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 389. Plaintiffs' witnesses included a medical doctor of aerospace medicine and aging, as well as a professor of psychology who had specialized in the psychology of aging, cognition and gerontology. *Id.* To rebut the evidence offered by Western's witness, plaintiffs' witnesses testified that physiological deterioration is not caused by age, nor does it necessarily accelerate in all persons between the ages of sixty and seventy years. *Id.* These experts also opined that "[t]he aging process itself, which commences at conception, occurs at different rates in different individuals and the differences which result from these differential rates becomes increasingly pronounced in increasingly older age groups." *Id.* To support their thesis, plaintiffs' experts noted that it is not uncommon to find individuals in the protected age groups to be in better health than their younger counterparts. *Id.* Noting that sudden physiological deterioration is caused by disease rather than aging, one of the experts testified "it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over [sixty], were physically qualified

relied on health screenings in making fitness determinations for pilots and co-pilots on an individual basis.[23] Finally, plaintiffs introduced evidence that

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to continue to fly." *Id.*

In regard to the individual testing issue, another of Western's contentions before the district court was that the additional medical testing which might be necessary to pinpoint precisely which individuals over sixty years of age might not be physically fit was effectively blocked by specific bargaining agreement language prohibiting the employer from requiring "a more stringent medical examination than that required for an FAA second class airman's certificate." *Id.* at 397. The ADEA itself, moreover, "prohibits a more stringent medical examination requirement for plaintiffs than for younger pilots." *Id.*

The district court noted the potential irony involved should Western be compelled by a court decision to begin making retirement decisions on the basis of individual examinations but at the same time prohibited from doing so by a negotiated agreement. *Id.* To remedy this situation, the district court explicitly held in its ruling that Western would be permitted to conduct, at its own expense, appropriate examinations until contract negotiations recommenced. *Id.* The lower court noted that at that point the company would be able to bargain for whatever concessions it thought necessary to conduct the physicals it determined to be important. *Id.*

23. *Id.* at 390. Western had claimed that individual health screenings could not be relied on in making employment decisions relative to whether a specific flight engineer might be able to continue working past the age of sixty. *Id.* at 389. Plaintiffs were able to show that their employer, as well as the FAA, had routinely used such screenings to determine pilot fitness. *Id.* at 390.

As an example, plaintiffs pointed to the federal requirement that pilots have to maintain a first class medical certificate issued by the FAA on the basis of a physical examination. *Id.* Plaintiffs argued that the airline industry, in general, puts great faith in such examinations, as illustrated by the fact that there had been cases where pilots, grounded for a time as the result of some disabling condition such as alcoholism or cardiovascular disease, later had been recertified and allowed to resume flying as captains. *Id.* Plaintiffs also pointed to a number of cases in which pilots who had received only a second class medical rating from the FAA had been downgraded to flight engineer positions. *Id.* This past practice of Western suggested that the company was willing to accept a less stringent fitness standard for flight engineers than for pilots. *See id.*

The district court, in its ruling, commented directly on this point as follows: "There is nothing in the record to indicate that these flight deck crew members [pilots who had been unable to secure a first class medical rating but who were allowed to serve as flight engineers] are physically better able to perform their duties than flight engineers over age 60 who have not experienced such events or that they are less likely to become incapacitated." *Id.*

In a related argument, Western implicitly contended that a medical emergency suffered by a flight engineer during flight might endanger the entire aircraft. *Id.* A statistical analysis of airline accidents showed, however, that no airline accident which occurred from 1961 to 1982 had been traced to a medical emergency or incapacitation involving a flight engineer. *Id.*

The court's findings in this regard were subsequently supported by conclusions reached in the FAA's study in 1984. 49 Fed. Reg. 14,692 (1984). After reviewing the comments it had received on the question of whether its "Age 60 Rule" should be expanded to flight engineers, the FAA determined that there did not seem to be a basis for doing so. *Id.*; *see also* note 6, *supra*. Citing statistics it received from the Flight Engineers International Association (FEIA) and the National Transportation Safety Board (NTSB) covering the years from 1962 to 1981, the FAA stated:

> These figures indicate that flight engineers have been cited as a causal or contributing factor in only 17 (1 percent) out of the 1,616 total air carrier accidents or incidents during the period; flight engineers were involved in 5 (3 percent of the 164 fatal acci-

a number of airline companies allowed their flight engineers to continue to work past the age of sixty "without any reduction in their safety record" as a result.[24]

After fifteen days of testimony, the jury returned a verdict for the plaintiffs and awarded both monetary and equitable damages.[25] Western ap-

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dents); and flight engineers have been cited as a cause in only 13 (0.8 percent) of all accidents or incidents and as a factor in 4 cases. FEIA states that in its review of the reports, none of these 13 involved a flight engineer over age 60. FEIA also states that of the five cases of in-flight incapacitation in the last 10 years, none jeopardized safety.

49 Fed. Reg. 14,694 (1984). The Supreme Court also made reference to this FAA report in its decision. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2746-47.

24. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 390. In its decision, the district court noted:

> A number of other commercial air carriers, including American, TWA and Pan American, have flight engineers older than age 60 flying the line. The evidence indicates that there are in excess of 200 such flight engineers on wide-bodied aircraft. Taking the airline pilot population as a whole, approximately one-half of them are employed by carriers which do not impose an Age 60 Rule on flight engineers.

Id.

Even if the plaintiffs in *Western* had not entered evidence that other airlines were allowing their flight engineers to continue past the age of sixty, the Supreme Court Justices would have been aware of this fact from a case it had decided six months earlier. Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613 (1985). In fact, the central issue in *Thurston* grew directly out of TWA's adoptions of a policy which *allowed* its flight engineers to continue to work in that classification past the age of sixty. *Id.* at 619. The question in that case was whether a pilot close to retirement could bump a less senior flight engineer out of a position or whether the pilot had to wait until such time as there was a flight engineer vacancy to which she might demote. *Id.* at 620. According to TWA's policy, pilots were allowed to bump down into any position held by a less senior flight engineer for any reason except retirement. *Id.* at 619. Pilots who were demoting because they were close to the age of sixty and wanted to avoid retirement were forced to wait for a vacancy. *Id.* If none occurred prior to the time they turned sixty, they were forced to retire. *Id.* Such a policy, the plaintiffs in that case argued, clearly had a discriminatory impact on persons who were in a protected class for reasons of age. *Id.* at 620. The Supreme Court agreed: "The ADEA requires TWA to afford 60-year-old captains the same transfer privileges that it gives to captains disqualified for reasons other than age." *Id.* at 626.

25. Criswell v. Western Air Lines, Inc., 514 F. Supp. at 387. Criswell received $60,393.87 and Starley received $52,088.94 in back wages. *Id.* Ron, who had been earlier reinstated as a flight engineer pending the outcome of the litigation, was awarded $5000.00 in back wages. *Id.* Furthermore, the jury found Western's discriminatory actions to be "willful" in regard to each plaintiff's claim. *Id.*

After the jury verdict was in, the district court held an evidentiary hearing on the issue of whether and to what extent equitable relief would be proper. *Id.* On the basis of its findings and the evidence presented to the jury, the court directed that plaintiffs Criswell and Starley be "immediately returned to Western's payroll at salaries fully reflecting their positions and seniority." *Id.* at 394. They were each to be given proper training and allowed "to select such DC-10 second officer positions as they would have been entitled to if they had not been involuntarily retired." *Id.* The court also awarded $313,309 in attorneys' fees. All damages and equitable and fee awards made by the district court were sustained on appeal. Criswell v. Western Airlines, Inc., 709 F.2d 544, 556 (9th Cir. 1983).

It should also be noted that, while *Western* was never amended to become a class action

pealed this ruling to the Ninth Circuit Court of Appeals alleging, *inter alia*,[26] that the jury had been misinstructed in terms of the company's BFOQ defense[27] and that its retirement policy was a BFOQ under the law.[28]

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suit, the district court did grant plaintiffs' judgment request for systemwide relief: "that Western be enjoined generally from refusing to permit flight deck crew members to work as second officers after age 60." Criswell v. Western Air Lines, Inc., 514 F. Supp. at 396.

26. In addition to the BFOQ defense, Western's issues on appeal before the Ninth Circuit included the assertions: 1) that the bargaining agreement language did not permit downbids, and that, therefore, the company had the equivalent of an "absolute statutory exemption" to deny the requests of Criswell and Starley, *see supra* note 12; 2) that ALPA, the pilots' union, should have been joined as an indispensible party; 3) that the systemwide relief requiring Western to allow its flight engineers to continue to work beyond the age of sixty was not sanctioned; and 4) that the award of attorneys' fees and prejudgment interest were in error. Criswell v. Western Air Lines, Inc., 709 F.2d 544, 547 (1983). The Ninth Circuit rejected Western's position on all of these points of appeal. *Id.* at 546.

27. *Id.* The instructions given by the district court bench were as follows:

> If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defenddant's defense that age is a "bona fide occupational qualification" for its Second Officers (flight engineers). This defenseis usually abbreviated "BFOQ". The BFOQ defense is available only if it is reasonably necessary to the normal opertion-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence-of Western's business is the safe transportation of air passengers.
>
> The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.
>
> One method by which defendant Western may establish a BFOQ in this case is to prove:
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> (1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely; and
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> (2) that some Second Officers (flight engineers) over age 60 possess traits of physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.
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> In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978.

Criswell v. Western Air Lines, Inc., 709 F.2d 544, 549 (9th Cir. 1983).

28. *Id.* Relative to its appeal to the Ninth Circuit on the BFOQ issue, Western made five specific objections to the instructions given to the jury:

> (1) It argues that the court erred in instructing that the BFOQ defense was available only if the defendant's behavior was "reasonably necessary"and contends instead that a "rational basis in fact" would have been sufficient. (2) It objects that no elucidation of the term "reasonably necessary" was given to the jury, arguing that such is required since it is a legal term of art. (3) It objects to the description of the "normal-operation-essence" of its business as "the safe transportation of air passengers," contending that it is statutorily bound to a much higher standard of safety. (4) It objects further that the term "normal" might have been understood by the jury to encompass only routine operations rather than including periods of emergency. (5) Finally, it objects to the entire last two paragraphs, which guide the jury in how Western might

The Ninth Circuit, in affirming the lower court's decision in all respects, specfically ruled that the instruction the jury received regarding the BFOQ defense "tracks both the language and the spirit of circuit law on this matter."[29] Western subsequently petitioned to the Supreme Court and certiorari was granted.[30] The United States Supreme Court *held*, affirmed.[31] An employer who is attempting to defend an age-sensitive policy as a BFOQ exception to the ADEA must demonstrate: (1) that the age-sensitive job qualification is "reasonably necessary to the essence of the business;" and (2) that "the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry."[32] *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985).

At the heart of Western's petition was its contention that the lower court's jury instructions had construed the ADEA's requirement that a BFOQ be "reasonably necessary to the normal operation of the particular business"[33] too narrowly. The Court approached this central issue by noting that the legislative history of the Age Act grew out of a recognition by both the executive and legislative branches that there was "widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability."[34] The Court found that the preamble to the ADEA explicitly stated that the law's intent was to "prohibit arbitrary age discrimination in employment"[35] and that the 1978 Amendments clearly underline Congress' intent that "the policies and substantive provisions of the [ADEA] apply with especial force in the case of mandatory retirement provisions."[36]

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establish the BFOQ defense, arguing that it should not have been required to reconstruct what it calls "the medical rationale underlying the FAA's Age 60 Rule."

Id. at 549-50. The circuit court discusses and dismisses each of these specific appeals in its decision. *Id.* at 550-51.

29. *Id.* at 550.

30. 469 U.S. 815 (1984). The Supreme Court granted certiorari to hear arguments on the "question [of] . . . whether the jury was properly instructed on the elements of the BFOQ defense." Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2746. In doing so, the Court specifically agreed to consider whether "the instruction on the BFOQ defense was insufficiently deferential to the airline's legitimate concern for the safety of its passengers." *Id.* at 2749.

31. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2756.

32. *Id.* at 2751.

33. 29 U.S.C. § 623(f)(1) (1982).

34. Western Air Lines v. Criswell, 105 S. Ct. at 2749 (quoting REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 9 (1965)).

35. *Id.* (quoting 29 U.S.C. § 621(b) (1982)).

36. *Id.* at 2750. In its decision, the Court included the following block quotation from one of the legislative committees which was considering the proposed amendments to the ADEA:

> Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be re-employed have

In addition to finding that Congress' remedial intent was clear in the history and the language of the ADEA, the Court found further support for its narrow construction of the BFOQ provision[37] in the interpretive guidelines; these were promulgated soon after the effective date of the ADEA by the Secretary of Labor, who had been given the responsibility for enforcing the ADEA by the original legislation.[38] Those guidelines explicitly stated that the BFOQ exception was to be of "limited scope and application" and must be construed narrowly.[39] This same narrow construction of the BFOQ language was adopted by the Equal Employment Opportunity Commission (EEOC) when it took over responsibility for enforcing the ADEA in 1981: "It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed."[40] After considering the evidence furnished by the law's language, congressional intent and the consistent interpretative guidelines issued by the regulatory agencies charged with its administration, the Court in *Western* concluded that "like its Title VII counterpart, the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of age discrimination contained in the ADEA."[41]

The Court in *Western* then turned its attention to an examination of relevant caselaw in the circuits to determine what contours had been defined in terms of the "extremely narrow" BFOQ exception contained in the ADEA, and focused particularly on the leading case of *Usery v. Tamiami Trail Tours, Inc.*[42] In *Tamiami*, the Fifth Circuit was asked to decide if a bus company's refusal to consider any applicant over forty years of age for its driver positions was violative of the ADEA.[43] The company argued that

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> a much more difficult time finding a new job than younger persons.
>
> Society, as a whole, suffers from mandatory retirement as well. As a result of mandatory retirement, skills and experience are lost from the work force resulting in reduced GNP. Such practices also add a burden to Government income maintenance programs such as social security.

Id. (quoting H.R. Rep. No. 527, 95th Cong. 2 (1977)). It was the 1978 Amendments which sharply curtailed the exception loophole formerly afforded employers who retired otherwise protected class employees under bona fide retirement plans. 29 U.S.C. § 623(f)(2) (1982). *See also* note 11, *supra*.

37. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2750. The Court notes that in drafting the BFOQ exception for the ADEA "Congress . . . [borrowed the] concept and statutory language from Title VII of the Civil Rights Act of 1964." *Id.* The specific, ancestral language in Title VII provides for an affirmative defense "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1982).

38. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2750.

39. 29 C.F.R. § 860.102(b) (1985).

40. 29 C.F.R. § 1625.6(a) (1985).

41. Western Air Lines Inc. v. Criswell, 105 S. Ct. at 2750-51.

42. 531 F.2d 224 (5th Cir. 1976).

43. *Id.* at 227.

its screening practice was a BFOQ for reasons related to the protection of public safety.[44]

In reaching its decision, the *Tamiami* court developed an analytical structure consisting of two parts. In its initial analysis, that court looked at whether the specific "job qualifications which the employer invokes to justify his discrimination . . . [were] *reasonably necessary* to the essence of his business — here, the *safe* transportation of bus passengers from one point to another."[45] Such a consideration was intended to eliminate those cases in which the qualifications at issue were so peripheral to the company's central mission that to allow a discriminatory screening device to be based on them would, on balance, unfairly deny an otherwise qualified person the opportunity to compete for vacancies.[46]

Once an employer cleared this threshold hurdle, the *Tamiami* Court held it still had a second burden: that of establishing an objective nexus between the position's now-validated job qualifications and any age-sensitive screening criteria.[47] A company could satisfy this second prong of inquiry in one of two ways:[48]

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44. *Id.* The bus company's safety argument grew out of its practice of assigning the preferred and regular routes to its drivers on the basis of seniority. *Id.* at 231. Newer drivers were expected to fill in for senior drivers on short notice. *Id.* New drivers also drew most of the long charter trips which were physically demanding and exhausting. *Id.* A new driver could be expected to have to work under these conditions for up to twelve years, approximately the amount of seniority a driver needed before he was able to successfully bid on a regular route. *Id.* The bus company argued that it was predictable that a number of persons over the age of forty could not hold up under the physically exhausting and stressful work demanded of new drivers over such an extended period of time. *Id.* at 228. The risk of a sudden, incapacitating medical event which would jeopardize the lives of passengers statistically increased with the driver's age, the bus company pointed out; and since it was impossible to determine which applicants over forty years of age could hold up under such strain, Tamiami argued its under-forty requirement for applicants was a defensible BFOQ. *Id.* at 237. The trial judge ruled for the bus company. *Id.* at 228. Its decision was affirmed on appeal. *Id.* at 238.

45. *Id.* at 236.

46. *Id.* The *Tamiami* Court adopted the first of its tests from a decision it had made in a Title VII sex discrimination case, Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). In that case, Pan American had an employment policy which excluded males from working as cabin attendants. *Id.* at 387. It attempted to defend the practice as a BFOQ arguing that males could not attend to certain psychological needs of passengers as adequately as females. *Id.* The Fifth Circuit rejected the company's argument by holding that "the primary function of any airline is to transport passengers safely from one point to another." *Id.* at 388. It then found that "[b]efore sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that [sic] possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential." *Id.* at 388-89.

47. Usery v. Tamiami Trial Tours, Inc., 531 F.2d at 236. In *Tamiami*, the appellate court found: "No one has suggested that Tamiami's stringent job qualifications . . . for the position of bus driver are either unrelated to the essence of the business or unreasonable in light of the safety risk. Tamiami has unquestionably satisfied the *Diaz* prong of the BFOQ test." *Id.*

48. *Id.* The *Tamiami* Court adopted the second prong of its analysis from another sex

> whether it had reasonable cause, that is, a factual basis, for believing that all or substantially all persons over 40 would be unable to perform safely and efficiently the duties of the job involved, *or* whether it is impossible or impractical to deal with persons over 40 on an individualized basis.[49]

After examining the two-pronged process set forth in *Tamiami*, the Supreme Court in *Western* observed that the same, bifurcated process was implicitly envisioned by members of the Congress in discussing the 1978 Amendments to the ADEA,[50] that "every Court of Appeals that has confronted a BFOQ defense based on safety considerations has analyzed the problem consistently with the *Tamiami* standard"[51] and that this judicial standard paralleled the one promulgated by the EEOC.[52] For these reasons,

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discrimination case it had earlier decided, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). In that case, the court had ruled that it was a discriminatory practice for a company to categorically refuse to consider a female applicant for the position of switchman without any attempt to determine whether that individual could not, in fact, carry out the physical demands of the job. *Id.* at 235.

49. *Id.* In *Tamiami*, the court upheld the bus company's hiring policy on the basis of its evidence that "the passenger-endangering characteristics of over-40-year-old job applicants cannot practically be ascertained by some hiring test other than automatic exclusion on the basis of age." *Id.* at 237.

50. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2752. The Court includes a quotation from a Senate Committee Report which expressed some concern that the sharp curtailment envisioned in the then-proposed amendments to the retirement plan exception, *see supra* note 11, would have an ill-advised impact in certain situations:

> For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews or current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.
>
> Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age.

Id. The Court finds this legislative intent to be mirrored in the elements set out in *Tamiami*. *Id.*

51. *Id.* The Court's observation that the circuits have all adopted the *Tamiami* standard ignores the fact that for a number of years there was a clear split of authority in the circuits. Reed, *Age Discrimination of Airline Pilots: Effects of the Bona Fide Occupational Qualification*, 48 J. AIR L. & COM. 383-405 (1983). Until it adopted the *Tamiami* elements in *Orzel v. City of Wauwatosa Fire Dep't.*, 697 F.2d 743 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983), the Seventh Circuit led a vociferous minority which tended to grant employers a far greater degree of deference than other circuits where public safety was involved. *Id.* at 1147. *See* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974). *See also* Comment, *The Scope of the Bona Fide Occupational Qualification Exemption Under the Age Discrimination in Employment Act*, 57 CHI.[-]KENT L. REV., 1145, 1146-47 (1981).

52. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2753 (referring to 29 C.F.R. §

the Court concluded "that this two-part inquiry properly identifies the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety."[53] This adoption of the *Tamiami* standard, in a unanimous decision by the Court, makes *Western* a leading case in discrimination complaints where an affirmative BFOQ defense is alleged to rest squarely on the foundation of public safety.

In the final sections of its decision in *Western*, the Court turned its attention to a number of key issues related to the BFOQ exception to the ADEA, including jury instructions,[54] the amount of deference to be afforded regulations issued by administrative agencies,[55] and some indication of the weight which should be accorded the "reasonable necessity" standard.[56] At the same time, the Court's answers in *Western* give rise to additional questions which will call for further refinement by the Court in future cases.

While the Court did not closely examine the jury instructions given in *Western*,[57] its decision implicitly upheld those given from the lower bench.[58] Therefore, those directions are valuable as future reference points for both the courts and employers.

In addition to providing future direction in the area of jury instructions, *Western* also broadly suggests that the Court is likely to give little, if any, deference to regulations issued by administrative agencies if those rules run counter to the grain of the ADEA.[59] Western had argued before the Court that the FAA's "Age 60 Rule" should be expanded to include flight engineers along with captains and first officers.[60] While the Court did concede that the FAA's rule was relevant, it explicitly stated that the rule "is not to be accorded conclusive weight."[61] As a way of assessing the probative value of such regulations, the Court made reference to a two-part analysis it had

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1625.6(b) (1985)). This section of the federal regulation describes the BFOQ exception in terms strikingly parallel to the generic elements set forth in the *Tamiami* decision:

> An employer 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 that cannot be ascertained except by reference to age. If 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 it or equally advance it with less discriminatory impact.

Id.

53. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2753.
54. *Id.* at 2753-55.
55. *Id.* at 2755-56.
56. *Id.* at 2753-54.
57. *Id.* at 2755. The Court only refers to the instructions once in the closing sections of its opinion noting simply that they provided sufficient indication of Western's safety mandate. *Id.*
58. *Id.* *See also* note 27, *supra*.
59. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2754.
60. *Id.*
61. *Id.*

utilized in *Johnson v. Mayor & City Council*[62] in which it held that "the extent to which the rule is probative varies with the weight of the evidence supporting its safety rationale and 'the congruity between the . . . occupations at issue.' "[63] Given the facts in *Western*, the Court had no difficulty

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62. 105 S. Ct. 2717 (1985).

63. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2754 (quoting Johnson v. Mayor & City Council, 105 S. Ct. 2717, 2727 (1985)). *Johnson* was issued the same day as *Criswell*. In *Johnson*, the central issue was whether a federal statute which required federal firefighters to retire at age 55 could be relied on by the City of Baltimore as a basis from which it could, as a matter of law, assert a BFOQ defense for an identical policy it had established for city firefighters. *Id.* at 2720. The Court ruled that while introduction of the federal law into evidence may be "relevant," it was not "dispositive." *Id.* at 2722. In that decision, the Court stated:

> The mere fact that some federal firefighters are required to cease work at 55 does not provide an absolute defense to an ADEA action challenging state and local age limits for firefighters. We would be remiss, in light of Congress' indisputable intent to permit deviations from the mandate of the ADEA only in light of a particularized, factual showing [citations omitted] to permit nonfederal employers to circumvent this plan by mere citation to an unrelated statutory provision that is not even mentioned in the ADEA.

Id.

Similar rulings recently have come down in at least two of the circuits. In *Touhy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), the court was faced with a similar decision. In that case, the defendant company had required one of its company pilots to retire at age sixty. *Id.* at 843. When a charge of age discrimination was filed by the pilot who had been involuntarily retired, Ford Motor based its BFOQ defense on the FAA's "Age 60 Rule" and sought a summary judgment in the matter. *Id.* Ford's request was granted by the district court. Touhy v. Ford Motor Co., 490 F. Supp 258 (E.D. Mich. 1980).

In reversing the lower court's judgment, the Fifth Circuit stated that the FAA's rule applied to commercial, not corporate, pilots. *Id.* *See also* note 2, *supra*. Noting that there was a factual dispute as to whether medical examinations could accurately screen out those pilots over the age of fifty-nine who presented a safety risk, the court remanded the case, emphasizing that Ford had the burden of presenting a "factual basis for its determination that medical science cannot predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitied during flight." *Id.* at 846.

The Seventh Circuit was faced with a slightly different variation of an employer's extension of a regulation in *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983). In that case, the plaintiff contested his being being retired at age 55 from the position of assistant chief of the city's fire department. *Id.* at 746. It was stipulated prior to the trial that the plaintiff was "physically and mentally in excellent condition and good health and no claim is made that he personally was not capable of performing all fire department functions." *Id.* City officials defended their action as being in accord not only with federal requirements for federal firefighters but with a specific Wisconsin statute as well. *Id.* at 747. Both regulations, the city contended, required persons in "protective services" classifications to retire at the age of fifty-five. *Id.*

The Seventh Circuit upheld a magistrate's decision which ruled that reference to a federal statute which is only analogous and not directly applicable to the positions at issue does not remove from the defendant employer the onus of establishing a factual basis in the record for relating "age 55, as opposed to ages 50 or 60, to the public interest and safety." *Id.* at 747. As to the Wisconsin statute, the Court refused to grant a statutory presumption of validity to it since such a presumption "would effectively shift to the employee . . . the burden of refuting his employer's BFOQ defense. Such burden shifting, however, contravenes the settled law of both

concluding that Western could not validly base its BFOQ defense on the FAA's "Age 60 Rule."[64] The fact that the FAA had explicitly refused to do so,[65] together with the fact that a number of other airlines permitted their second officers to work past the age of sixty, logically swept away any arguments the company tried to make.[66]

Beneath the relative ease with which Western's particular pleadings were dismissed lies the clear message that it is the current Court's opinion that governmental regulations are not to be given presumptive status by the judiciary.[67] This is particularly true in cases where rules are extended to job classes beyond those specifically included within the scope of their language.[68] The Court indicates that, once challenged, such regulations will come under close judicial scrutiny on two levels: 1)the "congruity" between the class actually covered by the regulation at issue and the one proposed to be covered by it; and 2) the empirical evidence supporting the age-sensitive qualification for the covered class.[69] Even in a case where a regulation or statute refers directly to the position at issue, the trier of fact will not automatically grant a BFOQ to the employer but will examine the evidentiary foundation "supporting its safety rationale."[70]

But while *Western* would indicate that the application of a federal regulation to classes other than those specifically addressed by it would be subject to strict judicial scrutiny, the decision does not explicitly address the question of how much, if any, deference should be given to a federal regulation when it is directly at issue in the case. In other words, it is not absolutely clear how the Court would have ruled had pilots Criswell and Starley been challenging the FAA's "Age 60 Rule" itself rather than Western's attempt to extend it to flight engineers.[71]

A partial answer to this question of deference may be implied both in

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this and other circuits that it is the employer — not the employee — who has the burden of establishing a BFOQ defense." *Id.* at 751 (citations omitted).

64.. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2755.

65. 49 Fed. Reg. 14,695 (1984).

66. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2754.

67. *Id.*

68. *Id. See supra* note 63.

69. *Id.*

70. *Id.*

71. It would seem logical to conclude that the Court still could have utilized the analytical model provided by *Tamiami.* Applying that model, the Court could have examined as a threshold issue whether public safety was an essential component of Western's business. Once it concluded that this was the case, the Court could then have determined whether the rationale and findings used by the FAA to establish its "Age 60 Rule" were of sufficient persuasive weight, together with all of the other facts of the case, to justify the use of age as the only efficient proxy for protecting those safety-related interests. In the alternative, the Court could, under the separation of powers doctrine, simply have deferred to the regulatory agency, empowered by Congress to create regulations to insure the public's safety while using services provided by a public carrier.

Western and in a case the Court decided six months earlier, *Trans World Airlines, Inc. v. Thurston.*[72] The issue in *Thurston* grew out of a policy instituted by TWA which allowed more senior pilots to bump or displace flight engineers when the former elected to transfer for any reason other than because they had reached the mandatory retirement age for pilots.[73] In the latter case, a pilot was not allowed to bump a less senior flight engineer and had to find a vacancy before being allowed to demote.[74] If a vacancy did not occur before the pilot reached his sixtieth birthday, he was immediately retired.[75] Plaintiffs successfully argued this was a discriminatory practice which was violative of the ADEA.[76] In neither *Thurston* nor *Western* was the "Age 60 Rule" directly challenged; and the Court, by not making any comment regarding the validity of the FAA rule when it had the opportunity to do so, may be indicating that it is willing to notice the rule's validity without a separate showing of empirical evidence.[77] Moreover, in *Johnson v. Mayor and City Council,* the Court explicitly recognized the right of Congress to regulate the conditions of employment for federal employees: "Congress, of course, may exempt federal employees from application of the ADEA and otherwise treat federal employees, whose employment relations it may directly supervise, differently from those of other employees."[78]

There are indications in these cases that the Court is prepared to give great deference to a federal regulation which sets out an age-sensitive condition of employment for federal employees when it is applied to federal em-

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72. 105 S. Ct. 613 (1985). *See supra* note 11.

73. *Id.* at 616.

74. *Id.*

75. *Id.*

76. *Id.* at 617.

77. In its *Thurston* decision, the Court notes, without further comment, that "in this litigation, the respondents have not challeged TWA's claim that the FAA regulation establishes a BFOQ for the position of captain." *Id.* at 622 n.17.

While the Supreme Court did not choose to reach the question of whether the FAA's "Age 60 Rule" itself is valid in the face of the ADEA, it might be noted that this regulation has not been immune from criticism. *See* Criswell v. Western Air Lines, Inc., 514 F. Supp. at 391 n.9. In *Criswell,* for example, the district court noted that "with respect to pilots, it is somewhat of an irony that the FAA does not apply its Age 60 Rule to its own pilots who fly that agency's fleet, which consists of aircraft as large as B-707's." *Id.* The U.S. Navy, based on its "1000 Aviator Study," has recently rescinded its age limitation policy for pilots. *Id.*

Another example appeared in *Thurston,* in which the Court noted that "the EEOC guidelines, however, do not list the FAA's [A]ge 60 [R]ule as an example of a BFOQ because the EEOC wishes to avoid any appearance that it endorses the rule." Transworld Airlines, Inc. v. Thurston, 105 S. Ct. at 622 n.17 (citing 96 Fed. Reg. 47,724-25 (1981)). While speculative, it does seem logical that if the Court had any reservations regarding the validity of the "Age 60 Rule" one perhaps might have expected it to comment further on the rule in either *Thurston* or *Western.* Or it may be that the Court is simply choosing to silently skirt the thorniness of this issue until such time as it is forced to address it directly in some future case.

78. Johnson v. Mayor & City Council, 105 S. Ct. at 2724 n.10.

ployees.[79] It would appear, however, that the teachings of *Johnson* and *Western* are that identical employment policies formulated and put into place by non-federal employers for non-federal employees will not be afforded any deference by the courts, and such employers, whether private or public, will have to defend their age-sensitive policies with empirical evidence.[80]

In addition to illuminating how the Court perceives the relative values which are to be accorded age-sensitive regulations which impact directly or indirectly on employees, the Court also provided insight into how it construes the "reasonably necessary" standard in examining a BFOQ defense under the ADEA.[81] In asserting its BFOQ defense, Western had argued that where public safety was a factor, juries should be instructed to defer to the employer's "selection of job qualifications"[82] since the ADEA "only requires that the employer establish 'a rational basis in fact'[83] for believing that identification of those persons lacking suitable qualifications cannot occur on an individualized basis."[84] The Court explicitly overruled such a formulation as being less than the standard envisioned by Congress and called for in the ADEA's "reasonably necessary" requirement: "This proposal is plainly at odds with Congress' decision, in adopting the ADEA, to subject such management decisions to a test of *objective justification* in a court of law."[85]

But while it is clear that the Court perceives "reasonably necessary" as a standard higher than either "a rational basis in fact" or "reasonableness," the line of demarcation between the two is not always a brightly colored one in cases like *Western*, where the amorphous concept of public safety is to be placed on one side of the balance.[86] On one hand, the Court explicitly holds that it is the employer's burden to establish the BFOQ "by the preponder-

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79. *See id.*

80. *See id.* at 2726. This same evidentiary burden apparently will also fall on employers who base their age-sensitive policies on regulations issued by state legislatures or agencies, whether or not such regulations apply directly to the class of positions at issue. *See* EEOC v. Wyoming, 460 U.S. 266 (1983).

81. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2753-54.

82. *Id.* at 2754. The Court notes that Western desired a jury instruction stating "that in 1978, when these plaintiffs were retired, there existed a *rational basis in fact* for defendant to believe that use of [flight engineers] over age 60 on its DC-10 airliners would increase the likelihood of risk to its passengers." *Id.* at 2753.

83. Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

84. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2755.

85. *Id.* at 2754 (emphasis added). The Court pointed out that the "rational basis in fact" standard has been rejected by practically every court which has considered it. *Id.* n.34. *But see* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

86. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2754. The Court noted that "the employer cannot be expected to establish the risk of an airline accident 'to a certainty . . . .'" *Id.*

ance of credible evidence."[87] Yet at the same time the Court appeared willing to allow a sliding scale analysis by recognizing that "the uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to error on the side of caution in a close case."[88] This somewhat sliding standard implies that it may in fact be sufficient for a defendant employer to be successful in a BFOQ defense by reaching an evidentiary level which is something short of the "preponderance" requirement as long as the case is a "close case."[89] The Court recognized that, to a degree, the jury itself — "many of whom no doubt have flown or could expect to fly on commercial air carriers"[90] — was likely to apply a sliding scale analysis in favor of the public carrier in a close case and "defer in a close case to the airline's judgment."[91] In *Western*, the Court did not conclude there was a single standard of proof to be applied in all cases but held that the weight of the standard of proof will be located within the facts of the individual case by the trier of fact:

> Several Courts of Appeals have recognized that safety considerations are relevant in making or reviewing findings of fact. Such considerations, of course, are only relevant at the margin of a close case, and do not relieve the employer from its burden of establishing the BFOQ by the preponderance of credible evidence.[92]

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87. *Id.* at 2755.

88. *Id.* at 2754 (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d at 238.)

89. *Id.* It is arguable that the district court's ruling in *Tamiami* itself was illustrative of the problem which arises in terms of the extent of the employer's evidentiary burden, inasmuch as that verdict may have been based on evidence which, from an objective point of view, may have fallen something short of reaching the preponderance of evidence level. *See* Usery v. Tamiami Trail Tours, Inc., 531 F.2d at 238. While the Fifth Circuit sustained the ruling of the lower court in *Tamiami* and allowed the bus company to continue to reject any driver applicants older than the age of forty, there is a tone in the appellate court's comments which might imply that the judges were something less than enthusiastic about the lower court's finding that the evidence in the record clearly supported the bus company's age-sensitive policy in that case:

> The key question is whether a sufficient factual basis for Tamiami's case has been demonstrated. . . . Whatever might have been our finding were we deciding this issue *de novo*, the District Court found that examinations cannot detect the relevant physiological and psychological changes "with sufficient reliability to meet the special safety obligations of motor carriers of passengers."

Id. But while perhaps indicating some discomfort with the specific findings of fact of the lower court, the appellate court appears to agree that considerable deference must be given to the element of public safety by the trier of fact:

> Priceless as is a single life in our concept of the value of human life and our undoubted unwillingness ever to approve a practice which might kill one but not, say, twenty, we think the safety factor should be evaluated in terms of the possibility or likelihood of injury/death.

Id.

90. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2754.

91. *Id.*

92. *Id.* n.29 (citations omitted).

The Court did not clarify further why there should be any need for deference given an employer by the trier of fact in a case where defendant has met the burden of proof by a preponderance of evidence.[93]

A similar opacity in terms of meaning reappears in the Court's dicta on the subject of expert testimony, which, predictably, was an important component in both parties' presentations.[94] On one hand, the Court summarily dismissed a Western argument that "juries should not be permitted to resolve bona fide conflicts among medical experts respecting the adequacy of individualized testing,"[95] and that, in terms of an evidentiary burden, it should be sufficient for a BFOQ defense if an employer is able to show at least some credible, medical rationale for an age-sensitive, screening device.[96] The Court held that to allow such a minimal evidentiary showing to be sufficient would be tantamount to giving employers free rein to construct whatever discriminatory practices they desired as long as such practices could be shown to be based on some medical opinion, "no matter how unpersuasive."[97]

Lurking beyond the light shed by the Court's summary dismissal of Western's argument is a spectre which haunts all BFOQ cases involving both the ADEA and public safety.[98] Once an employer has successfully surmounted the threshold hurdle of the *Tamiami* standard and is attempting to show that age — because medical science cannot accurately predict which employees present a safety hazard — is the only efficient proxy for the validated job qualifications at issue, such proceedings become, in reality, a contest of medical experts.[99] The truth in Western's contention was that, regardless of jury instructions and regardless of the presence of applicable or analogous regulations, juries are in a position of having to resolve what is essentially a medical debate for which there appears to be no empirically valid resolution at the present time.[100] Since they are instructed to find for one side or another, the jury will likely make a choice even though there appears to be no solid, objective and conclusive, medical foundation on which any resolution can be based.[101] At best, the trier of fact can only find

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93. *See id.*

94. *See id.* at 2755-56.

95. *Id.* at 2755. Among Western's arguments before the Court was its contention that juries were simply not equipped to make a choice in an area where medical experts were in sharp disagreement. *Id.*

96. *Id.*

97. *Id.* at 2756. The Court also stated: "Indeed, under a rational basis standard a jury might well consider that its 'inquiry is at an end' with an expert witness' articulation of any 'plausible reaso[n]' for the employer's decision." *Id.* n.36.

98. *See id.* at 2755.

99. *See id.*

100. *See id.*

101. *See id.*

for the party whose expert witness was the most persuasive.[102] The prospect of forcing our justice system to make what appear to be empirically undecidable decisions is equally disquieting for all concerned parties: for the gray panther advocate who finds any age-sensitive qualifications unpalatable; for the airline passenger who has alarming dreams of wrinkled, palsied hands resting on the flight controls; and for airline companies like Western, as well as the lawyers who advise them, who must try to continuously reconcile the rights of employees and sometimes conflicting concerns for the public's safety.[103]

Upon reflection, the empirically unresolved debate over the predictive capabilities of the medical sciences is something of a red herring in any age discrimination case where a BFOQ defense is being asserted by an employer whose business involves the public's safety.[104] While identifying those older individuals who are quite capable of continuing to excel at their job responsibilites and allowing them to continue to work would be the obvious and most equitable resolution to many of these cases, the medical sciences simply have not advanced to the point where they can, by themselves, provide the touchstone for either employers' decisions or our jurisprudence in this area.[105] In terms of the *Tamiami* model, medical evidence is relevant to the second part of the analysis in which the employer has the burden of showing that it, by necessity, has to rely on the age-sensitive policy at issue by demonstrating that most or all persons above a certain age are not able to carry out the job safely or, alternatively, by showing that it is impossible to select out, on an individualized basis, those employees who would present a risk.[106] Since medical science is not able to select out the unsafe employees and it is hard to conceptualize a case where an employer could successfully establish that most, if not all, of the job incumbents who were above a certain age but below the age of seventy presented a safety risk, the real battleground in these cases for the employer would appear to lie, both in sequence and importance, in the initial prong of the *Tamiami* analysis: in validating the age-sensitive policies at issue as "safety-related job qualifications."[107]Once the employer has been able to leap that hurdle with a preponderance of evidence, then the current state of medical science may cut in the employer's favor in terms of its inability to conclusively select low-risk incumbents, al-

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102. *See id.* at 2756. The Court recognizes a problem of bias with expert testimony in the closing paragraph of its decision in *Western* when it notes that Western's attempt to refute a mountain of evidence "on the basis of the contrary opinion of experts — *solicited for the purposes of litigation* — is hardly convincing. . . ." *Id.* (emphasis added).

103. *See id.* at 2755-56.

104. *See generally* Criswell v. Western Air Lines, Inc., 514 F. Supp. at 389 (contradictory evidence presented by the respective parties' medical experts reflective of the current problem).

105. *Id.*

106. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2752.

107. *Id.* at 2751.

though the Court, in *Western*, insisted the employer still had the burden of showing it was "highly impractical" for it to do so on the basis of "individualized testing."[108]

While the Court does not set out a step-by-step process in *Western*, it is worthwhile to attempt to construct such a prototype as well as to postulate some of the inquiries which might be appropriate at each level. In the first stage of the *Tamiami* analysis, a court must determine whether "the job qualifications which the employer invokes to justify his discrimination . . . [are] *reasonably necessary* to the essence of his business."[109] Such an inquiry has a number of logical subparts.[110] The court will look to determine, for example, whether and the extent to which the public's safety is an essential component of the employer's business.[111] The number of people likely to be involved, together with the extent of property at risk, are factors to be considered as well.[112] The court will also need to consider how closely the specific class of position at issue is related to or impacts on this public safety component.[113] It will need to look closely at the predictable, rippling effects which would take place should that employee or a member of that class of employees suffer a sudden incapacitating medical event.[114] In this analysis, the potential risk of a medical emergency involving a flight attendant is obviously much different than the same incident involving a pilot, on the one hand, or a flight steward or stewardess, on the other.[115] The presence of another employee who can immediately assume control or perhaps other types of alternatives and contingencies would also be a consideration.[116] Courts would also study the job qualifications at issue in light of their relationship to the skills and abilities required to carry out the major duties and responsibilities of the individual or class of position.[117] How much of their work weeks these employees spent performing those duties which would present a risk to the public is yet another consideration.[118] In addition, the court would want to assess the possibility of any non-discriminating alternatives which could be substituted for the age-sensitive policy.[119]

It is only when an employer has satisfactorily carried this initial burden by a preponderance of the evidence that it reaches the burden of having to

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108. *Id.* at 2756.
109. *Id.* at 2751 (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d at 236).
110. *See* Western Airlines, Inc. v. Criswell, 105 S. Ct. at 2751.
111. *Id.*
112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*

show that the age-sensitive job qualification is "reasonably necessary,"[120] either by showing that all persons over a certain age would not be able to perform the job in a safe manner or by showing it is not possible to determine which individuals could or could not do so.[121] It is at this point that the medical testimony has bearing; as indicated above, *Western* holds that if the case is a close one it is then and only then that the trier of fact should tip the scales in favor of the employer and public safety.[122]

In the broad analysis, the Court reached its decision in *Western* primarily on the basis of findings related to the first prong of the *Tamiami* analysis.[123] While certainly an employer whose business is involved with public safety,[124] Western could not establish the tight fit the Court required between the responsibilities of a flight engineer and its concern for public safety.[125] The fact that there were other personnel in the flight deck itself who could assume the flight engineer's duties in the event he became medically incapacitied were relevant in this regard.[126] The fact that other airlines allowed their flight engineers to continue working past the age of sixty without any impact on their safety records was very significant.[127] Finally, the fact that the FAA explicitly chose not to include flight engineers under its "Age 60 Rule" was very persuasive in the eyes of the Court.[128] In the face of such contrary evidence, Western had very little chance of successfully carrying its burden of justification during the first prong of the *Tamiami* inquiry.[129] The issue over the prognosticative ability of medical science, therefore, would appear to have had relatively little importance in the Court's holding in *Western*.[130] Such an implication is evident in the Court's closing paragraph:

> When an employee covered by the Act is able to point to reputable businesses in the same industry that choose to eschew reliance on

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120. *Id.* at 2751-52.

121. Because medical science itself cannot provide a resolution, at least one commentary has proposed that Congress assemble a blue-chip, medical task force which would operate independently of any vested interest group and be charged with the task of establishing age guidelines where these might be defensible for those positions where medical qualifications are viewed to be critical in terms of public safety. *See* 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).

122. Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2756.

123. *See id.*

124. *Id.* at 2755.

125. *Id.* at 2754. The Court noted: "[W]e are satisfied that the verdict is a consequence of a defect in Western's proof rather than a defect in the trial court's instructions." *Id.*

126. *Id.* at 2746.

127. *See id.* at 2756.

128. *Id.* at 2746.

129. *See id.* at 2751.

130. *See id.* at 2756.

> mandatory retirement earlier than age 70, when the employer itself relies on individualized testing in similar circumstances, and when the administrative agency with primary responsibility for maintaining airline safety has determined that individualized testing is not impractical for the relevant position, the employer's attempt to justify its decision on the basis of the contrary opinion of experts — solicited for the purposes of litigation — is hardly convincing on any objective standard short of complete deference. Even in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision.[131]

Western is a significant decision primarily for its adoption of the *Tamiami* standard and for its dicta which provides additional insight into the Court's analysis in this area.[132] More broadly speaking, *Western* is of some significance precisely because of the postures of strict construction and strict scrutiny which the Court strikes and maintains throughout the ruling. In an era where the current political trend would appear to lie towards deemphasizing governmental intervention in employment decisions being made by private sector employers, the Court's ruling in *Western* stands in sharp, dogmatic relief. It may be that the trend in the future will be for less intervention on the part of the government in the private marketplace. But before that can come to pass, at least in the area of age discrimination, *Western* seems to stand for the proposition that Congress will have to amend the ADEA. The Court's unanimous opinion is that, as the ADEA reads currently, employers who attempt to enforce any sort of mandatory retirement policy involving employees who are less than seventy years of age should expect to come under sharp, judicial scrutiny should that policy ever be challenged. Employers who have such policies may be well advised to re-examine both the rationale and evidentiary foundations which underlie them.[133]

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131. *Id.* at 2756.

132. *See* Johnson v Mayor & City Council, 105 S. Ct. at 2722. In its discussion of that case, which considered the validity of Baltimore's mandatory retirement policy for firefighters at the age of fifty-five, the Court noted that, in terms of ADEA analysis, "[w]e recently have elaborated on the precise standard to be applied. Western Air Lines, Inc. v. Criswell, ___ U.S. ___, 105 S. Ct. 2743, 85 L. Ed. 2d ___ (1985)." *Id.*

133. *See* Western Air Lines, Inc. v. Criswell, 105 S. Ct. at 2754. There is some indication in the *Western* dicta that the Court would assume that employers using BFOQ's in good faith already would have made such an analysis before implementing them. *Id.* In discussing the burden which the employer bears in such cases, the Court held: "When an employer establishes that a job qualification *has been carefully formulated to respond to documented concerns for public safety*, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business." *Id.* (emphasis added). The distinct implication would seem to be that employers would be well advised not to wait until after an age discrimination suit has been filed to assess and document the rationale for an age-sensitive retirement policy which they might currently have in place. *See id.*