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STRIKING A BALANCE BETWEEN THE INTERESTS OF PUBLIC SAFETY AND THE RIGHTS OF OLDER WORKERS: THE AGE BFOQ DEFENSE

In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA)[1] in an effort to curb arbitrary employment decisions based on stereotypes and misconceptions concerning older workers.[2] The ADEA, as amended,[3] prohibits employers, employment agencies, and labor unions from making worker-related decisions solely on the basis of age.[4] Enforced by the Equal Employment Opportunity Commission (EEOC),[5] the ADEA covers workers from the ages of forty to seventy[6] in both the private sector and state and local government.[7]

The purpose of the ADEA is similar to that of Title VII of the Civil Rights Act of 1964.[8] Both statutes attempt to ensure that employers

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[1] 29 U.S.C. §§ 621-34 (1970).

[2] *See id.* § 621(b); James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEVE. L. REV. 1, 1 (1977) [hereinafter cited as James & Alaimo]; 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 ST. L. REV. 1339, 1340 (1978) [hereinafter cited as *Balancing the Interest*]. In the preamble to the Age Discrimination in Employment Act (ADEA), Congress stated that one of the purposes of the ADEA was to prohibit arbitrary age discrimination in employment. 29 U.S.C. § 621(b); *see* James & Alaimo, *supra*, at 1339 & 1340; *Balancing the Interest*, *supra*, at 1.

[3] *See* Age Discrimination in Employment Act Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 74; Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, §§ 1-7, 92 Stat. 189 (1978).

[4] *See* 29 U.S.C. § 623. In regard to employer practices, the ADEA provides that an employer cannot refuse to hire or discharge any individual because of age or classify workers with respect to age when that classification will deprive the worker of employment opportunities. 29 U.S.C. § 623. Section 623 also outlines similar provisions for employment agencies and labor unions. *Id. See generally* Note, *The Age Discrimination in Employment Act of 1967*, 80 HARV. L. REV. 380 (1976) [hereinafter cited as *The Age Discimination*] (thorough discussion of the ADEA of 1967).

[5] *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978 Compilation), *reprinted in* 5 U.S.C. app. at 354 (Supp. III 1979) *and in* 92 Stat. 3781 (1978). Originally, the Department of Labor was the enforcing administrative agency for the ADEA. 29 U.S.C. § 625 (1975). The Equal Employment Opportunity Commission (EEOC) now has responsibility for enforcement of the Act. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978 Compilation).

[6] *See* 29 U.S.C. § 631 (1976), *amended by* Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified at 29 U.S.C. § 631) (upper age limit changed from sixty-five to seventy).

[7] 29 U.S.C. § 630(b) (1976) (ADEA applies to state and local government employees); *see* Arritt v. Grisell, 567 F.2d 1267, 1270 (4th Cir. 1977) (application of ADEA to government workers constitutional); EEOC v. Wyoming, 50 U.S.L.W. 1103, 1104, (Jan. 12, 1982) (Supreme Court considered constitutionality of ADEA's application to state governments in their role as employers).

[8] 42 U.S.C. §§ 2000e-1-2000e-17 (1964). Congress enacted Title VII to promote employment decisions based on an individual's ability, rather than his or her race, sex, or religious beliefs. *Id.* § 2000e-2. Similarly, Congress enacted the ADEA to ensure employment deci-

base employment decisions on individual ability to perform the job, rather than on the basis of irrelevant factors such as race, religion, gender, and age.[9] Like Title VII, the ADEA also includes several exceptions to the blanket prohibition of discriminatory actions against workers.[10] An employer charged with discrimination based on age under the ADEA either may deny the discrimination and offer another reason for his employment decision,[11] or he may admit to a per se violation of the statute but offer a justification for the violation.[12] If an employer denies the allegation of age discrimination, he must show either that he demoted or fired the employee for good cause,[13] or that he based the decision on a factor other than age.[14] An employer, however, frequently

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sions based on ability rather than age and to prohibit arbitrary age discrimination. 29 U.S.C. § 621(b); *see* Lorrillard v. Pons, 434 U.S. 575, 584 (1978). The ADEA and Title VII have important similarities in overall purpose and substantive provisions. *Id.*

Congress considered the idea of a federal law to ban age discrimination in 1964 in connection with Title VII. *Hearings on H.R. 405 before the Subcomm. on Labor of the Comm. on Education and Labor*, 88th Cong., 1st Sess. 22, 38-39, 92, 430, 478-79 (1963); *see Balancing the Interest, supra* note 2, at 1339. The legislative history of Title VII does not indicate why Congress decided not to include age discrimination in Title VII. *Balancing the Interest, supra* note 2, at 1339 n.3. Congress may have believed that substantive differences existed between the factors underlying sex and race discrimination as opposed to age discrimination. *Id.* One commentator has suggested that age discrimination differs from race and sex discrimination because of the element of the continuing effects of past discrimination in race and sex cases. *See The Age Discrimination, supra* note 4, at 396. When a minority member or a woman is refused a job, latent and unintentional discrimination may be present even if the employer bases his decision on the individual's lack of skills. *Id.* The lack of skills in race and sex cases may be the result of past discrimination in the area of education. *Id.* Older workers as a group generally do not suffer from the effects of past discrimination. *Id.* at 397. Federal studies conducted soon after the Civil Rights Act indicated, however, that age discrimination had become a national problem even in the absence of past discrimination. *See* U.S. DEPT. OF LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964: RESEARCH MATERIALS 67-69 (1965). These studies led to the enactment of the ADEA in 1967. *See Balancing the Interest, supra* note 2, at 1339 n.3.

[9] *See* note 8 *supra.*

[10] *See* 42 U.S.C. § 2000e-2 (1970) (employer defenses under Title VII); text accompanying notes 12-19 *infra* (employer defense under ADEA). Title VII has a counterpart to the ADEA bona fide occupational qualification exception. 42 U.S.C. § 2000e-2(e) (1970) (religion, sex, or race may be grounds for discrimination if that characteristic is a bona fide occupational qualification); *see* text accompanying notes 19-22 *infra.*

[11] *See* Player, *Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection, and the 1978 Amendments*, 12 GA. L. REV. 747, 749-50 (1978) [hereinafter cited as Player]. An employer charged with discrimination under the ADEA may choose to deny that age was the basis of his employment decision. *Id.* The employer then must show a valid reason other than age for his action under § 623(f) of ADEA. 29 U.S.C. 623(f); Player, *supra*, at 749-50. These nonage reasons for the employment action are not true defenses to a charge of age discrimination because the employer does not admit the discriminatory practice. Player, *supra*, at 750; *cf.* text accompanying notes 15-18 *infra* (defenses under the ADEA).

[12] *See* Player, *supra* note 11, at 749-50.

[13] 29 U.S.C. § 623(f)(3) (1970); *see* note 11 *supra.*

[14] 29 U.S.C. § 623(f)(1) (1970); *see* note 11 *supra.*

will choose to admit that he based his employment decision solely on age, but will argue that one of the three defenses to age discrimination under the ADEA excuses his action.[15] An employer may show that he based his employment decision on a bona fide seniority system[16] or on a bona fide benefit plan of which age is an integral part.[17] Finally, the employer may show that age is a bona fide occupational qualification (BFOQ) for the job.[18]

The most significant and most litigated of the three defenses to an ADEA violation is that the challenged age policy is a BFOQ.[19] To assert the BFOQ exception, an employer must prove as an affirmative defense[20] that its age policy is "reasonably necessary to the normal operation of the particular business."[21] Since the BFOQ exception is inconsistent with the general thrust of the ADEA to eliminate employment-related generalizations based on age,[22] the original enforcing agency of the ADEA, the Department of Labor,[23] recommended that courts and employers construe the exception narrowly, and warned of its potential for abuse of

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[15] *See* Player, *supra* note 11, at 749-50; text accompanying notes 16-18 *infra*.

[16] 29 U.S.C. § 623(f)(2) (1970); *see* Player, *supra* note 11, at 779-81 (general discussion of bona fide seniority plan defense).

[17] 29 U.S.C. § 623(f)(1) (1970); *see* Player, *supra* note 11, at 767-79 (general discussion of bona fide benefit plan defense).

[18] 29 U.S.C. § 623(f)(1) (1970). The Department of Labor (DOL) construed the BFOQ defense in § 860.102 of the Code of Federal Regulations. 29 C.F.R. § 860.102 (1976). The DOL stated that courts should consider a BFOQ in the light of the relevant facts of each case. *Id.* The DOL recommended a narrow construction of the age BFOQ since it is an exception to the general ban against discrimination on the sole basis of age. *Id.* The DOL also stated that the employer carried the burden of establishing the necessity for a BFOQ. *Id.*

[19] *See* note 18 *supra*; Rosenblum, *Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions*, 32 HASTINGS L. J. 1261, 1266 (1981) [hereinafter cited as Rosenblum] (BFOQ defense is most frequently used defense by employers).

[20] *See* Note, *Age Discrimination in Employment*, 41 OHIO ST. L. J. 349, 380 (1980) [hereinafter cited as *Age Discrimination*]. In a typical BFOQ situation, the defendant charged with a violation of the ADEA admits the discriminatory practices, but asserts that because of the nature of his business, age is a necessary qualification of employment. *Id.* After the defendant raises this affirmative defense, the burden of persuasion shifts to him to prove the elements of the BFOQ defense. *Id.*; *see* Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977) (burden of proof on employer for BFOQ defense); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th cir. 1977) (same); Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975) (same). The Department of Labor also placed the burden of the BFOQ defense on the employer in its interpretive bulletin. 29 C.F.R. § 860.102(b) (1976).

[21] 29 U.S.C. § 623(f)(1) (1970).

[22] *See* note 8 *supra*. The ADEA's purpose is to promote individual ability rather than age as the primary factor in employment decisions. *Id.* The BFOQ defense, however, allows the employer to use age as a blanket generalization and to deny some older workers with the ability to do the job the chance even to apply for the position. *See* Rosenblum, *supra* note 19, at 1267; Note, *The Scope of the Bona Fide Occupational Qualification Exemption Under the Age Discrimination in Employment Act*, 57 CHI-KENT L. REV. 1145, 1148-49 (1981) [hereinafter cited as *The Scope of the BFOQ*]; *Age Discrimination*, *supra* note 20, at 383.

[23] *See* note 5 *supra*.

ADEA purposes.[24] Unfortunately, no clear guidelines for the scope or application of the age BFOQ exist in either the sparse legislative history of the exception or the administrative interpretations.[25]

Since neither the administrative agencies nor the legislatures have clarified the BFOQ provision, the burden has fallen on the judicial system to interpret and apply the BFOQ in individual cases. Judicial application of the BFOQ, however, has produced a confusing and conflicting amalgam of circuit court and district court decisions upon which the Supreme Court has refused to act.[26] Part of the courts' difficulty in fashioning consistent tests to determine when age should be a BFOQ is due to the myriad of fact situations involving the BFOQ defense which the courts have faced.[27] The major complicating factor in age BFOQ cases, however, has been the sharp contrast between the rights of the older worker as set out in the ADEA and the interests of public safety

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[24] 29 C.F.R. § 860.102(b) (1976); *see* James & Alaimo, *supra* note 2, at 2; *Balancing the Interest, supra* note 2, at 1343.

[25] *See* James & Alaimo, *supra* note 2, at 9. The BFOQ provision of the ADEA has very little explanatory legislative history. *Id.* Neither House or Senate hearings before the passage of the ADEA explain the intent of statutory language. *Id.* The chairman of the House subcommittee studying the bill made the only legislative statement relevant to the BFOQ. His statement stressed the importance of individualized testing of the aged, but gave no guidelines in regard to how the issue of individualized testing fits into the BFOQ statutory provision. *Id.* at 9 n.73; *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 72 (1967) (statement of Congressment Dent). *See generally* H.R. REP. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* (1967) U.S. CODE CONG. & AD. NEWS 2213; S. REP. No. 493, 95th Cong., 2d Sess. (1978), *reprinted in* (1978) U.S. CODE & AD. NEWS 504 (legislative intent of entire ADEA).

Besides the Department of Labor's mandate to interpret the BFOQ provision narrowly, 29 C.F.R. § 860.102(b) (1976), the administrative agencies in charge of the ADEA also have given little guidance on the BFOQ provision. *See The Scope of the BFOQ, supra* note 22, at 1145.

[26] *See The Scope of the BFOQ, supra* note 22, at 1146; *e.g.*, Smallwood v. United Air Lines, Inc., No. 80-1111 (4th Cir., Oct. 8, 1981); Murnane v. American Airlines, Inc., 26 FEP Cases 1537 (D.C. Cir. 1981); EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980); Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1978); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). Several district courts have also considered the age BFOQ issue. *See* Beck v. Borough of Manheim, 505 F. Supp. 923, 925 (E.D. Pa. 1981); Tuohy v. Ford Motor Co., 490 F. Supp. 258, 261 (E.D. Mich. 1980); Aaron v. Davis, 414 F. Supp. 453, 456 (E.D. Ark. 1976).

The Supreme Court has denied certiorari in both of the appealed BFOQ circuit court cases. *See* Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1978); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

[27] *See Balancing the Interest, supra* note 2, at 1360 (some BFOQ cases involve hiring and others involve firing; BFOQ cases involve different types of occupations with different levels of responsibility for public safety).

found in nearly all the litigated BFOQ cases.[28] Almost all of the occupations in issue in the age BFOQ cases have involved employee responsibility for the safety of large numbers of people.[29] Courts dealing with BFOQ cases that involve public safety have been tempted, despite administrative mandates to the contrary, to interpret the BFOQ in favor of the employer for fear of increasing the risk of harm to the public if employers hire older workers.[30] The relatively short history of case law on the subject of the age BFOQ reflects the judicial struggle to reach a balance between public safety and the aims of the ADEA.[31]

All of the circuit court decisions determining the validity of age BFOQs are the progeny of two conflicting cases, *Hodgson v. Greyhound Lines*[32] and *Usery v. Tamiami Trail Tours, Inc.*[33] The *Hodgson* line of cases has adopted a broad construction of the age BFOQ defense and vests a great deal of discretion concerning age and employment practices in the employer.[34] The *Tamiami* line of cases, on the other hand, follows a more stringent and detailed test for the BFOQs fashioned from several leading Title VII race and gender discrimination cases.[35]

In *Hodgson v. Greyhound Lines*,[36] the Seventh Circuit addressed the question of whether Greyhound's refusal to hire new bus drivers over the age of thirty-five qualified as a legitimate BFOQ defense to a charge of age discrimination.[37] The lower court in *Hodgson* had relied upon the

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[28] *See* Player, *supra* note 11, at 766-67 (tension between safety concerns and rights of older workers); *Balancing the Interest*, *supra* note 2, at 1364 (public safety is common thread in all BFOQ cases).

[29] *See, e.g.*, Smallwood v. United Air Lines, Inc., No. 80-1111 (4th Cir., Oct. 8, 1981) (commerical air line pilot); Murnane v. American Airlines, Inc., 26 FEP Cases 1537, 1539 (D.C. Cir. 1981) (commercial airline pilot); EEOC v. City of Janesville, 630 F.2d 1254, 1256 (7th Cir. 1980) (police chief job); Arritt v. Grisell, 567 F.2d 1267, 1270 (4th Cir. 1977) (police job); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir. 1977) (test pilot); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 228 (5th Cir. 1976) (bus driver); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974) (bus driver).

[30] *See* text accompanying notes 106-154 *infra*.

[31] *See* notes 28 & 29 *supra*.

[32] 499 F.2d 859 (7th Cir. 1974).

[33] 531 F.2d 224 (5th Cir. 1976); *see The Scope of the BFOQ*, *supra* note 22, at 1156-57 (*Hodgson* and *Tamiami* are leading BFOQ cases).

[34] *See The Scope of the BFOQ*, *supra* note 22, at 1154, text accompanying notes 37-73 *infra* (discussion of 7th and D.C. Circuit courts' test for BFOQ).

[35] *See The Scope of the BFOQ*, *supra* note 22, at 1154; text accompanying notes 74-105 *infra* (discussion of 4th, 5th and 8th Circuit court tests for BFOQ).

[36] 499 F.2d 859 (1974), *cert. denied*, 419 U.S. 1122 (1975); *see Balancing the Interest*, *supra* note 2, at 1348 (*Hodgson* was first major court of appeals decision to develop test for age BFOQ defense).

[37] 499 F.2d at 860. In *Hodgson*, the Secretary of Labor filed an age discrimination suit against a bus carrier, Greyhound, for refusing to hire bus drivers over the age of thirty-five. *Id.* at 860. Greyhound admitted to the discriminatory practices, but claimed that age was a bona fide occupational qualification for the job. *Id.* at 866. The lower court found for the Secretary and held that Greyhound had not met its burden of proving the BFOQ exemption. *Id.* The 7th Circuit Court reversed, however, and allowed the age limit policy to stand. *Id.* at

standard in *Weeks v. Southern Bell Telephone and Telegraph Co.*,[38] a case which dealt with the Title VII BFOQ sex discrimination defense,[39] to hold that the age limit on bus drivers could not qualify as a BFOQ.[40] The *Weeks* court had stated that for a gender BFOQ to exist the employer must prove he had a factual basis for believing that all or substantially all women would be unable to perform the job duties safely and efficiently.[41] The lower court in *Hodgson* applied the *Weeks* standard to age discrimination and found that the employer had failed to carry his burden under the *Weeks* test.[42] The lower court in *Hodgson* then struck down the employer's BFOQ defense.[43]

The Seventh Circuit stated, however, that the *Weeks* standard was too stringent and was inapplicable to the age discrimination case before the court.[44] The court pointed out that the *Weeks* case did not involve the safety of the public and that the standard for the BFOQ thus could be stricter in *Weeks* than in a high safety risk case such as *Hodgson*.[45]

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865. The *Hodgson* court relied heavily on evidence introduced by Greyhound that the body undergoes degenerative changes during the thirties that are impossible to detect medically. *Id.* at 863. These changes in the body's physiology, Greyhound argued, made a risky practice of hiring drivers over the age of thirty-five. *Id.*

Greyhound admitted that the company's safest drivers were over thirty-five years old, but they also had had nearly twenty years of experience with the company. *Id.* Greyhound argued that it could never achieve the blend of age and Greyhound driving experience it needed to produce the safest drivers if the court forced it to hire workers over thirty-five. *Id.* The company further stressed that its seniority system gave newly hired drivers the rougher "extra board" runs, which were physically and mentally exhausting. Greyhound argued that older workers being hired at age thirty-five or over could not meet the demands of the extra board system, but would not be eligible for regular runs for at least ten years. *Id.* at 864. Although the government tried to stress the increased maturity and experience the older workers would have, the *Hodgson* court determined that age was a BFOQ, and that the company could exclude all applications from workers over thirty-five regardless of individual physical ability. *Id.* at 865.

[38] 408 F.2d 228 (5th Cir. 1969). In *Weeks*, a telephone company declined the application of a woman for the position of switchman. *Id.* at 231. The telephone company asserted that sex was a BFOQ under Title VII because of the physically demanding activities the switchman's job entailed. *Id.* at 232. The court denied the BFOQ exemption, stating that the company had not met its burden of showing that all or substantially all women would be unable to perform the job. *Id.* at 235.

[39] 42 U.S.C. § 2000e-2(e) (1970) (Title VII BFOQ defense).

[40] 499 F.2d at 861. The lower court in *Hodgson* probably relied on the Title VII *Weeks* case because Title VII of the Civil Rights Act of 1964 contains a BFOQ provision nearly identical to the age BFOQ in the ADEA. *See* 42 U.S.C. § 2000e-2(e)(1) (1976); *The Scope of the BFOQ, supra* note 22, at 1146 n.5. Almost all of the age BFOQ cases subsequent to *Hodgson* have turned to Title VII BFOQ precedent to set up tests for the age BFOQ. *See The Scope of the BFOQ, supra* note 22, at 1146.

[41] 408 F.2d at 235.

[42] 499 F.2d at 861.

[43] *Id.*

[44] *Id.* at 861-62; *see* text accompanying note 45 *infra*. *See also* note 8 *supra* (applicability of Title VII principles to age discrimination problems).

[45] 499 F.2d at 861-62.

The *Hodgson* court then turned to two other Title VII cases, *Diaz v. Pan American World Airways, Inc.*[46] and *Spurlock v. United Air Lines, Inc.*,[47] to fashion a broader guideline for the age discrimination BFOQ defense.[49] The *Diaz* court had stated that gender could be the basis for discriminatory employment actions only if the employer could show that hiring women would undermine the essence of its business.[49]

The *Hodgson* court adopted the *Diaz* standard[50] and explained that the essence of the bus transportation industry was the safe transportation of passengers.[51] The court then suggested that safety, the essence of the bus industry, would be undermined if elimination of the age requirement would cause even a minimal increase in the risk of harm to passengers.[52] The *Hodgson* court also stressed the public safety factor in referring to dictum from the *Spurlock* decision that the higher the risk to the public, and the higher the skill involved in the job, the more discretion the employer should enjoy in setting potentially discriminatory limits in employment practices.[53] The *Hodgson* court combined the *Diaz* essence of the business test[54] and the *Spurlock* safety/discretion test[55] to fashion a guideline for the BFOQ defense that only requires the employer to show reasonable cause to believe that elimination of the age requirement would result in even a minimal increase in risk to the public.[56] Further, under *Hodgson*, if the business involves obvious public safety factors, courts should allow employers a great deal of discretion in setting age limits for the hiring and firing of employees.[57]

The Seventh Circuit subsequently has extended the *Hodgson* rule in

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[46] 442 F.2d 383 (5th Cir. 1971).

[47] 475 F.2d 216 (10th Cir. 1972).

[48] 499 F.2d at 862-63; *see* text accompanying notes 49-55 *infra*.

[49] 442 F.2d at 388. In *Diaz*, the plaintiff charged an airline company with sex discrimination in failing to hire male flight attendants because of their sex. *Id.* at 386. The airline responded by admitting a per se violation of the Civil Rights Act, but argued that the company fell within the BFOQ exemption. *Id.* The airline argued that females were better equipped to relieve the anxiety of the passengers than were males, and that the passengers preferred female stewardesses. *Id.* at 387. However, the *Diaz* court found that safe transportation was the essence of the airline business and that the airline had not proven that hiring men would undermine the essence of the business. *Id.* at 388-89.

[50] 499 F.2d at 862.

[51] *Id.*

[52] *Id.* at 863.

[53] *Id.* at 862-63. *Spurlock* involved a race discrimination suit against an airline that set up pre-employment qualifications that allegedly discriminated against black pilots. 475 F.2d at 217. The *Spurlock* court stated that when a job required high skill and involved a high risk to public safety, the court should be cautious in requiring an employer to lower his standards. *Id.* at 219. The court allowed the qualifications, which included a college degree and several hours of flight experience, to stand. *Id.* at 219-20.

[54] *See* text accompanying note 49 *supra*.

[55] *See* text accompanying note 53 *supra*.

[56] 499 F.2d at 863.

[57] *Id.*

EEOC v. City of Janesville,[58] an age discrimination case involving an age limit for the hiring of police personnel.[59] The *Janesville* court, while appearing to follow the broad *Hodgson* rule,[60] actually went beyond *Hodgson* by suggesting that the employer's good faith and nondiscriminatory intent in regard to the challenged age limit might be a sufficient test for a BFOQ.[61] The court further broadened the BFOQ defense to the detriment of the older worker in its treatment of whether the employer should consider the age of the applicant in connection with the whole operation of the business or only the specific duties of the job for which the worker was applying.[62] The court ruled that the entire nature of the business should be the determining factor to compare with age, not just the specific duties of the job.[63] The normal variation among different types of jobs in the same industry thus becomes irrelevant under the *Janesville* BFOQ test.[64]

A second extension of the *Hodgson* rationale occurred in a 1981 case, *Murnane v. American Airlines*,[65] concerning age limits for hiring com-

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[58] 630 F.2d 1254 (7th Cir. 1980). *See generally, The Scope of the BFOQ, supra* note 22, at 1160-78 (thorough discussion of *Janesville*).

[59] 630 F.2d at 1256. *See The Scope of the BFOQ, supra* note 22, at 1165 (*Janesville* decision broadens BFOQ exemption more than *Hodgson*). The *Janesville* decision involved the forced retirement of a policeman at the age 55 from his police chief position. The police chief's job entailed only administrative work, and not actual public protection duties. 630 F.2d at 1256-57.

[60] 630 F.2d at 1257-59; *see* text accompanying notes 57 & 58 *supra*.

[61] 630 F.2d at 1258-59. *See The Scope of the BFOQ, supra* note 22, at 1171. Although the *Hodgson* court mentioned the defendant's good faith in its opinion, the *Janesville* court declared that the good faith of the employer is enough even in the absence of empirical data to uphold the BFOQ defense. 630 F.2d at 1258-59. *See* note 123 *infra*.

[62] 630 F.2d at 158; *see The Scope of the BFOQ, supra* note 22, at 1166-70.

[63] 630 F.2d at 1258.

[64] *Id.* The *Janesville* court stated that it was irrelevant that a particular occupation may be encompassed within the business. *Id.* The court believed that the business, and not the occupation, should be the focal point for the BFOQ inquiry. *Id.* Thus, all the various types of jobs within the police department of Janesville were lumped together to determine if age was a BFOQ for the whole "business" of the police station. *Id.* at 1258-59; *cf.* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 230 (5th Cir. 1976) (job qualifications must be examined with age to determine if age is BFOQ); *see The Scope of the BFOQ, supra* note 22, at 1167-69 (statutory and legislative intent mandate against the *Janesville* interpretation).

The very broad interpretation of *Janesville* court gave to the BFOQ defense may be misleading. The employer in the *Janesville* case was the state, and the discriminatory age policy was set out in a state statute. The extreme deference to the state legislature court displayed in dictum may have colored the *Janesville* opinion. 630 F.2d at 1259; *see The Scope of the BFOQ, supra* note 22, at 1175-77.

[65] 667 F.2d 98 (D.C. Cir. 1981). The *Murnane* case involved an airline age limit for hiring new flight officers. American Airlines had an established ranking system in which pilots began as flight officers and worked up to the rank of captain in fourteen to twenty years. *Id.* at 99 n.2. If the airline determined it could not promote the pilots, the company fired them. *Id.* at 99. Further, the Federal Aviation Administration requires retirement of pilots at age 60. 14 C.F.R. § 121.383(c) (1980). American Airlines thus alleged that a pilot hired past the age of thirty might not have time to reach the rank of captain before retirement. *Id.* at 100.

mercial airline pilots.[66] The *Murnane* court followed the *Hodgson* rationale by determining that the safe transportation of airline passengers was the essence of American's business.[67] The court then stated that the airline had shown some evidence that elimination of the age requirement would undermine safety because of a potential marginal increase in the risk of airplane accidents caused by older pilots.[68] Toward the end of its opinion, however, the *Murnane* court dispensed with even the relatively minor *Hodgson* protection for older workers.[69] The *Murnane* court stated that if safety is the critical element of the employer's business, the courts should automatically defer to the employer's judgment in employment practices.[70] The District of Columbia Circuit in the *Murnane* decision thus displayed the most severe aversion to date to tampering with an employer's business discretion when the business involves safety, even to the point of allowing discriminatory policies to stand.[71] Thus, while *Hodgson* itself requires a showing that the elimination of an age policy undermines the essence of the business,[72] later *Hodgson* line cases have moved toward a very lenient, pure good faith showing by the employer that safety may be at risk.[73]

In constrast to the Seventh and D.C. Circuits' approach to BFOQ defenses, the progeny of *Usery v. Tamiami Trail Tours, Inc.*[74] have established more stringent tests for employers to meet in proving age as a BFOQ defense.[75] In *Tamiami*, the court considered the legality of a maximum age limit policy for hiring bus drivers.[76] The *Tamiami* court

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American also argued that the safest pilots were those who were trained in the entire American pilot program, from flight officer to captain. American therefore contended that safety to the public would be decreased by hiring new pilots too old to go through the entire ranking program. *Id.* The *Murnane* court accepted the airline's argument and upheld the policy as a legitimate BFOQ.

The factual situation of the *Murnane* case may have affected the court's opinion. Even if the age policy had been struck, the court found that Murnane was not competitively qualified for the pilot's position. *Id.* at 101-02. The court thus had a less than appealing case factually in which to find for the pilot plaintiff.

[66] *See* note 65 *supra.*

[67] 667 F.2d at 101 (court cited *Diaz* essence of the business test which *Hodgson* incorporated).

[68] *Id.*

[69] *See* note 37 *supra.* The *Hodgson* test requires that the employer show harm to the essence of his business if he hired older workers. *See* text accompanying note 51 *supra.*

[70] 667 F.2d at 101.

[71] *Id.*

[72] 499 F.2d at 862-63.

[73] 667 F.2d at 101; 630 F.2d at 1258-59.

[74] 531 F.2d at 224 (5th Cir. 1976).

[75] *See The Scope of the BFOQ, supra* note 22, at 1154; text accompanying notes 75-105 *infra* (discussion of *Tamiami* line of cases' narrowing of BFOQ in order to further ADEA objectives).

[76] 531 F.2d at 226. The facts involved in *Tamiami* are markedly similar to those in *Hodgson. See* note 37 *supra.* In *Tamiami* the defendant bus company refused to hire intercity bus drivers between the ages of 40 and 65. 531 F.2d at 226. The company claimed that the

first turned to the *Diaz* essence of the business test, and required as a first step that the employer show that the challenged job qualifications were reasonably necessary to the essence of the business.[77] The *Tamiami* court then added the *Weeks* "ability of all or substantially all of the class" test[78] as an additional hurdle for the employer to pass before the employer may claim age as a BFOQ.[79] The *Tamiami* court used the original *Weeks* rule that an employer must show cause to believe that all or substantially all of the class discriminated against could not perform the occupational duties.[80] The *Tamiami* court, however, mitigated the severity of the *Weeks* rule by upgrading dictum in a *Weeks* footnote concerning the impossibility of individualized testing to the level of an alternative defense for the employer.[81] The *Weeks* court had stated in a footnote that an employer might be able to sustain a BFOQ defense if he could show the impossibility or impracticality of individualized testing.[82] The *Tamiami* court shaped the original *Weeks* test and the individualized

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new drivers would have to spend several years as "extra board" drivers, a strenuous occupation, because of their seniority system. *Id.* at 231. The bus company argued that older drivers not trained by Tamiami would be unable to perform these functions safely. *Id.* The expert testimony conflicted regarding whether age had a negative impact on driver safety that outweighed the benefits of maturity. *Id.* at 228. After careful consideration of the Department of Labor's mandate to construe the BFOQ defense narrowly, the court found that Tamiami met the burden of proving that age was a BFOQ. *Id.* at 229-30 & 238. The court found that Tamiami had shown that the job qualifications were reasonably necessary to the essence of the business, safety. *Id.* at 236. Although the defendant did not show that all or substantially all older workers were unable to drive the buses safely, it did show that it would be highly impracticable individually to test each applicant for ability. *Id.* at 234-35. The *Tamiami* court ultimately found for the defendant, pointing out frequently the public safety aspect involved in the case. *Id.* at 236-38.

[77] *Id.* at 236. Although both *Hodgson* and *Tamiami* claim to follow the *Diaz* test, the *Tamiami* court gave a slightly different wording to the *Diaz* test. In *Hodgson*, the court examined whether the elimination of the age requirement would undermine the essence of the business. 499 F.2d at 862. In *Tamiami*, however, the court stated that *Diaz* required that the job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of the business. 531 F.2d at 236. By stating the *Diaz* test negatively, the *Hodgson* interpretation slightly favors the defendant. Rather than examining the age policy on its merits, the *Hodgson* court seemed satisfied with only discussing the effect of termination of the policy might have on the employer's business. 499 F.2d at 862. The court thus focused upon the rights of the employer and public safety rather than on the rights of the older worker. In constrast, the *Tamiami* interpretation of *Hodgson* requires an examination of the allegedly discriminatory policies to determine their relationship to the business. 531 F.2d at 236.

[78] *See* text accompanying note 41 *supra* (*Weeks* test).

[79] 531 F.2d at 235-38.

[80] *Id.* at 235-36.

[81] *Id.* The alternative of being able to show the impracticality of testing individually rather than to show that all or most of the older workers were unfit for the job was only a footnote in the *Weeks* opinion. 408 F.2d at 235 n.5. The *Tamiami* court, however, treated the impracticality alternative as a full-fledged choice, with no explanation for the upgrading of the impracticality requirement. 531 F.2d at 235-36.

[82] 408 F.2d at 235 n.5.

testing footnote into an either/or standard.[83] Under *Tamiami*, therefore, the employer can show either the inability of older workers to perform, or, if it is unable to carry that burden, the employer can show the impossibility or impracticality of individualized testing.[84] The court also eased the rigorous burden of the *Weeks* test by reiterating the *Spurlock* principle that as the public safety factor increases, so should the employer's discretionary powers.[85] The *Tamiami* test further favors the employer in the test's implicit acceptance of the bus company's argument that its seniority system would be hurt by the elimination of the age requirement.[86] The *Tamiami* decision suggests that inquiry into other established business practices relating to age besides the age policy itself is inappropriate.[87]

The Eighth Circuit, in *Houghton v. McDonnell Douglas Corp.*,[88] adopted the *Tamiami* test verbatim in a commercial pilot age limit case.[89] The *Houghton* case is significant on its facts because the *Houghton* court applied the *Tamiami* test to the firing of older workers rather than to the hiring of new employees.[90] The court in *Houghton* found that age was

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[83] *See Balancing the Interest, supra* note 2, at 1351 n.89; text accompanying note 84 *infra*. The *Tamiami* court was the first court to use an either/or standard with the *Weeks* tests of inability to perform and inability to test. *See Balancing the Interest, supra* note 2, at 1351 n.89.

[84] 531 F.2d at 235-36.

[85] *Id.* at 236.

[86] *Id.* at 231, 237-38. The *Tamiami* court stated that Tamiami's seniority system, which relegated new drivers to the demanding "extra board" runs and gave senior drivers a choice of extra board or regular runs, was not beyond examination under the ADEA, if it led to age discrimination. *Id.* at 237. The *Tamiami* court did not examine the seniority system and gave no reason for its failure to do so, even though the seniority system did lead to discrimination, because the company believed aging drivers could not cope with the extra board. *Id.* at 237-38.

[87] *See* note 86 *supra* & note 130 *infra*; Player, *supra* note 11, at 760-62 (*Tamiami* court incorrect in refusing to examine seniority system).

[88] 553 F.2d 561 (8th Cir. 1977).

[89] *Id.* at 564.

[90] *Id.* at 563. In *Houghton*, an airline company found it necessary to reduce its staff of pilots because of a decline in business production. *Id.* The company transferred three pilots, including the named plaintiff, from test pilot duty to other nonflight jobs solely on the basis of their age (all above forty-five). *Id.* Houghton was dissatisfied with his demotion, tried to look for outside work, failed, and returned to the company in a nonflight job. *Id.* The airline fired Houghton soon thereafter for nonproductivity. *Id.* The company admitted a per se violation of the ADEA, but contended that age was a BFOQ for test pilots. *Id.* Even though Houghton produced a large amount of evidence showing that aircraft accidents decreased with the pilot's age, that test pilots aged slower than the rest of the population, and that he was personally in excellent health with little risk of experiencing a heart attack or stroke in flight, the lower court found that age was a BFOQ for test pilots. *Id.* at 563-64. The Eighth Circuit reversed, however, on the ground that the company had not shown that all or most older test pilots could not perform their duties, or that the company could not examine test pilots individually for ability. *Id.* at 564. On the contrary, the record showed that medical experts could detect disabling medical conditions affecting pilots with almost foolproof accuracy. *Id.* The court did not disucss the public safety aspect found in *Tamiami* or *Hodgson*

not a BFOQ because of medical testimony that indicated that individual testing for pilots' ability was possible.[91] The court also found that many pilots in their forties and fifties were able to perform their duties quite safely.[92] The plaintiff in *Houghton*, which was a job termination case, had the advantage over new applicants of impressive work and health records with the defendant airline.[93] Commentators have suggested that a court will be less likely to approve age as a BFOQ in a firing case because the individual's performance and safety records can be introduced at trial and are a known factor as opposed to the guesswork involved in hiring new older workers.[94] The court in *Houghton* also noted that the occupation in issue was that of test pilot, rather than commercial airline pilot.[95] Fewer people in the public at large are at risk in a test pilot situation than in a commercial pilot case so that public safety was not a major issue in *Houghton*.[96] The *Houghton* court, in fact, left out any reference to the *Spurlock* safety/employer discretion rule found in the previous age BFOQ cases.[97]

The Fourth Circuit also has adopted the basic *Tamiami-Weeks/Diaz* standard,[98] but apparently has eliminated the *Spurlock* idea of high risk

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because Houghton was not a commercial pilot, but a test pilot who carried no passengers. *See* Note, Houghton v. McDonnell Douglas Corporation: *Age Discrimination and Test Pilots*, 23 ST. LOUIS U.L.J. 187, 196 (1979) [hereinafter cited as *Age Discrimination and Test Pilots*].

[91] 553 F.2d at 564.

[92] *Id.*

[93] *Id.* at 563. In *Houghton*, two doctors found the plaintiff test pilot in exceptional physical condition, even in comparison to other test pilots. *Id.* The doctors were 99.9% certain that the plaintiff would not suffer a heart attack or stroke while in flight. *Id.*

[94] *See* James & Alaimo, *supra* note 2, at 7; *Balancing the Interest*, *supra* note 2, at 1360-61. Because courts can measure and assess an employee's performance in a contested discharge case, a court will be more likely to base its decision on specific capabilities in the job context. *Balancing the Interest*, *supra* note 2, at 1361. However, a court will be more likely to fall back on general assumptions about age in the absence of concrete individual data. *Id.* A *Houghton* commentator thus warns that courts probably will interpret *Hodgson* narrowly as applying only to firing cases in which a great deal of specific individual information about the plaintiff is available. *See* James & Alaimo, *supra* note 2, at 7.

[95] 553 F.2d at 563.

[96] *See Age Discrimination and Test Pilots*, *supra* note 90, at 195-96. The test pilot does not have as great a degree of responsibility for the public as do commercial airline pilots. *Id.* at 196. The test pilot's duties do not include the transportation or protection of the public. *Id.* Many test pilots, however, do fly over heavily populated areas at some time in their flights, so a certain degree of risk to the public is present for test pilots. *Id.* at 195.

[97] *Id.* at 196. The lower court in *Hodgson* did address the issue of public safety and analogized the occupation of test pilot to airline pilot. *Id.* at 195-96. The Eighth Circuit, however, ignored the issue of public safety in its opinion. *Id.* at 196. Either the court decided that the test pilot occupation did not involve the issue of public safety, or it purposefully left public safety out of its test for BFOQ in order to avoid allowing the employer too much discretion. *See* text accompanying notes 36-73 *supra* (previous BFOQ cases gave employer broad discretion when public safety involved).

[98] *See* text accompanying notes 76-87 *supra* (*Tamiami* standard).

to the public mandating greater employer discretion.[99] *Arritt v. Grisell*,[100] a police firing case, and *Smallwood v. United Airlines*,[101] a commercial pilot case, involved occupations with a high degree of responsibility to the public.[102] While both cases expressly favored the basic *Tamiami* test,[103] neither mentioned the *Spurlock* factor of increased employer discretion.[104] In fact, the Fourth Circuit in both *Arritt* and *Smallwood* stressed the need to keep the BFOQ defense as narrow as possible to promote the overall meaning of the ADEA.[105]

Both the *Tamiami* and *Hodgson* lines of tests are vulnerable to criticism on the ground that the tests have defined the BFOQ exemption too broadly in contravention of the spirit of the ADEA, using public safety to avoid close scrutiny of employer motives.[106] Two aspects of the tests in particular reflect the broadening effects of the present tests on the BFOQ defense.[107] First, the tests arbitrarily vest too much unsupervised discretion in the employer with respect to employment practices and the older worker.[108] Second, the courts have not focused clearly enough on the potential for individual testing before approving the use of a BFOQ generalization based on age.[109]

The circuit courts have used the catch phase of "danger to the public safety" to give broad and undefined amounts of discretion to employers and this discretion weakens any purported guidelines set up in the rest

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[99] *See* text accompanying note 53 *supra* (discussion of *Spurlock* rule); Player, *supra* note 11, at 766-67 (Fourth Circuit cases appear to be narrowing earlier BFOQ cases by not relying simply on public safety generalization).

[100] 567 F.2d 1267 (4th Cir. 1977).

[101] 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3948 (April 1982).

[102] *Arritt* involved the denial of a 40 year old policeman's application by the police civil service commission on the ground of age. 567 F.2d at 1269. The defendants alleged, among other things, that the age requirement was a BFOQ for the job of active duty policeman. *Id.* at 1271. The lower court entered summary judgment for the defendants using the *Hodgson* rule as a standard to judge the legitimacy of the age policy. *Id.* The Fourth Circuit reversed and remanded on the ground that the lower court had erred in using the *Hodgson* test rather than the *Tamiami* test to judge the BFOQ. *Id.*

Smallwood involved an age limit set by the commercial airlines on initial hiring of pilots. 661 F.2d at 305. The district court found that age was a BFOQ for the job of commercial pilot, but the Fourth Circuit, following the *Arritt* rationale, reversed. *Id.* at 307-09.

[103] *Id.*; 567 F.2d at 1271.

[104] 661 F.2d at 307-09; 567 F.2d at 1271 n.14.

[105] 661 F.2d at 307 (need to keep BFOQ defense narrow); 567 F.2d at 1271 (rejection of broad *Hodgson* rule).

[106] *See* Player, *supra* note 11, at 754-65; James & Alaimo, *supra* note 2, at 1-6; *Balancing the Interest*, *supra* note 2, at 1354-57.

[107] *See* text accompanying notes 108-09 *infra*.

[108] *See* text accompanying notes 119-41 *infra*; Player, *supra* note 11, at 763-64 (courts have allowed defendants to carry burden of proof on BFOQ too easily, using unfounded speculation); *The Scope of the BFOQ*, *supra* note 22, at 1174-75 (employers have enjoyed too much discretion in age/retirement practices).

[109] *See* text accompanying notes 142-67 *infra*; *Balancing the Interest*, *supra* note 2, at 1356-57; *The Age Discrimination*, *supra* note 4, at 383-84.

of the opinions.[110] The courts' apparent rationale is that employers whose everyday business practices involve public safety are better equipped to set hiring and firing standards to choose the best qualified workers for the job than is the judicial system.[111] While employers involved in fields which endanger a large segment of the public may be in a better position to analyze safety needs and worker performance,[112] they should not have an absolute, free reign to set employment standards with no inquiry into the motivations behind the standards.[113] The courts should be able to examine the validity of assumptions and possible stereotypical conceptions that underlie business decisions concerning older workers when a worker files a charge of age discrimination against a particular employer.[114] The majority of courts to date have not demanded empirical evidence of the effect of the hiring of older workers on safety.[115] When one court did demand and examine empirical data on safety, it found that older workers actually increased the safety of the business.[116] The court thus discerned no need for extra discretion for the employer when his business involved safety, and so left out the *Spurlock* increased discretion guideline in its opinion.[117] The enactors of the ADEA surely did not contemplate a meek acquiescence by the courts to the hiring and firing

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[110] *See* Player, *supra* note 11, at 766. Using a concern of public safety as their rationle, courts have not actually analyzed the safety and medical evidence in BFOQ cases. *Id.* Rather, courts have acted on generalized assumptions detrimental to the aged for fear of risk to the public. *Id.* Placid acceptance of an employer's plea of safety without an examination of medical and statistical evidence concerning older workers perpetuates the discrimination problem at which the ADEA was aimed in the name of public safety. *Id.* Most courts to date have set up relatively strict tests for employers to meet in regard to the BFOQ defense, but have promptly weakened or destroyed the tests by giving the employer unfettered discretion almost as an afterthought when the defendant raises the public safety issue. *See* Usery v. Tamiami Trail Tours, 531 F.2d at 230; Hodgson v. Greyhound Lines, Inc., 499 F.2d at 862.

[111] Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981); *see* Usery v. Tamiami Trail Tours, Inc., 531 F.2d at 238; Hodgson v. Greyhound Lines, Inc., 499 F.2d at 863.

[112] *See* Player, *supra* note 11, at 756-57.

[113] *See* note 98 *supra* (purpose of ADEA is to insure employment decisions are made with nondiscriminatory motives); 531 F.2d at 236 n.30 (courts must not allow employers absolute discretion in safety standards).

[114] *See* Player, *supra* notee 1, at 766-67; *The Scope of the BFOQ*, *supra* note 22, at 1175, 1177-78. *But see Balancing the Interest*, *supra* note 2, at 1364-65. One commentator suggests that courts are not able to delve deeply enough into medical testing possibilities and other employment data to determine when age limits are reasonable BFOQs. *Id.* Rather than increase the employer's discretion to make the decisions, the commentator suggested the administrative handling of the problem of age BFOQs by an agency equipped to do the necessary research on age and employment. *Id.* Through the use of employer applications to the agency for the use of a BFOQ, more equitable decisions based on all the current medical and safety data will be possible. *Id.* at 1362-64.

[115] *See* Player, *supra* note 11, at 766. The *Hodgson* and *Tamiami* courts permitted generalized conclusions that safety risks increased with age. *Id.* at 754, 756.

[116] 553 F.2d at 563 (accident rate of pilots decreases with age).

[117] *See* note 97 *supra.*

practices of employers, but rather foresaw a healthy inquiry into the causes and the effects of these decisions, even if the business involved public safety.[118]

The *Hodgson* line of tests presents the most blatant examples of excessive discretion given to employers in the name of public safety.[119] The *Hodgson* court cited as an unquestionable caveat the *Spurlock* principle advocating great discretion in public safety businesses,[120] rather than attempting to balance the interests of public safety versus employment of older workers.[121] The *Hodgson* court's flat assertion of the *Spurlock* rule effectively cuts off inquiry into the motivation of the employer for setting up his allegedly discriminatory age policy. The *Janesville* police hiring test does allow an inquiry into the employer's good faith in setting the age standard,[122] but stops far short of allowing a consideration of discriminatory effect as opposed to intent on the part of the employer.[123] If the employer's actions meet the *Janesville* good faith test, the test sets no limits on how the employer may implement or administer the good faith policy.[124] The *Murnane* pilot test sums up the *Hodgson* perspective by sweepingly concluding that courts are ill-equipped to make age policy decisions when the business at issue involves public safety, and that courts should leave employers to their own judgment as much as possible.[125]

While the *Tamiami* line of cases do not accede so easily to employer discretion, analysis of the *Tamiami* decision itself reveals some tendency to defer to the employer's judgment, particularly when the subject of public safety is present.[126] The *Tamiami* decision begins by setting a relatively precise *Weeks/Diaz* guideline for employers that all or substantially all of the older workers must be unable to perform or that individualized testing of applicants is impossible.[127] The *Tamiami* court

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[118] *See* 29 U.S.C. § 621(b) (purpose of the ADEA is to prevent arbitrary age discrimination).

[119] *See Balancing the Interest, supra* note 2, at 1355.

[120] 499 F.2d at 862-63.

[121] *See Balancing the Interest, supra* note 2, at 1355 (*Hodgson* court may have relied on *Spurlock* to appear to strengthen its lenient interpretation of *Diaz*).

[122] 630 F.2d at 1258-59.

[123] *See The Scope of the BFOQ, supra* note 22, at 1172-73. The *Janesville* court's emphasis on the employer's good faith is in error, since Congress designed the ADEA to prohibit discriminatory effect as well as discriminatory intent, regardless of the employer's good faith. *Id.* at 1172. By allowing the employer complete discretion as to age policies as long as they are carried out in good faith, the BFOQ will allow a "continuation of the arbitrary policies the ADEA was intended to prevent." *Id.* at 1171-72.

[124] *Id.* at 1172-73.

[125] 667 F.2d at 101.

[126] 531 F.2d at 236 (the greater the safety factor, the more stringent the job qualifications may be); *see Balancing the Interest, supra* note 2, at 1356. The tendency of the *Tamiami* court to reduce scrutiny of employment practices when the business involves public safety is dangerous because the company may set very high qualifications that would effectively eliminate all older applicants. *Id.* at 1356.

[127] 531 F.2d at 234-36.

states, however, after its formulation of the *Weeks* test, that employers involved in safety issues should have some degree of discretion in labor practices.[128] The *Tamiami* court revised the *Spurlock* principle to read that the higher the risk the more stringent job qualifications may be, rather than the more discretion the employer should have, thus removing some of the emphasis on pure unbounded employer discretion.[129] Even though the *Tamiami* court softened the *Spurlock* principle, however, the very presence of the principle makes the *Tamiami* case ambiguous as a guide to determining the amount of discretion an employer legitimately can exercise.[130] Fortunately, the more recent *Tamiami* line cases have ameliorated some of the *Tamiami* ambiguity in that none of the opinions mention the applicability of the *Spurlock* rule even though all of the cases involve some degree of public safety.[131]

In addition to stressing employer discretion, the circuit courts have broadened the BFOQ defense by deemphasizing the importance of the individual's ability to perform the job duties regardless of his age.[132] Instead, the courts either disregard or place low priority on the alternative of individualized testing.[133] The disregard of individual ability is incorrect for two reasons. First, the ADEA specifically emphasizes its preference for individual testing over age-based generalizations.[134] Second, the opinions, while expressing great concern for safety, ignore the

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[128] *Id.* at 236.

[129] *Id.* The *Hodgson* court dwelt on lessening the burden of the employer to explain the employer's discriminatory practices in safety cases. 499 F.2d at 863. The *Tamiami* court, however, just stated that the job qualifications could be more stringent, not that they would not be subject to review by the courts. 531 F.2d at 236.

[130] *See* James & Alaimo, *supra* note 2, at 5-6. Further evidence of *Tamiami*'s ambiguity toward employer discretion, besides its adoption of the *Spurlock* rule, is the court's decision not to review the employer's age-based seniority plan which was an integral part of the defendant's BFOQ defense. 531 F.2d at 237-38. The *Tamiami* court's refusal to consider the seniority-run "extra board" system was erroneous for two reasons. Player, *supra* note 11, at 761. First, the company should not be allowed to refuse to hire qualified workers because at some future time under the seniority system the demands of the job will become too great. *Id.* For example, a forty-year old driver could probably handle the extra run, but a fifty-year old driver might not. Yet, under Tamiami's seniority system, a new driver might have to stay on the "extra board" runs for over ten years. An employer should not be allowed to refuse the older worker's application when he is able to perform the job just because of the future possibility of having to fire him because of a seniority system. *Id.* at 763. Firing the worker later would be less discriminatory than never hiring him or giving him a chance to perform at all. *Id.*

In addition, § 4(f)(2) of the ADEA provides that no employee plan shall excuse the failure to hire any individual. *Id.* Arguably, the "employee benefits plans" referred to include seniority plans. *Id.* The *Tamiami* court thus may have been wrong under the act to allow Tamiami's seniority plan to block Usery's application for employment. *Id.*

[131] *See* note 104 *supra*; Player, *supra* note 11, at 764. One commentator believed that the absence of the *Spurlock* test from *Arritt* is important in narrowing the scope of the BFOQ. *Id.* The omission of any mention of seniority systems as a variable for denying consideration for employment is also important. *Id.*

[132] *See* text accompanying notes 133-57 *infra.*

[133] *Id.*

[134] 29 U.S.C. § 621(b); *see* note 22 *supra.*

possible aid to safety that individual testing could achieve.[135] Individual testing of older workers could ensure a blend of health, maturity, and experience in the older worker for the employer.[136] Extensive inquiry into the feasibility of testing applicants or older employees individually for ability should be mandatory before the determination of whether age alone would be a legitimate generalization upon which to base an employment decision.

The *Hodgson* line of cases violates the policy of the ADEA in a more unabashed fashion than does the *Tamiami* line, although *Tamiami* also effectively relegates the individual testing issue to a relatively low priority through a creative interpretation of *Weeks* dictum.[137] The *Hodgson* court dealt with the ADEA's emphasis on individualized testing by ignoring it.[138] Although the *Hodgson* court considered and rejected in dictum the feasibility of individual testing for bus drivers, the court did not incorporate the idea into its final test for a BFOQ.[139] Instead, the *Hodgson* test focused on whether the eligibility of older workers would undermine the essence of the business.[140] The *Hodgson* test thus implicitly discusses older workers as a class, rather than on an individualized basis.[141]

The *Janesville* police firing case, besides adopting the *Hodgson* test that does not promote individual testing of ability,[142] stresses the group rather than the individualized concept in another very subtle way. The *Janesville* court considered the applicant's age in relation to the entire business operation involved in the conflict, not just to the specific duties of the occupation subject to the age policy.[143] By shifting the focus away

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[135] *See* Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 563 (1977). Individual testing, such as the medical test performed in *Hodgson*, allows airlines to be almost certain that their pilots will not suffer heart attacks while in flight. *Id.* at 564. Individual testing would allow healthy older pilots to fly, which would increase safety since risk of airplane accidents decreases as the pilot's age increases. *Id.*

[136] *See id.* at 564 (older pilots have better safety records).

[137] *See* text accompanying notes 146-53 *infra*.

[138] *See Balancing the Interest, supra* note 2, at 1356. The effect of *Hodgson* is to exclude the possibility of individualized testing. *Id.*

[139] 449 F.2d at 864. The *Hodgson* court mentioned the government's argument that employers should test drivers on the basis of their "functional" age rather than their chronological age. *Id.* The court dismissed the functional age argument by stating that the feasibility of individualized testing was "questionable." *Id.* The court, however, did not require Greyhound to produce evidence of the impracticality of testing for ability. *Id.*

[140] *Id.* at 862.

[141] *See Balancing the Interest, supra* note 2, at 1356. The *Murnane* decision perpetuates the *Hodgson* line of reasoning by failing to consider the possibility of individual testing for the test pilot's job involved in *Murnane*. *See* 667 F.2d at 101. The *Murnane* court pointed out that it did not need to discuss the testing of the pilot plaintiff, because the airlines established seniority system was the real basis for refusing to hire older pilots. *Id.*

[142] *See The Scope of the BFOQ, supra* note 22, at 1165 (*Janesville* follows *Hodgson*, and goes further in broadening BFOQ defense).

[143] 630 F.2d at 1258. In *Janesville*, the police chief was fired after he reached age fifty-five. *Id.* at 1256. The police chief, however, performed only administrative duties. *Id.* The

from the specific occupational duties, the court also implicitly rendered impossible the testing and matching of individual applicants for those specific duties.[144] The *Janesville* test instead focuses on whether age would be a relevant factor in the overall business, which may include several types of duties with broad variations in the physical and mental qualities necessary to perform those duties.[145]

In an analysis of the area of individualized testing, the *Tamiami* line of cases fares only slightly better than the *Hodgson* line. While *Tamiami* does incorporate a test for individual ability into its final BFOQ rule, it does so in a negative and subordinate sense.[146] The *Tamiami* rule mandates that either the employer prove that all or substantially all of the class are unable to perform the job, which implicitly groups workers or applicants as a class, or, if the employer cannot carry this burden, that he prove the impossibility of individualized testing.[147] The first inquiry thus is into workers as a class, and only if the employer cannot pass the first test is he forced to determine the feasibility of individual testing.[148] The *Tamiami* court also phrased the idea of individualized testing in the negative sense of proving the impossibility of testing, which further deemphasizes the importance of the issue under ADEA purposes.[149] In support of individualized testing, however, the *Tamiami* court modified the *Diaz* essence of the business test to focus on the specific job qualifications.[150] Particularly when viewed against the Seventh Circuit's rejection of the consideration of specific occupational duties,[151] the *Tamiami* court's rewording of the *Diaz* test seems supportive of the individualized testing spirit of the ADEA.[152]

Subsequent *Tamiami* line cases, while improving on the employer discretion/safety aspect of *Tamiami*, have done little to improve the status of individualized testing, since they have merely followed the

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Janesville court, however, refused to consider the duties involved in the job of police chief and the plaintiff's ability to perform them. *Id.* at 1258. Instead, the court ruled that age was important to the business of police work, and that the particular jobs within that business were of no consequence under the ADEA BFOQ defense. *Id.*

[144] *See The Scope of the BFOQ, supra* note 22, at 1166-67.

[145] *See* notes 143 & 144 *supra.*

[146] *See* text accompanying notes 112-114 *supra*; *Balancing the Interest, supra* note 2, at 1356-57. *Tamiami* violated *Week's* spirit by shifting the focus away from individual testing of ability. *Id.* at 1357.

[147] 531 F.2d at 235.

[148] *See* 531 F.2d at 235. The *Tamiami* test first focused on whether the employer proved that *all* women would be unable to perform their duties. "All" women connotes a class concept rather than an individualized concept.

[149] *See Balancing the Interest, supra* note 2, at 1357. The *Tamiami* court phrased the individual testing prong of the *Weeks* test so that it emphasized the employer's expense and effort, rather than the individual's right to be tested for his ability. *Id.*

[150] 531 F.2d at 236. The *Tamiami* court stated that the job qualifications must go to the essence of the business. *Id.*

[151] *See* text accompanying notes 143-45 *infra.*

[152] *See* note 77 *supra.*

Weeks/Tamiami standard without questioning the order or substance of the test.[153] The sole exception is the *Smallwood* pilot hiring case, in which the Fourth Circuit discussed at some length the individual testing procedures for pilots and the medical evidence introduced at trial which suggested that pilots could be tested individually.[154] The court, after finding that the employer's assertion of a BFOQ did not satisfy the first prong of the *Tamiami* standard, went on to consider whether the BFOQ satisfied the individual testing aspect.[155] *Smallwood* thus suggests a possible trend toward equalizing the individualized testing prong of the *Tamiami* test or even requiring that courts consider the prongs jointly rather than as an either/or standard.[156]

Courts need a new and narrower test to determine when age should serve as the basis for a BFOQ defense because of the discretion and individualized testing problems in the two present lines of cases.[157] The new test needs to incorporate at least three factors to ensure that the ADEA's antidiscriminatory purposes will be given effect.[158] First, the court needs to look at the feasibility of testing older individual employees or applicants for the specific job in controversy to determine each individual's unique ability to perform the required tasks, particularly if the job involves public safety.[159] If an accurate and economically feasible[160] method of testing is available, the question of allowing age as a

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[153] *See* 661 F.2d at 307; 567 F.2d at 1271.

[154] 661 F.2d at 307-09. The *Smallwood* court emphasized that the defendant airline's present medical exam could detect potential disabling medical problems in pilots. *Id.* at 308-09. Medical exams also could predict the risk of heart attack or stroke with a high rate of certainty. *Id.* The defendant airline would not even have to institute new individualized tests in order to detect medical problems in older pilot applicants. *See id.* The *Smallwood* court thus held that the defendant had failed to show the impracticability of individualized testing to enable the airline to take advantage of the BFOQ defense. *Id.*

[155] *Id.*

[156] *See* James & Alaimo, *supra* note 2, at 6 (both portions of *Weeks* test should be met to justify BFOQ defense).

[157] *See* Players, *supra* note 11, at 766-67; *The Age Discrimination, supra* note 4, at 383-84.

[158] *See* text accompanying notes 159-66 *infra.*

[159] *See* Player, *supra* note 11, at 766; *The Age Discrimination, supra* note 4, at 383-84.

[160] One major argument against a narrow interpretation of the BFOQ defense is that employers cannot afford individualized testing. The cost argument may be valid in areas in which medical technology has not produced an accurate and relatively inexpensive test. *See Age Discrimination, supra* note 20, at 407-08. In such cases, an age BFOQ generalization may be the only practical way that employers can ensure the safety of their customers. *See id.* Too often, however, testing cost arguments by the employer hide other less valid economic arguments against hiring and retaining older employees. Hiring or retaining older employees often costs employers more in increased salaries and pensions than consistent hiring of new and inexperienced workers. *See The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 581 (1979) [hereinafter cited as *The Cost of Growing Old*]. Although the ADEA discourages the influence of purely age-based economic motives such as salaries on employment decisions, 29 C.F.R. § 860.103(b) (1980), employers naturally will be tempted to discriminate against higher-salaried older

generalized BFOQ should never even arise.[161] Second, if testing is not possible, the court needs to determine if age is the best and the narrowest generalization available to employ qualified workers.[162] In order to avoid unnecessary generalizations, the court needs to examine closely the exact job duties, and make certain that no unsupported assumptions about age and job duties underlie the analysis.[163] The employer should have to support each assertion that an older worker is less able to perform a specific task of his job than a younger one by convincing empirical data, not just generalized assumptions.[164] Last, the court should look beyond an employer's blanket assertion of risk to the public for other motives that the employer may have for wanting to employ younger workers, such as the ability to pay lower wages to less experienced employees.[165] Courts should analyze carefully factors that the employer uses to justify its age policy, such as seniority plans, in order to guard against hidden discriminatory motives.[166]

The foregoing BFOQ test is suggested as a broad guideline for the judiciary to follow when considering age discrimination cases. The proposed test, however, like the *Hodgson*[167] and *Tamiami* tests,[168] may prove superficial and inadequate in practice until Congress resolves the underlying political dilemma which created the present age BFOQ conflict in the circuits.[169] Simply stated, the BFOQ dilemma involves tension between the right of older workers to employment security and the

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workers, particularly if business is in a decline. *See The Cost of Growing Old, supra* at 581-82. However, narrowing the BFOQ and thereby increasing the collective age of the workforce can be an economic benefit to certain employers. Older employees, with their experience and judgment, actually have increased safety levels in certain occupations, thereby leading to fewer accidents and fewer concomitant law suits. *See* 553 F.2d at 563. Also, some commentators have noted that employer compliance with the spirit of the ADEA which includes a narrow BFOQ defense could lead to fewer suits under the ADEA itself by disgruntled applicants or employees and better relations with the labor force in general. *See The Cost of Growing Old, supra* at 595.

[161] *See The Scope of the BFOQ, supra* note 22, at 1166. Some recent cases have noted that medical research has progressed to the point that doctors can detect debilitating medical problems in older employees or applicants with surprising accuracy and efficiency, and at a relatively low cost to the employer. *See* Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir. 1977) (possible to detect disabling physical condition in test pilot with virtually foolproof accuracy); EEOC v. County of Los Angeles, 27 FEP Cases 904, 908 (C.D. Cal. 1981) (undetected heart disease can be predicted with up to 99% accuracy as to short-term problems).

[162] *See* Player, *supra* note 11, at 766-67; *The Age Discrimination, supra* note 4, at 384.

[163] *See* Player, *supra* note 11, at 766 (recently courts have been demanding proof of actual inability and resisting generalizations).

[164] *See The Scope of the BFOQ, supra* note 22, at 1168-70.

[165] *See* Smallwood v. United Airlines, Inc., 661 F.2d at 307.

[166] *See* Player, *supra* note 11, at 766.

[167] *See* text accompanying notes 36-57 *supra* (*Hodgson* test).

[168] *See* text accompanying notes 74-87 *supra* (*Tamiami* test).

[169] *See* text accompanying notes 187-93 *infra* (discussing basis of safety and age discrimination dilemma); notes 36-105 *supra* (BFOQ conflict among circuits).

right of the public to expect adequate precautionary hiring measures in businesses involving some safety risk to the public.[170] Policymakers have not yet pronounced a position on the conflict between public safety and the employment of allegedly less competent workers, whether older, handicapped, or otherwise.[171] Until Congress decides that safety is superior to the interest of such workers, or that it must balance the two interests, or that public safety inherently is of lessor importance than the rights of workers, any BFOQ test will remain a mere placebo for a very complex societal ill.[172]

The core of the age/safety dilemma will become apparent only after policymakers have reached decisions on two preliminary levels.[173] First, Congress needs to decide if an employer's invocation of "public safety" alone is sufficient to support an age BFOQ.[174] Congress could conclude that safety is absolutely paramount and that government interference with employer discretion in age-related hiring practices is improper.[175] The current political trend which favors the reduction of government influence in private business lends itself to a legislative acquiescence in employer discretion in regard to employment practices.[176] Legislative acquiescence in employer discretion in the hiring of older workers probably in turn would gain support from the current tendency toward judicial restraint in the private business sector.[177] In the event of Congress' acceptance of complete employer judgment about safety and the older worker, the courts could stop at this first level of inquiry and could fashion a BFOQ standard which incorporates this safety/employer discretion bias.[178]

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[170] *See* James & Alaimo, *supra* note 2, at 11; *The Scope of the BFOQ, supra* note 22, at 1173. *See generally Balancing the Interest, supra* note 2.

[171] The ADEA does not mention the effect of public safety on the issue of employment of older workers. *See* 29 U.S.C. §§ 621-34 (1970). The Department of Labor bulletin construing the BFOQ provision did mention that a BFOQ must be imposed for the safety and convenience of the public to be valid. 29 C.F.R. §§ 806.102(d)(e) (1980). The EEOC has deleted this requirment from its bulletin, leaving the effect of safety on the BFOQ determination unclear. *See The Scope of the BFOQ, supra* note 22, at 1149 n. 25.

[172] *See* text accompanying notes 185-91 *infra* (judicial need for congressional guidelines).

[173] *See* text accompanying notes 174-83 *infra.*

[174] *See* Player, *supra* note 11, at 754-65; James & Alaimo, *supra* note 2, at 1-6; *Balancing the Interest, supra* note 2, at 1354-57. Congress should not allow an employer's mere assertion of public safety to block an examination of the employer's hiring practices. *See* text accompanying notes 120-32 *supra. But see* 667 F.2d at 101 (court should not interfere with employer discretion when public safety is involved).

[175] *Cf.* 667 F.2d 100-01 (judicial determination that safety is superior to rights of older workers).

[176] *See* McGowan, *Regulatory Analysis and Judicial Review*, 42 OHIO ST. L.J. 627, 630 (1981).

[177] *See* Smith, *Urging Judicial Restraint*, 68 A.B.A.J. 59, 60 (1982).

[178] *See* 667 F.2d at 101 (court adopts BFOQ test which favors safety and employer discretion).

If Congress rejects safety as an absolute justification for unfettered employer discretion, however, it must consider the second preliminary level of inquiry in the age discrimination dilemma. In the second level, Congress must decide if public safety is an interest subject to classification into measurable degrees of risk to the public, and thus measurable degrees of necessary protection.[179] The fundamental nature of public safety as a governmental responsibility makes careful, empirical analysis of the degree of risk to the public from hiring older workers in certain jobs essential even if difficult.[180] All jobs within the public transportation industry, for example, do not involve the same degree of risk to the public, even though most involve some responsibility for large numbers of people. A test pilot's job would seem to involve a less direct risk to the public than does a commercial pilot's job because the test pilot carries no passengers.[181] A bus driver's job, on the other hand, may involve a greater degree of risk to the public than a commercial pilot's job because a bus driver generally has no extra driver to replace him if he becomes ill.[182] By looking beyond safety as an absolute and by analyzing variables such as emergency replacements, medical capability of the employee to perform his job, and the number of people at risk in various occupations, Congress should be able to differentiate among degrees of risk to the public if employers hire older workers in certain occupations.[183] In some cases, the policymakers could discover that, although public safety is an integral part of a business, the hiring of older workers may not prove detrimental and perhaps could decrease the risk to the public.[184]

In those cases in which the second level of inquiry leads to a finding that the hiring of older workers might have some adverse effect on public safety, Congress finally must face the crux of the age discrimination/safety dispute. Congress must determine if, and to what extent, society is willing to balance risk to public safety against the rights of older workers.[185] Activities such as mass public transportation always

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[179] *See The Scope of the BFOQ*, *supra* note 22, at 1166-70 (discussing degrees of risk to public involved in various jobs within police department). The *Janesville* court suggested that degree of risk should not be a consideration when public safety occupations are at issue. 630 F.2d at 1256. The *Hodgson* court, on the other hand, did discuss the difference in risks to the public between various jobs in the airline industry. 553 F.2d at 564.

[180] *See The Scope of the BFOQ*, *supra* note 22, at 1170-75 (courts should consider empirical evidence of effect of hiring older workers on safety rather than relying on employer's good faith judgment).

[181] *See Age Discrimination and Test Pilots*, *supra* note 90, at 196.

[182] *See* 531 F.2d at 231.

[183] *See Balancing the Interest*, *supra* note 2, at 1361-64. A body with extensive fact-finding capabilities should make the determination of the effect of hiring older workers of safety in particular occupations rather than the courts. *Id.* at 1361.

[184] *See* 553 F.2d at 563-64 (airplane accidents decrease as pilot's age increases).

[185] *See* James & Alaimo, *supra* note 2, at 10-11; *Balancing the Interest*, *supra* note 2, at 1362.

have involved a certain degree of risk to the public.[186] Phrased starkly, the unappealing issue Congress must wrestle with is whether society is willing to increase that inherent risk even minutely to secure employment and financial well-being for the older worker in safety-related businesses.[187] Admittedly, Congress will face sensitive and often intangible moral, political, and economic considerations in its efforts to balance the rights of the public and the older worker.[188] The legislature's failure to deal with the ultimate political balancing, however, will lead only to a continuation of the judicial confusion over the BFOQ issue.[189] The absence of clear legislative guidance about the weight to be given safety and the rights of older workers in particular occupations has forced courts to rely on incomplete and biased empirical data offered by opposing parties and on their own individual instincts, prejudices, and morals in reaching decisions on the balancing of the rights of employers, workers, and the public.[190] As a result, the circuit courts have placed varying values on the respective interests of safety, employer judgment, and older workers,[191] and have created an ambiguous, inconsistent morass of tests which give little assistance to workers and employers who wish to avoid BFOQ age conflicts.

Since the age discrimination dilemma is so complex and politically sensitive, Congress probably will require much time to formulate rational guidelines for courts and employers to follow. In the meantime, employers can take some practical steps gleaned from current BFOQ case law to ameliorate the tension between safety and older workers.[192] The airline industry, which is currently at the center of the BFOQ conflict,[193] probably could reduce the amount of its litigation by following a few steps. First, the airlines should not immediately disqualify applicants over the age of thirty, as they do today.[194] Instead, the airline should set up a complete set of individualized tests for the symptoms that normally accompany aging and for undetected diseases that could affect public safety.[195] In fact, the airlines should examine the pilots even

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[186] *See* James & Alaimo, *supra* note 2, at 9.

[187] *See* 499 F.2d 859 (employer need only show that elimination of its hiring policy would jeopardize the life of one person for court to uphold BFOQ).

[188] *See Balancing the Interest, supra* note 2, at 1361.

[189] *See* text accompanying notes 36-105 *supra* (conflicts among BFOQ cases).

[190] *See Balancing the Interest, supra* note 2, at 1361-62.

[191] *See* 667 F.2d at 101 (emphasis on employer discretion); 553 F.2d at 195-96 (emphasis on worker); 499 F.2d at 862-63 (prime emphasis on public safety).

[192] *See* text accompanying notes 193-99 *infra.*

[193] *See* Smallwood v. United Airlines, Inc., 661 F.2d 303 (4th Cir. 1981); Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977).

[194] *See* Rosenblum, *supra* note 19, at 1272 n. 67.

[195] *See Balancing the Interest, supra* note 2, at 1356. Individualized tests, if feasible, should operate to produce a very healthy, able group of older workers with little risk of undetected medical problems. *See* note 136 *supra.* Because of conflict within the medical com-

more thoroughly than the FAA's requirement of a six month general screening.[196] The airlines also should consider transferring flying experience credit from other airlines or the armed forces in order to shorten training periods or promotion periods for experienced pilots.[197] Most airlines currently do not consider prior flight experience in their age-related employment decisions.[198] Finally, if an airline truly feels that the hiring of older pilots will endanger the safety of its passengers, it should gather as much empirical data as possible to support its conclusions before denying the position to an older worker.[199]

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munity about the nature of the physical changes necessarily correlative with aging, and about the degree to which testing can discover these deficiencies, however, the concern in regard to hiring older workers in some fields may be justified. *See* Interview with Dr. William Hark, Chief of the Aero Medical Standards Division of the Office of Aviation Medicine, Federal Aviation Agency (March 1, 1982) [hereinafter cited as Hark Interview]. An intense debate concerning whether physical deterioration is caused by the aging process itself or by other external factors currently is being waged within the medical community. *Id.* The medical community also is divided over whether individual testing can accurately predict the chances of an individual being disabled by an undetected disease. *Id.* One commentator has suggested that doctors can predict the risk of suffering a heart attack or stroke from undetected heart disease with a great amount of accuracy. Rosenblum, *supra* note 19, at 1272; 553 F.2d at 564 (heart disease in pilots can be detected with almost foolproof accuracy); EEOC v. County of Los Angeles, 27 FEP Cases 904, 908 (C.D. Calif. 1981) (inexpensive tests like EKG and Bruce Protocol test can predict with 99% certainty the chances of future heart attacks over the short-term). Dr. Hark disagrees that medical testing has reached a point of virtual accuracy in predicting undetected diseases. Hark Interview, *supra*. He also stated that as age increases, the more complex the necessary medical tests become to detect future disabling deficiencies in pilots. *Id.* As the tests become more complex, so does the cost of the tests. *Id.* As medical technology advances, however, more efficient, accurate, and inexpensive methods of testing the symptoms accompanying aging are coming into use. *See* Rosenblum, *supra* note 19, at 1272 (advances in testing pilots). Twenty years ago, the FAA found individual testing impractical for commercial pilots. *Id.* However, tests are in existence now that can measure the effects of aging on piolts. *Id.*; *see* Smallwood v. United Air Lines, Inc., 667 F.2d 303 (4th Cir. 1981). United Air Lines subjects all pilots to periodic tests such as blood screening, electrocardiograms, urinalysis, x-rays and diabetes screening. *Id.*

If medical science in a certain field has progressed to the point where accurate and efficient individual testing is available, the factors of maturity, experience, and judgment that older workers can bring to their jobs make it impractical and even unsafe not to hire the older worker. *See* 553 F.2d at 563. The accident rate of pilots decreases with age. *Id.* A major cause of airplane accidents is poor pilot judgment, which is cause by lack of experience. *Id.* at 563-64. All of the airline crashes reported by the defendant in the *Hodgson* case involved young pilots in their thirties, not older, more experienced pilots. *Id.*

[196] Hark Interview, supra note 195. The FAA requires all pilots to undergo a general medical screening every six months. *Id.* The tests are not exhaustive, and some airlines add supplemental tests to the FAA testing. *Id.*

[197] *See* Rosenblum, *supra* note 19, at 1273. Some airlines do not allow pilots to transfer flying experience credits from other airlines or the armed forces. *Id.* The idea of nontransferability of skills can exclude many older pilots from employment because their promotion periods will not be shortened by the previous experience. *Id.* Thus, many older pilots, if hired, would reach age 60 and have to retire before they completed the training program. *Id.* Airlines will not hire pilots they do not expect to finish the training program. *See id.*

[198] *Id.*

[199] *See* Player, *supra* note 11, at 766-67; *The Age Discrimination*, *supra* note 4, at 384.

The present law of age BFOQs is in serious conflict among the circuits that have heard BFOQ cases.[200] None of the proffered tests adequately protect the aging worker or fully promote the policies behind the ADEA, although the *Tamiami* progeny is coming closer to approaching the ADEA goals.[201] The courts have failed to consider in depth the issue of public safety versus the needs of the older worker.[202] In particular the courts have ignored the possible contribution to safety that older, more experienced workers can bring to the job market.[203] The tests have given employers far too much discretion in the name of public safety, and have neglected to put in the forefront the necessity for individualized testing.[204] Congress needs to create a new test that will focus on areas ignored or undermined by the courts, such as matching the individual to specific duties rather than to the overall nature of the business.[205] Congress should wipe the age BFOQ slate clean of Title VII tests that have been misinterpreted and distorted,[206] and should fashion special tests particularly suited to the problem of aging. The BFOQ represents a potentially dangerous threat to workers, since the BFOQ rests on a generalization about age, usually considered an anathema to discrimination issues.[207] Only by narrowing considerably the availability of the BFOQ exception to employers, even in the areas involving some degree of public safety, will the interests of the aging worker be represented under the ADEA.[208]

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[200] *See* text accompanying note 25 *supra.*
[201] *See* text accompanying notes 106-07 *supra.*
[202] *See generally Balancing the Interest,* *supra* note 2.
[203] *See* text accompanying notes 135-36 *supra.*
[204] *See* text accompanying notes 108-56 *supra.*
[205] *See* text accompanying notes 157-66 *supra.*
[206] *See* James & Alaimo, *supra* note 2, at 11.
[207] *See* text accompanying note 22 *supra.*
[208] *See* text accompanying notes 157-66 *supra.*