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AN EXAMINATION OF MANDATORY RETIREMENT PROVISIONS FOR POLICE OFFICERS

I. INTRODUCTION

The 1960's marked a decade when American society as a whole became cognizant of the harmful effects of discrimination. In addition to the well-known advances toward equality in race and gender, America also made great progress towards the elimination of age discrimination in the workplace.¹ This progress is reflected by Congress' 1967 enactment of the Age Discrimination in Employment Act (ADEA).² Essentially, the purpose of this act is to promote employment of older people based on ability rather than age.³ Age-based discrimination occurs frequently in cases dealing with tenured university faculty, passenger carrier operators, state court judges, business partners, and law enforcement personnel.⁴

¹ See 42 U.S.C.A. § 2000e-2(a) (West 1976) (stating employer may not discharge or refuse to hire employee because of race or gender).

² See Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C.A. §§ 621-634 (West 1994)) (declaring unlawful to refuse to hire or discharge individual based on age).

³ See 29 U.S.C.A. § 621(b) (West 1967) (articulating purpose of elimination of arbitrary age discrimination in employment).

⁴ See Martin Schiff, *The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions?* 67 ST. JOHN'S L. REV. 27, 33 (1993) (noting courts more likely to uphold age-based mandatory retirement in some occupations than others). For example, courts are likely to uphold age-based mandatory retirement of passenger carrier operators more than age-based mandatory retirement of public safety personnel. *Id.* See also Tina E. Sciocchetti Comment, *Mandatory Retirement of Appointed State Judge--Age Discriminational*, 85 N.W.U.L. REV. 866, 901 (1991) (arguing states may not mandatorily retire judges); Don R. Sampen, *Age Discrimination and Reasonable Non-Age Factors*, 24 J.C. & U.L. 1, 20-24 (1997) (analyzing court decisions dealing with age-based discrimination in certain occupational fields). See also *infra* notes 58-144 and accompanying text (outlining court's holdings that adjudicate issues of forced retirement for public safety personnel); Sampen at n. 142 (setting forth various court's rulings on cases dealing with mandatory retirement of business partners); Amy Gibbons, *No Place to Go After 60: The Plight of Pilots and Flight Engineers in the Airline Industry*, 2 HOFSTRA LAB. L.J. 355 (1985) (articulating standards when deciding cases dealing with forced retirement of pilots); Marc L. Kesselman, *Putting the Professor to Bed: Mandatory Retirement of Tenured University Faculty in*

A common type of age-based discrimination occurs when state law mandates that law enforcement personnel retire at a certain age.⁵ Surprisingly, however, these mandatory retirement provisions for law enforcement personnel do not always violate the ADEA.⁶ The ADEA contains a clause that permits employers to set an age qualification, like a mandatory retirement age, for a job if that is a bona fide occupational qualification.⁷ To uphold these mandatory retirement provisions, courts require employers to make a fact-intensive showing of why these provisions are necessary.⁸ The Supreme Court, however, has not clarified what facts are needed.⁹ Consequently, courts have inconsistently interpreted analogous fact patterns.¹⁰

This article will examine the practice of state and local police departments mandatorily retiring their officers at a certain age. The article focuses on the bona fide occupational qualification (BFOQ) defenses that police departments often assert to justify their mandatory retirement ages. Part II of this note details the evolution of governmental agencies retiring their law enforcement officers.¹¹ Part III outlines the history of the ADEA in addition to illuminating its central purposes and provisions.¹² Part IV will explain the Supreme Court's standard in de-

the United States and Canada: 17 COMP. LAB. L.J. 206, 215 (1995) (analyzing American and Canadian courts' rulings on mandatory retirement for tenured university faculty).

⁵ See MASS. GEN. LAWS ch. 32, § 26(3)(a) (1991) (declaring all members of consolidated police force must retire at age 55).

⁶ See *EEOC v. New Jersey*, 631 F. Supp. 1506, 1515 (3rd Cir. 1987) (noting that mandatory retirement system did not violate ADEA); *EEOC v. City of East Providence*, 798 F.2d 524, 530 (1st Cir. 1986) (indicating age-based mandatory retirement scheme did not violate ADEA).

⁷ See 29 U.S.C.A. § 623(f) (West 1994). Section 623(f) provides in pertinent part: "It shall not be unlawful for an employer to [set an age qualification] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." *Id.* See also *infra* notes 62-64 and accompanying text (outlining recent case law that applies BFOQ standard).

⁸ See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 362 (1985) (setting forth BFOQ standard).

⁹ See generally *Western Air Lines Inc., v. Criswell*, 472 U.S. 400, 417 (1985) (noting Court omits specifics in what it defines as "reasonable").

¹⁰ Compare *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980) (declaring all police officers subject to identical mandatory retirement policy regardless of their individual duties) with *EEOC v. City of St. Paul*, 657 F.2d 1162, 1165 (8th Cir. 1982) (finding unfair to subject all police officers with different duties to same mandatory retirement policy).

¹¹ See *infra* notes 17-37 and accompanying text.

¹² See *infra* notes 38-50 and accompanying text.

termining whether the employer's age qualifications are BFOQs.¹³ Part V will analyze the case law that somewhat clarifies this standard.¹⁴ Part VI will conclude by explaining the current status of mandatory retirement provisions for Massachusetts State Police officers, a standard which *Gately v. Commonwealth of Massachusetts*¹⁵ dramatically refined.¹⁶

II. THE HISTORY OF MANDATORY RETIREMENT FOR LAW ENFORCEMENT PERSONNEL

Early retirement provisions for law enforcement personnel were first introduced in America in 1947 when Congress amended the Civil Service Retirement Act of 1930.¹⁷ This amendment allowed voluntary, early retirement for Federal Bureau of Investigation (FBI) personnel whom the Attorney General deemed were performing their duties inefficiently.¹⁸ The government characterized this retirement option for the officers as a reward for the years of dangerous work that they had performed for society.¹⁹ More importantly, by inducing these officers to retire voluntarily, the government minimized hazards that occurred when officers continued to work as their physical abilities declined.²⁰ When

¹³ See *infra* notes 51-59 and accompanying text.

¹⁴ See *infra* notes 60-115 and accompanying text.

¹⁵ 1998 WL 518179 (D. Mass. June 8, 1998).

¹⁶ *Id.* See also *infra* notes 116-150 and accompanying text.

¹⁷ See Schiff, *supra* note 4, at 18 (quoting Act of July 17, 1947, Pub. L. No. 80-168, 61 Stat. 307 (1947)) (amending Civil Service Retirement Act of 1930, Pub. L. No. 71-279, 46 Stat. 468 (1930)).

¹⁸ See *id.* at 18 (noting option availability to officers after they reached age 50 or 20 service years).

¹⁹ See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 364 (1985) (discussing older agents should not remain with FBI merely because of lack of retirement plan). Congress designed this optional retirement in part as an added stimulus to morale in the Federal Bureau of Investigation. *Id.* (quoting S. Rep. No. 76, 80th Cong., 1st Sess., 1-2 (1947)). Further, Congress designed this provision to act as an incentive for the [officers] to remain [with the FBI] until a reasonable retirement age is reached. *Id.* Moreover, Attorney General Tom C. Clark revealed that the Department of Justice sought to maintain the FBI as a young man's service." *Id.* at 364 (quoting S. Rep. No. 76, 80th Cong., 1st Sess., 2 (1947)).

²⁰ See Schiff, *supra* note 4, at 19 (noting retirement option also intended to help prevent burnout).

Congress passed this law, however, the government incurred minimal initial pension costs.²¹

When other government employees who performed work similar to FBI agents found out about these pensions, they demanded similar pensions for themselves.²² In 1948, Congress offered these benefits to all federal employees whose duties included "investigation, apprehension and detention of individuals suspected or convicted of committing federal crimes."²³ Consequently, by 1972, the government extended retirement benefits to many more employees than when it originally passed the law.²⁴ Moreover, these early retirement benefits did not conflict with the ADEA because they were wholly optional.²⁵

In 1974, Congress violated ADEA principles when it passed a law that implemented a mandatory retirement system for federal law enforcement officers and firefighters.²⁶ This new law went into effect January 1, 1978 and mandated retirement for the officers and firefighters who reached the age 55 and had completed 20 years of service.²⁷ Congress passed this law even though earlier in the year it had amended the ADEA

²¹ See *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel*, A Report by the Chairman of the Select Committee on Aging, H.R. Doc. No. 468, 98th Cong., 2d Sess. 1 (1984) [hereinafter *Myths and Realities*] (maintaining when Congress passed law only 36 FBI officers were eligible to receive pension benefit). Further, only 64 agents became eligible for the retirement benefits in the course of the next five years. *Id.*

²² See Schiff, *supra* note 4, at 19 (recognizing government employees wanted similar pension benefits).

²³ See *id.*

²⁴ See *id.* (noting expansion of pension benefits to federal correction employees, air traffic controllers, and firefighters).

²⁵ See *id.* (noting retirement scheme cannot violate ADEA if optional); see also *infra* notes 38-50 and accompanying text (describing purpose and evolution of ADEA).

²⁶ See Act of July 12, 1974, Pub. L. No. 93-350, sec. 4, § 8335, 88 Stat. 356 (1976)) (codified as amended at 5 U.S.C. § 8335(b) (1988)). The Act provides in pertinent part: "[When a firefighter] becomes 55 . . . or completes 20 years of service [that firefighter] shall be separated from service." *Id.* Section d of the Act provides in pertinent part: "[When a member of the Capitol Police] becomes 55 . . . or completes 20 years of service [that police officer] shall be separated from service." 5 U.S.C. § 8335(d) (1988)). See also Schiff, *supra* note 4, at 19 (suggesting new law contradicted ADEA).

²⁷ See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 364 (1985) (outlining history of statute). Neither the language nor the legislative history surrounding 5 U.S.C. § 8335 establish why Congress thought age 55 was an appropriate age to force a federal law enforcement officer to retire. *Id.* at 365. Further, there is no indication whether Congress believed that older federal law enforcement officers could not meet the rigors of their occupation. *Id.*

to cover federal, state, and local governments.²⁸ Consequently, Congress implicitly narrowed the ADEA's scope to cover only state and local law enforcement and firefighting personnel.²⁹ Moreover, when Congress enacted this bill, it omitted all references to employee hazards that the 1947 optional retirement bill contained.³⁰ In effect, this new bill departed from the rationale of why Congress originally introduced the early retirement option.³¹ Further, supporters of this new legislation claimed this system would improve the quality of law enforcement and firefighting because it would allow for a youthful and energetic work force.³² This argument, however, is a direct contradiction to the purpose of the ADEA as it equates youth with competence and energy while analogizing aging to incompetence and sluggishness.³³

Presently, there is a glaring inconsistency in the law as Congress has decreed that federal law enforcement officials must retire when they reach a certain age, to keep these forces youthful and energetic.³⁴ State and local law enforcement agencies, however, must adhere to the rigid guidelines of the ADEA, a statute that strongly discourages age-based

²⁸ See Schiff, *supra* note 4, at 20 (noting Congress expanded ADEA's reach to almost all sectors of government).

²⁹ See *id.* (acknowledging Congress obliquely limited scope of ADEA). In 1985, the Supreme Court affirmed that the ADEA was not applicable to federal law enforcement officials. See *Johnson*, 472 U.S. at 366-70 (articulating legislative history of ADEA does not establish coverage for federal public safety employees).

³⁰ See Schiff, *supra* note 4, at 19, 20 (quoting Act of July 12, 1974, Pub. L. No. 93-350, sec. 5, § 8336(c), 88 Stat. 356 (1974)) (recognizing new law lacked important references).

³¹ See *Johnson*, 472 U.S. at 364 (noting Congress implemented optional retirement system for FBI personnel as reward for years of service).

³² See Schiff, *supra* note 4, at 20 (recognizing argument that youth and energy improve quality of work force). The supporters of this bill, who argue the retirement provision would maintain a youthful force, overlook the fact that if a person has not completed 20 years of service the retirement provision does not take effect. *Johnson*, 472 U.S. at 365. For example, if a 63 year old firefighter has only ten years of service, then that firefighter will not have to retire. *Id.* Consequently, this exception undermines the argument that Congress is afraid that the public would be jeopardized by the employment of older firefighters or older law enforcement personnel. *Id.* at 365-66.

³³ See Schiff, *supra* note 4, at 20 (dismissing supporter's argument as contradictory). By 1978, the optional early retirement program, which Congress passed in 1947 as a reward for 36 brave and hardworking FBI agents, had evolved into a monolithic age-based hiring system and mandatory retirement system for more than 52,000 employees. *Id.*

³⁴ See Schiff, *supra* note 4, at 20 (noting ADEA does not protect federal law enforcement officials).

mandatory retirement.³⁵ Consequently, state and local law enforcement agencies face increased difficulty in maintaining a force which is youthful and vigorous.³⁶ As one legal analyst notes, "[It seems like there is an] absence of logic in justifying an exemption based on solely whether a law enforcement officer . . . is classified as federal as opposed to state or local."³⁷

III. THE DRAFTING AND THE EVOLUTION OF THE ADEA

In 1967, Congress enacted the ADEA in response to President Johnson's and society's general disapproval of employment practices that equate age with ability.³⁸ The three purposes of the ADEA are to "promote the employment of older persons based on their ability rather than their age, to prohibit arbitrary age discrimination in employment, and to help employers and workers to find ways of meeting problems arising from the impact of age in employment."³⁹ The legislative history

³⁵ See *id.* at 21 (recognizing ADEA protects state law enforcement officials); see also *infra* notes 38-44 and accompanying text (describing history and purpose of ADEA.)

³⁶ See Schiff, *supra* note 4, at 21 (recognizing potential for state and local police departments to be old and lethargic).

³⁷ *Id.*

³⁸ See Robert L. Fischman, Note, *The BFOQ Defense in ADEA Suits: The Scope of 'Duties on the Job'*, 85 MICH. L. REV. 330 (1986) (noting age discrimination mostly springs from unsubstantiated stereotypes). President Johnson realized that setting arbitrary age qualifications to jobs had a devastating effect on the dignity of the prospective employee. *Western Air Lines Inc., v. Criswell*, 472 U.S. 400, 410 (1985). He also recognized that by setting arbitrary age qualifications, the national economy would lose a staggering amount of human resources. *Id.* In 1967, while speaking to Congress, Johnson declared, "Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who are unemployed." H.R. Doc. No. 40, 90th Cong., 1st Sess., 7 (1967), Legislative History 61, *quoted in Criswell*, 472 U.S. at 412 n.13. Johnson further added, "in economic terms, this is a serious--and senseless-- loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well being which joblessness imposes on these citizens and their families." *Id.*

³⁹ 29 U.S.C.A. § 621(b) (West 1994). Arbitrary age discrimination occurs when one makes an assumption about the effect of age on an older worker when there is no basis for that assumption. Williard Wirtz, *Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964, The Older American Worker: Age Discrimination in Employment*, at 2 (1965). Wirtz, the Secretary of Labor, found that there were many workplaces which set limitations for employees based on age regardless

of the ADEA indicates that the statute's purpose is to reduce the waste that results from the underutilization of skilled and experienced workers.⁴⁰ The Senate concluded that if workers have the skill and ability to perform their jobs, they should not be denied employment.⁴¹ The ADEA provides that employers may not "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."⁴² Likewise, the "remedial and humanitarian" nature of the ADEA warrants a broad construction as to effectuate its purposes.⁴³ Currently, the ADEA prohibits arbitrary age discrimination to both public and private sector employees over age 40.⁴⁴

of whether the employees could still perform the work adequately. *Id.* at 7. *See also* EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (articulating that stereotypes not supported by factual basis cause age-based discrimination). This discrimination eliminated the worker's ability to "engage in productive and satisfying occupations which caused the worker to sustain economic and psychological injury." *Id.*

⁴⁰ *See* Francesca Capitano, *Age Discrimination and Police Employment Practices*, 4 HOFSTRA LAB. L.J. 153, 161-62 (1986) (indicating discrimination causes economic and psychological burden on society). Courts have also recognized that older employees provide invaluable experience. *See* Aaron v. Davis, 414 F. Supp. 453, 459 (E.D. Ark. 1976) (noting value of older police officers because of their experience).

⁴¹ *See* Sampen, *supra* note 4, at 6 (articulating that Congress wants skilled workers, regardless of their age). One proponent asserted that it seemed "unjustifiable to retire a worker just because the worker reaches a certain age." *Id.* at n. 47, (quoting S. Rep. No. 95-453, (1977) at 31. Moreover, courts have recognized that the ADEA applies with especial force when addressing mandatory retirement provisions. *Criswell*, 472 U.S. at 410.

⁴² 29 U.S.C.A. § 623(a)(1) (West 1994).

⁴³ *See* Durant v. Maher Chevrolet, Inc., 759 F. Supp. 787, 789 (M.D. Fla. 1991) (recognizing ADEA's remedial nature and therefore should be construed liberally for full effect).

⁴⁴ *See* 29 U.S.C.A. § 631(a) (West 1994) (providing protection to individuals above age 40). When Congress passed the ADEA, its prohibitions against age discrimination in the workplace only applied to employees who were between the ages of 40 and 65. 29 U.S.C.A. § 631(a) (1967). In 1978, Congress amended the ADEA, resulting in the statute protecting individuals between the ages of 40 and 70. 29 U.S.C.A. § 631(a) (1979). In 1986, Congress amended the ADEA to eliminate the maximum age requirement and now the ADEA protects all individuals over the age of 40 from arbitrary age discrimination. 29 U.S.C.A. § 631(a) (1994). At its inception, the ADEA only applied to private employers, labor organizations, and employment agencies. Schiff, *supra* note 4, at 1. Congress amended the ADEA in 1974 to extend the same protection against age discrimination to employees of federal, state, and local governments and the Supreme Court upheld this extension to state and local employees. *See Wyoming*, 460 U.S. at 248 (holding extension valid because of Congress' power under Commerce Clause). In dissent, Chief Justice Burger argued that if Congress extended the ADEA to the states it would impair their sovereignty because the state would not be able to choose who could

Today, a majority of cases considering mandatory retirement provisions are analyzed in light of the ADEA.⁴⁵ To establish a *prima facie* case of age discrimination under the ADEA, plaintiffs must show that they are over age forty, are qualified for the position, have suffered an adverse employment decision, and were replaced by a sufficiently younger person.⁴⁶ It is simple, however, for officers to establish *prima facie* cases when law enforcement agencies force them to retire since the agencies will usually concede that age is the reason for the mandatory retirement.⁴⁷ When it is undisputed that an employer discharged an employee solely because of age, the burden shifts to the employer to prove

serve as a law enforcement officer. *Id.* at 252. When dealing with mandatory retirement provisions, however, the ADEA only protects state and local law enforcement officials because Congress passed a subsequent bill mandating that the government can force federal law enforcement officials into mandatory retirement. *See supra* notes 34-37 and accompanying text (articulating double standard). After the *Wyoming* Court declared that the ADEA applied to state and local entities, the EEOC intensified its fight against mandatory retirement provisions. *Sampen, supra* note 4, at 8. In 1986, Congress amended the ADEA, and although these amendments still prohibited aged-based mandatory retirement provisions, it provided exceptions for public safety officers, such as police officers or firefighters. *Sampen, supra* note 4, at 8. Specifically, these exceptions provided that the state or local law which set the age qualification had to be in effect by March 1983 and had to be "pursuant to a bona fide hiring or retirement plan." *Sampen, supra* note 4, at 8. Congress passed these amendments because the legislators feared endangering public safety if police forces maintained older police officers. *Sampen, supra* note 4, at 8. The legislators made this exception temporary, from January 1, 1987 until December 31, 1993, presumably to allow the Equal Employment Opportunity Commission (EEOC) to investigate the consequences of mandatory retirement on society. *Id.* In 1996, Congress reenacted the public safety exemption. *Id.*

⁴⁵ *See Capitano, supra* note 40, at 160 (stressing pervasiveness of ADEA). A 1976 Supreme Court decision, however, demonstrates that this was not always the norm. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 317 (1976). In *Murgia*, a Massachusetts state police officer brought an action arguing that the state statute requiring him to retire at age 50 was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 309. In overturning the Massachusetts District Court's decision, the Supreme Court reasoned that the age classification was rationally related to furthering a legitimate state interest and therefore did not violate the Fourteenth Amendment. *Id.* at 314. The court acknowledged the state's interest of having physically fit officers so that they could protect the public. *Id.* *See also Popkins v. Zagel*, 611 F. Supp. 809, 813 (C.D. Ill. 1985) (finding rational basis for mandatorily retiring police officers).

⁴⁶ *See Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 136 (3d Cir. 1997) (setting forth four part standard).

⁴⁷ *See EEOC v. New Jersey*, 631 F. Supp. 1506, 1507 (D.N.J. 1986) *aff'd*, 815 F.2d 694 (3rd Cir. 1987) (establishing police department retired officers based solely because of age); *Gately v. Commonwealth*, 1998 WL 518179, *1 (D. Mass. June 8, 1998) (recognizing Massachusetts law mandating officers to retire at age 55).

that the termination falls within an ADEA exception.⁴⁸ One exception, an extremely narrow affirmative defense, permits employers to mandatorily retire an employee based on age, when "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."⁴⁹ The ADEA drafters, however, provided no indication of what specifically constitutes a BFOQ.⁵⁰

IV. THE SUPREME COURT STANDARD: THE DEVELOPMENT OF THE TWO-TIERED BFOQ TEST

The Supreme Court outlined the test for what constitutes a BFOQ in *Western Air Lines, Inc. v. Criswell*.⁵¹ In *Criswell*, the Court formally adopted the two prong test the Fifth Circuit initially applied in *Usery v. Tamiami Trail Tours Inc.*⁵² The first prong of the test requires the job qualification must be "reasonably necessary" to achieve the company's central objective.⁵³ The *Criswell* Court emphasized that when

⁴⁸ See *EEOC v. County of Santa Barbara*, 666 F.2d 373, 375 (9th Cir. 1982) (acknowledging two exceptions that allow employers to set age qualifications). In addition to the BFOQ exception, the ADEA permits employers to set age qualifications when pursuant to a bona fide seniority plan or bona fide employee benefit plan. 29 U.S.C.A. § 623(f)(2) (West 1994).

⁴⁹ 29 U.S.C.A. § 623(f)(1) (West 1994).

⁵⁰ See *id.* (providing no specification of what constitutes BFOQ).

⁵¹ 472 U.S. 400, 413-17 (1985). See also *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 362 (1985) (providing guidance in determining what constitutes BFOQ). The *Johnson* Court emphasized that employers must make particularized factual findings why they implemented job qualifications. *Id.*

⁵² 531 F.2d 224, 234-37 (5th Cir. 1976). The *Usery* court relied on Fifth Circuit cases for each prong. See *Diaz v. Pan American World Airways Inc.*, 442 F.2d 385, 388 (5th Cir. 1976) (requiring employer to show that job qualification reasonably necessary, not just tangentially related); *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (requiring employer to proffer empirical data which supports correlation between age and ability). The *Criswell* Court further noted that Congress intended the BFOQ exception to be "extremely narrow." *Criswell*, 472 U.S. at 412 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)).

⁵³ See *Criswell*, 472 U.S. at 413 (elaborating on how court may deem something reasonably necessary). The reasonably necessary standard rejects the more lenient reasonably related standard the First Circuit applied in a similar case a year earlier. *Mahoney v. Trabucco*, 738 F.2d 35, 37 (1st Cir. 1984) (noting court only requires reasonable relationship between age and business). The *Mahoney* court relied upon the reasonably related language the court used in a contemporary Seventh Circuit case. *Id.* See also *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 753 (7th Cir. 1983) (requiring reasonable relationship). But see *EEOC v. Pennsylvania Liquor Control Board*, 565 F.

Congress passed the ADEA, the legislators intended it to have a standard of "reasonable necessity," rather than mere reasonableness.⁵⁴ In other words, an employer may not discriminate on the basis of age just because it is convenient or advantageous to do so.⁵⁵ Accordingly, scholars have compared this reasonable necessity requirement to be analogous to the strict scrutiny of suspect classifications that courts implement in Fourteenth Amendment cases because of its rigid standard.⁵⁶

If the court finds the employer's job qualification reasonably necessary to fulfill the central mission of the company's objective, the employer must then pass the second prong of the *Criswell* test and demonstrate why they relied on age as a proxy for job qualifications.⁵⁷ This requires the employer to show it had a factual basis for believing all or substantially all of the employees over the job qualification would be unable to safely and efficiently perform the duties of their job.⁵⁸ If the employer is unable to meet this standard, then it must demonstrate it is "impossible or highly impractical" to identify on an individualized basis whether those candidates over the age qualifications could safely and efficiently perform their job duties.⁵⁹

Supp. 520, 523 (E.D. Pa 1983) (rejecting employer's assertion that reasonably related standard may be used to meet BFOQ standard).

⁵⁴ See *Criswell*, 472 U.S. at 414 (reiterating legislative intent).

⁵⁵ See *id.* (asserting test is difficult to pass).

⁵⁶ See Sampen, *supra* note 4, at 23 (analogizing both standards because of their rejection of rational basis test).

⁵⁷ See *Criswell*, 472 U.S. at 414 (detailing test and how employers can pass it).

⁵⁸ See *id.* at 414 (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976)) (setting forth standard of review).

⁵⁹ *Criswell*, 472 U.S. at 414-15. The EEOC also adopted the *Criswell* test and declared in its regulations that 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) all or substantially all individuals excluded from the job are in fact disqualified, or (3) some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age." 29 C.F.R. § 1625.6(b) (1993). The EEOC added another element to this test by declaring that 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 there is no acceptable alternative which would better advance or equally advance it with less discriminatory impact. *Id.*

V. BFOQ CASE LAW

The BFOQ exception is extremely narrow resulting in a majority of courts ruling that employers fail to meet the standard.⁶⁰ This is most likely because employers have the difficult task of making particularized findings that led them to implement these job qualifications.⁶¹ Management may not implement job qualifications for employment by using implicit, stereotypical, or unsubstantiated assumptions that older people are not adequately able to perform the duties of their job.⁶² Additionally, employers cannot assert the BFOQ defense because of economic factors.⁶³ For example, an employer may not set an age-based hiring system solely to maximize profits.⁶⁴

The Supreme Court has not outlined the specific facts necessary to fulfill the two-tiered *Criswell* test and therefore courts have been

⁶⁰ See Schiff, *supra* note 4, at 23-34 (giving comprehensive analysis of BFOQ cases).

⁶¹ See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 362 (1985) (noting necessity of particularized findings).

⁶² See *Beck v. Borough of Manheim*, 505 F. Supp. 923, 925 (E.D. Pa. 1981) (holding employer may not rely upon stereotypical notions or hunches about age). *Aaron v. Davis*, 414 F. Supp. 453, 461 (E.D. Ark. 1976) (providing employers may not rely on hunches without empirical justification); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982) (noting ADEA condemns assumptions that older people cannot adequately perform their jobs).

⁶³ See *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1042 (9th Cir. 1982) (holding employers should not consider cost benefit analysis when implementing age qualification). In this case, the court examined whether a county could set a maximum hiring age for helicopter pilots and deputy sheriffs. *Id.* at 1040. The County of Los Angeles argued that if it hired people over the age of 35 it would receive a "less than optimal return on the training it provided for these pilots." *Id.* at 1042. The court rejected this argument stating that Congress designed the ADEA for the specific reason of eliminating age discrimination based on economic factors. See also *Johnson*, 472 U.S. at 365-370 (noting implementation of mandatory retirement age cannot occur because of cost-cutting.)

⁶⁴ See *County of Los Angeles*, 706 F.2d at 1042 (explaining that employer may not set age qualification based on economic factors). The American judicial system affords much more protection against age discrimination to its older citizens than the British judicial system. Bryan D. Glass, Comment, *The British Resistance to Age Discrimination Legislation: Is it Time to Follow the U.S. Example?*, 16 COMP. LAB. L.J. 491, 504 (1995). For example, in the United Kingdom, employers may set an age ceiling when searching for prospective employees. *Id.* This age cutoff saves the employers administrative costs by allowing them to sift through a large number of applications for particular positions. *Id.*

widely split in settling a standard.⁶⁵ For example, the circuit courts have been widely inconsistent in defining the meaning of "particular business."⁶⁶ The Seventh Circuit reasoned that the plain meaning of the phrase "particular business" left it unsusceptible to further interpretation and therefore specific occupations within a particular business should not be treated differently.⁶⁷ Consequently, if a mandatory retirement policy applies to a police officer who performs hazardous duties on the front line, that same mandatory retirement policy should apply to the sedentary police officer who works in an administrative capacity.⁶⁸

Alternatively, the Eighth Circuit reasoned that particular occupations within the particular business should be treated differently.⁶⁹ The court reasoned that Congress enacted the ADEA to promote employment based on ability rather than the age.⁷⁰ Consequently, the court found it unfair to retire a police chief who could perform all the duties of his position, but could not perform the duties of a different position within the department.⁷¹

In *Mahoney v. Trabucco*,⁷² the First Circuit adopted the middle ground between the Seventh and Eighth Circuit's conflicting approaches.⁷³ In *Mahoney*, the plaintiff held the position of sergeant spe-

⁶⁵ See *infra* notes 66-104 and accompanying text (noting inconsistencies in court decisions).

⁶⁶ Compare *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980) (holding specific occupations within business should not be treated differently) with *EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-66 (8th Cir. 1982) (holding specific occupations within business should be treated differently).

⁶⁷ See *City of Janesville*, 630 F.2d at 1258 (arguing Congress could have used specific language if it wanted individual occupations within business treated differently).

⁶⁸ See *id.* (holding employers must apply uniform mandatory retirement policy).

⁶⁹ See *City of St. Paul*, 671 F.2d at 1165-66 (explaining employer must set age qualification on case by case basis, not legislative fiat).

⁷⁰ See *id.* (articulating ADEA's purpose).

⁷¹ See *id.* (holding uniform policy would be inconsistent with goal of ability-based decisions). As a result, the Eight Circuit applied different standards for police chiefs and police troopers. *Id.* In the past, critics have argued that this approach could become unworkable for employers if they had to consider each specific job position when it establishes its BFOQ defense. *EEOC v. State of Tennessee Wildlife Resources Agency*, 696 F. Supp. 1163, 1177 (M.D. Tenn. 1986). This criticism, however, seems to overlook the premise that an employer should treat each situation on an individualized, fact-intensive basis. See Fischman, *supra* note 38, at 339 (arguing that analyzing employee's duties is consistent with ADEA's purpose and with public safety concerns).

⁷² 738 F.2d 35 (1st Cir. 1984).

⁷³ See *id.* at 38 (noting court found middle ground in between both decisions).

cializing in telecommunications and therefore the officer rarely ventured into the field.⁷⁴ At the time, however, Massachusetts law mandated that all state police officers must retire at age 50, even if the officer only worked in an administrative capacity.⁷⁵ The *Mahoney* court defined "duties of the job" as referring to each discrete vocation within the state police organization.⁷⁶ Essentially, the court reasoned that police officers of different ranks have different duties, and therefore every rank should be analyzed separately.⁷⁷ The court did not want to distinguish between the duties within each rank and consequently all sergeants were treated the same for BFOQ purposes.⁷⁸ The court stressed that all officers of a paramilitary organization, like a police department, are subject to reassignment in times of emergency, and that the rank of the officer, rather than the officer's permanent or temporary assignment will determine the occupation of the officer.⁷⁹

Courts also use a fact specific analysis in applying the *Criswell* test when determining how an employer deems something reasonably necessary.⁸⁰ In *EEOC v. Commonwealth of Pennsylvania*,⁸¹ the Third Circuit concluded that if a police department does not implement, develop, and enforce a program which sets minimum fitness standards for all its officers, the department can not justify its mandatory retirement law by relying on good health as a BFOQ.⁸² The police department was estopped from asserting an effective BFOQ defense because it does not

⁷⁴ See *id.* at 37 (recognizing that officer works in mainly administrative position).

⁷⁵ See *id.* at 36 (noting Massachusetts law does not give more leniency to officer working in administrative capacity).

⁷⁶ See *id.* at 39 (explaining differences of occupations within departments).

⁷⁷ See *Mahoney v. Trabucco*, 738 F.2d 35, 38 (1st Cir. 1984) (noting no correlation between rank and strenuous activity).

⁷⁸ See *id.* (recognizing inconsistent treatment of same ranks causes problems).

⁷⁹ See *id.* at 39 (arguing court's interpretation is faithful to words "occupational qualification"). The court recognized this approach's shortcomings as well. *Id.* It acknowledged that this approach would sweepingly classify one rank to retire at a certain age, even if there were specialists who should not be forced to retire. *Id.* at 41. The court, however, maintained that this approach would be useful to prevent both overt and veiled attempts to undermine the purposes of the ADEA. *Id.*

⁸⁰ See *infra* notes 81-112 and accompanying text (noting courts' various interpretations to deem if BFOQ reasonably necessary).

⁸¹ 829 F.2d 392 (3rd Cir.1987).

⁸² See *id.* at 395 (advancing necessity of minimum fitness standard). The court disregarded the fact that the Pennsylvania State Police was in the process of developing a minimum fitness standard for all officers. *Id.* But see *infra* notes 91-96 and accompanying text (noting First Circuit's use of different standard).

fulfill the first prong of the *Criswell* test establishing that the job qualification is reasonably necessary to the central mission of the business.⁸³ Before a trait can be a BFOQ, the employer must demonstrate that this trait is required for all employees.⁸⁴

Similarly, in *EEOC v. Kentucky State Police Dep't*,⁸⁵ the Sixth Circuit held that the Kentucky State Police could not justify its mandatory retirement age of 55 by relying on physical fitness as a BFOQ because the police department never implemented a minimum fitness standard.⁸⁶ Although the department claimed that cardiovascular fitness and aerobic capacity were reasonably necessary to the central mission of their business, the department had no program for testing the fitness of these officers.⁸⁷ The court emphasized that the physical fitness requirement was not reasonably necessary because the department retained the services of many officers under age 55 who had endured heart surgery and suffered heart attacks.⁸⁸ If the Sixth Circuit categorized this BFOQ as reasonably necessary despite the absence of employee fitness standards, it would have contradicted the purposes of the ADEA.⁸⁹

Not all courts are in accord with the views of the Third and Sixth Circuits.⁹⁰ In *EEOC v. City of East Providence*,⁹¹ the First Circuit declared that physical strength and conditioning were reasonably necessary to the performance of a police force even though the police department did not require its officers to meet any conditioning standards.⁹² In up-

⁸³ See *EEOC v. Commonwealth of Pennsylvania*, 829 F.2d at 395 (declaring police department will fail test because it did not meet first prong).

⁸⁴ See *id.* at 395 (noting ADEA does not require strict monitoring of particular qualification at all age levels). ADEA does, however, prohibit selective age based enforcement of these qualifications. *Id.*

⁸⁵ 860 F.2d 665 (6th Cir. 1988).

⁸⁶ See *id.* at 669 (finding that police department did not compel younger officers to meet fitness standard).

⁸⁷ See *id.* at 667 (noting evidence demonstrated department did not attempt to require good health of officers).

⁸⁸ See *id.* (noting 25 year veteran died at 49 after suffering fourth heart attack while in police cruiser.) In fact, the department retained their services without any reduction of their duties. *Id.*

⁸⁹ See *supra* note 39 and accompanying text (discussing ADEA's purpose is to prevent arbitrary age discrimination).

⁹⁰ See *infra* notes 91-100 and accompanying text (articulating First and Fifth Circuits' positions).

⁹¹ 798 F.2d 524 (1st Cir. 1986).

⁹² See *id.* at 530 (acknowledging department fulfilled both prongs of *Criswell* test). Once the police department fulfilled the reasonable necessity of their age qualification, it

holding this BFOQ, the First Circuit primarily relied on testimony from retired officers who maintained that physical strength and stamina were reasonably necessary to the operation of the police department.⁹³ The court noted that although the existence of physical fitness testing reinforces the proposition that physical conditioning is reasonably necessary, the lack of testing should not indicate that it is not reasonably necessary.⁹⁴ Conversely, a police force with low physical fitness standards, coupled with other factors, may indicate to a court that health and fitness are not reasonably necessary for the job.⁹⁵ The First Circuit reasoned that Congress intended the ADEA to be used as a shield to protect older employees, not as a sword to compel employers to perfect their procedures for assuring maximum physical fitness of their younger employees.⁹⁶

In *EEOC v. Miss. State Tax Comm'n*,⁹⁷ the Fifth Circuit adopted a different standard, finding a middle ground between the polar views of

had no problem meeting the second prong of the *Criswell* test because it presented undisputed evidence that the officers over the age of 60 could not meet the force's physical standards. *Id.* at 527. The evidence was undisputed because the EEOC failed to procure medical experts to rebut the witnesses in a timely manner. *Id.* See also *supra* notes 57-59 and accompanying text (outlining criteria for second tier of *Criswell* test).

⁹³ *East Providence*, 798 F.2d at 530. Each of the retired officers, who were either detectives, patrolmen, or patrol sergeants testified that they "performed one or more of the following tasks: chasing a suspected criminal, struggling with a suspect, pushing a car that blocked traffic, arresting a gunman at gunpoint, engaging in a high speed motor vehicle chase, and rescuing a victim from a burning car." *Id.* In this case, to assert a successful BFOQ defense, the police department had to establish a factual basis for believing that officers over the age of 60 could not meet the physical standards in addition to fulfilling the reasonably necessary test. See *supra* note 92 (describing how police department fulfilled second prong of *Criswell* test).

⁹⁴ See *East Providence*, 798 F.2d at 530 (holding no testing does not prove lack of departmental requirement of officers in top condition). See also James M. Wicks, Comment, *Proving that Over Age Sixty is Over the Hill for Police Officers: EEOC v. Pennsylvania*, 62 ST. JOHN'S L. REV 361, 369-70 (1988) (arguing that requiring fitness testing to uphold reasonably necessary standard is unfair to employer). The Eighth Circuit and First Circuit have similar views regarding the lack of a physical fitness standard. See *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 454 (8th Cir. 1984) (holding regular physical fitness program is unnecessary when implementing mandatory retirement program).

⁹⁵ See *East Providence*, 798 F.2d at 530 (stressing officer's health is reasonably necessary to job despite department's lack of monitoring).

⁹⁶ See *id.* at 529 (commenting on Congressional intent).

⁹⁷ 873 F.2d 97 (5th Cir. 1989).

the First and Third Circuits.⁹⁸ The Fifth Circuit held that the fact-finder should decide whether a police force's lack of fitness standards supported the notion that the police do not consider physical conditioning reasonably necessary.⁹⁹ The court noted that the Supreme Court stressed the necessity of "fact-finding on a case by case basis under the ADEA structure."¹⁰⁰

Courts have striven to effectuate the purpose of the ADEA, to eliminate arbitrary age discrimination by asserting that an employer must provide particularized, factual evidence to show that a substantial amount of the employees over the mandatory retirement age could not perform the duties of their job.¹⁰¹ In age discrimination cases, the evidentiary burden the employer must advance depends on the risk of harm imposed on the public and other employees should the employer eliminate this mandatory retirement age.¹⁰² Accordingly, when there is a high risk of harm and the alternative measures to the age discrimination lack certainty and adequacy, the employer is permitted a greater degree of discretion in setting the mandatory retirement age.¹⁰³ When public safety is in question, courts would prefer employers to err on the side of caution.¹⁰⁴

⁹⁸ See *id.* at 99 (reasoning lack of fitness standard may or may not be job qualification).

⁹⁹ See *id.* (giving great deference to fact finder's conclusions during lower court's proceedings).

¹⁰⁰ *Id.* (quoting *Western Air Lines v. Criswell, Inc.*, 472 U.S. 400, 422 (1985)).

¹⁰¹ See *Durant v. Maher Chevrolet, Inc.*, 759 F. Supp. 787, 789 (M.D. Fla. 1991) (declaring ADEA remedial in nature); *Criswell*, 472 U.S. at 410 (finding ADEA applies with especial force to mandatory retirement provisions); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 355, 362 (1985) (outlining requirement of particularized findings).

¹⁰² See *Beck v. Manheim*, 505 F. Supp. 923, 925 (E.D. Pa. 1981) (stressing importance of keeping employees out of harm's way).

¹⁰³ See *Usery v. Tamiani Trail Tours*, 531 F.2d 224, 236 (5th Cir. 1976) (noting public safety is of great concern); *Beck*, 505 F. Supp. at 925 (recognizing employers must act prudently when public safety at issue).

¹⁰⁴ See *Usery*, 531 F.2d at 236 (holding employer satisfied BFOQ standard based on safety considerations); *Beck*, 505 F. Supp. at 925 (allowing police department to implement mandatory retirement system because of small force). In *Beck*, the court noted that the local police force was small and if the police department retained officers who were incapable of performing their duties, then other officers would have to help out, thereby making them unable to complete their required duties. *Id.* at 927. Consequently, the court allowed this mandatory retirement system because it was hesitant to put the public at risk as it feared that officers would inadequately protect the public. *Id.*

In *EEOC v. New Jersey*,¹⁰⁵ a case upholding a mandatory retirement age as a BFOQ, the Third Circuit reasoned that all or substantially all of the officers over the age of 55 could not safely and efficiently perform police duties because of diminished aerobic capacity.¹⁰⁶ The New Jersey State Police argued that the health and fitness of their officers was reasonably necessary to the central mission of their business.¹⁰⁷ The courts agreed that the officer's fitness was reasonably necessary because the police department required all of its officers to participate in an annual fitness exam which measured their ability to perform rudimentary activities.¹⁰⁸ Having met the first prong of the *Criswell* test, the police department needed to satisfy the second prong.¹⁰⁹ Neither party disputed that to safely and efficiently perform a police officer's duties, the officer must meet a certain minimum aerobic capacity.¹¹⁰ Further, overwhelming and largely undisputed evidence demonstrated that all or substantially all of the officers would not possess that minimum capacity.¹¹¹

¹⁰⁵ 631 F. Supp. 1506 (D.N.J. 1986) *aff'd*, 815 F.2d 694 (3rd Cir. 1987).

¹⁰⁶ *See id.* at 1515 (holding medical evidence at trial substantiated this argument).

¹⁰⁷ *See id.* at 1508 (arguing that police officers must be in peak physical condition).

¹⁰⁸ *See id.* at 1514 (noting police department forced retirement of police officers with significant known health problems). Conversely, in *EEOC v. Kentucky State Police Dept.*, the court noted that the police force retained officers who had significant health problems and therefore it rejected the police department's argument that physical fitness was reasonably necessary to effectuate their goal. *EEOC v. Kentucky State Police Dept.*, 860 F.2d at 669. *See also supra* notes 87-88 and accompanying text (detailing Kentucky's state police forces acceptance of officers in poor health); *Heiar v. Crawford County* 746 F.2d 1190, 1198 (7th Cir. 1984) (noting fallibility of fitness tests significant only to consequences of retaining unfit employee).

¹⁰⁹ *See New Jersey*, 631 F. Supp. at 1514 (admitting department met first prong). As stated earlier, the second prong in the BFOQ test states that employers must prove either they had a factual basis for believing all or substantially all of the [officers over the age of 55] would be able to perform the duties of the job involved or it is impossible or highly impractical to deal with the [officers over the age of 55] on an individualized basis. *Western Air Lines v. Criswell*, 472 U.S. 400, 414 (1985) (quoting *Usery v. Tamiami Trail Tours*, 531 F.2d 224, 236 (5th Cir. 1976)).

¹¹⁰ *See New Jersey*, 631 F. Supp. at 1510 (specifying minimum aerobic capacity level was 41 ml/kg/min).

¹¹¹ *See id.* (indicating overwhelming evidence at preliminary injunction hearing demonstrated officers would not have minimum capacity). Both sides agreed that at least 95% of the officers over age 55 would not have the requisite aerobic fitness. *Id.* In addition, the state proffered persuasive medical evidence which concluded that a large percentage of officers over the age of 55 possess significant, but silent, coronary artery disease. *Id.* at 1507. Further, the risk of this disease, which could cause sudden death, would prevent these officers from safely and efficiently performing their duties as an officer. *Id.* at 1513. Moreover, at the time, doctors could not screen for this heart dis-

Accordingly, it appears that the only way an employer is assured of proffering a factual basis that the employees over the mandatory retirement age cannot perform the duties of their job is when there is uncontested, undisputed evidence.¹¹²

In 1992, a team of medical experts, led by Dr. Frank Landy, released a thorough and authoritative report that stated unequivocally that currently available tests were more effective than age in determining an officer's fitness to serve.¹¹³ Accordingly, the Landy report suggested that law enforcement agencies and fire departments should adopt physical and psychological tests to determine the officer's fitness to serve rather than merely implementing mandatory retirement schemes.¹¹⁴ Congress also recognized that age is not an accurate predictor of an officer's fitness to serve because in 1996 it passed amendments to the ADEA stating that an officer must pass a physical fitness exam rather than being forced into mandatory retirement.¹¹⁵

ease on an individualized basis because these techniques were medically impracticable and unacceptable. *Id.* at 1511.

¹¹² Compare *New Jersey*, 631 F. Supp. at 1510-11 *aff'd*, 815 F.2d 694 (3rd Cir. 1987) (upholding department's BFOQ because evidence showed officers over 55 will not have requisite aerobic capacity) with *EEOC v. Kentucky State Police Dept.*, 860 F.2d at 667 (rejecting employer's BFOQ because of mitigating evidence).

¹¹³ See Frank J. Landy et al., *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs, Executive Summary*, at 17-18 (1992) (finding risk factor screenings effective when determining chance for heart attack) [hereinafter Landy]. The Landy Report maintained that age is a poor predictor in determining a public safety officer's ability to serve. *Id.* After studying more than 2000 subjects comprised of police officers, firefighters and correctional officers, the report indicated that as officers age they gradually engage in more administrative work. *Id.* Consequently, if they remained on the force, their skills, experience, and wisdom is passed on to the young, inexperienced officers who engage in the more physically demanding parts of the job. *Id.* at 4, 5. See also H.R. REP. No 97-52, pt. 1, p. 2, (1977), quoted in *Criswell*, 472 U.S. at 411 (maintaining mandatory retirement results in loss of skills in workforce).

¹¹⁴ See Landy, *supra* note 113, at 17, 18 (recognizing effectiveness of testing).

¹¹⁵ See 29 U.S.C.A. § 4(j) (West 1997) (amending ADEA). Specifically, these amendments, which only pertain to subsequently enacted police retirement statutes, decree that states must "(a) compile a list of tasks that all police officers must be able to perform; (b) develop and promulgate corresponding fitness tests; and (c) implement a nationwide fitness testing regimen by September 30, 2000 to excuse from age based compulsory retirement any officer who can pass such a test." *Id.*

VI. MASSACHUSETTS LAW

Recently, Massachusetts tackled a new issue regarding mandatory retirement for police officers: whether the state can mandatorily retire a police officer pursuant to a consolidation of police forces.¹¹⁶ In *Gately v. Commonwealth of Massachusetts*, the court held that the ADEA superseded and preempted a consolidation act and permanently enjoined the Commonwealth from requiring its officers to retire solely because of their age.¹¹⁷ In *Gately*, the plaintiffs brought an action claiming the mandatory retirement age of 55 violated the ADEA.¹¹⁸ The state forced this involuntary retirement pursuant to the Consolidation Act, mandating that state police forces, the Metropolitan District Commission (MDC), the Massachusetts Division of State Police, the Capitol Police, and the Registry of Motor Vehicles Law Enforcement Division consolidate into the Department of State Police.¹¹⁹ Before the Consolidation Act, the MDC, Capitol Police, and the Motor Vehicles Division had retirement ages of 65 while the Massachusetts Division of State Police had a mandatory retirement age of 50.¹²⁰

For years, the MDC, Registry, and Capitol Police forces had been working until the age of 65.¹²¹ In 1989, just three years before the Consolidation Act, the Commonwealth performed a comprehensive study that recommended no change in the retirement age of 65 for the three police forces.¹²² Nevertheless, the legislature decreed that the members of these police forces must retire ten years earlier even though the traditional retirement age had been 65.¹²³ In addition, since the implementa-

¹¹⁶ See *infra* notes 117-150 and accompanying text (discussing *Gately*).

¹¹⁷ See *Gately v. Commonwealth*, 1998 WL 518179, *12 (D. Mass. June 8, 1998) (holding ADEA supersedes Consolidation Act and police departments could not establish age 55 as BFOQ).

¹¹⁸ See *id.* at *1 (noting plaintiffs brought action on December 21, 1992 to prevent imposition retirement date of December 31, 1992).

¹¹⁹ See 1991 Mass. Acts ch. 412 § 122-123 (detailing Consolidation Act).

¹²⁰ See *Gately*, 1998 WL 518179, at *1 (announcing Consolidation Act repealed MASS. GEN. L. ch. 32 § 69(d) and MASS. GEN. L. ch. 32 § 26(3)(a)).

¹²¹ See *Gately*, 1998 WL 518179, at *1 (acknowledging that before Consolidation Act officers could work until 65).

¹²² See Brief for the Plaintiffs at 20, *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221 (1st Cir. 1993) (No. 92-2485) (noting Commonwealth did major study and recommended no change).

¹²³ See 1991 Mass. Acts ch. 412 § 122-123 (acknowledging three segments of Massachusetts police officers will have their retirement age lowered ten years).

tion of this lowered retirement age, there have been impressive advancements in medicine and labor saving technology, but despite these advancements, the Commonwealth still decided to lower the mandatory retirement age.¹²⁴

The plaintiff police officers, all former members of the now defunct law enforcement agencies, brought this action to enjoin the state from retiring them based solely on their age.¹²⁵ The United States District Court for the District of Massachusetts entered judgement for the plaintiffs and granted a preliminary injunction.¹²⁶ In doing so, the court held that the plaintiffs demonstrated a likelihood of success on the merits.¹²⁷

On appeal, the Commonwealth argued that *Mahoney* established the mandatory retirement of age 50 as a BFOQ for State Police officers and therefore the court should not upset *stare decisis*.¹²⁸ The First Circuit Court of Appeals distinguished this case from *Mahoney* by reasoning that this case involved a different set of facts, a more developed set of rules, and first impression legal issues.¹²⁹ Further, in *Gately*, the police officers presented evidence that was not available for the police officers in *Mahoney*, and this new evidence stated unequivocally that there are ways to

¹²⁴ See Brief for the Plaintiffs at 20, *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221 (1st Cir. 1993) (No. 92-2485) (pointing to improvements in health and longevity). Without any empirical, particularized findings to back up this sudden drastic lowering of age, one can only conclude that the Legislature consolidated the forces because of economic or logistical factors, factors that preclude an effective BFOQ defense. See *supra* notes 63-64 and accompanying text (noting that economical savings can not compel mandatory retirement scheme).

¹²⁵ See Brief for the Plaintiffs at 20, *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221 (1st Cir. 1993) (No. 92-2485) (arguing law violated ADEA).

¹²⁶ See *Gately v. Commonwealth of Massachusetts*, 811 F. Supp. 26, 31 (D. Mass. 1992) (acknowledging many circuit courts surrendered mandatory retirement ages in favor of individualized testing).

¹²⁷ See *id.* (holding plaintiffs faced irreparable injury and that public interest favored their position).

¹²⁸ See *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (arguing *Mahoney* should apply to this case).

¹²⁹ See *id.* at 1228 (declaring *stare decisis* does not provide basis for avoiding trial on merits); see also *supra* notes 51-52 and accompanying text (noting that in 1985 Supreme Court adopted two-tiered standard when determining BFOQs). The *Gately* cases are the first cases in the country which have dealt with mandatory retirement provisions that arise solely because of a consolidation act. Nicole M. Arangio, *First Circuit Strikes Down Age-Based Mandatory Retirement Policy for State Police Officers--Gately v. Massachusetts*, 28 SUFFOLK L. REV. 929, 934 (1994).

identify officers who could not perform their duties.¹³⁰ In addition, *Mahoney* and *Gately* were not addressing the same central issue.¹³¹ In *Gately*, the parties focused on whether the ADEA could permit the Commonwealth to merge four police forces into one consolidated force, thereby raising the retirement age of one segment of the force by five years, and lowering the retirement age of three segments of the force by ten years, notwithstanding that the four forces' duties were identical.¹³² Because of these circumstantial differences, the court did not follow the *Mahoney* precedent in affirming the District Court of Massachusetts' ruling.¹³³

In 1998, the officers brought this action once again, seeking to permanently enjoin the state from mandatorily retiring them.¹³⁴ The Commonwealth had the burden of proving there was a BFOQ, and therefore it had to fulfill the *Criswell* test.¹³⁵ The Commonwealth first had to prove that this mandatory retirement age for its officers was reasonably necessary so that the officers would perform their duties safely.¹³⁶ The Commonwealth argued that the purpose of establishing this mandatory retirement age was to ensure the physical preparedness and fitness of its officers.¹³⁷ Yet the police department could not establish this mandatory retirement age simply by assuming that fitness declines with age.¹³⁸ The police officers, however, conceded that this mandatory retirement age

¹³⁰ See *Gately*, 2 F.3d at 1227 (arguing better alternatives than age-based mandatory retirement of police officers).

¹³¹ See Brief for the Plaintiffs at 8, *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221 (1st Cir. 1993) (No. 92-2485) (explaining difference between *Gately* and *Mahoney*).

¹³² See *id.* (distinguishing *Mahoney* because it dealt with preconsolidated police force).

¹³³ See *Gately*, 2 F.3d at 1227 (holding *Mahoney* precedent not applicable to case).

¹³⁴ *Gately v. Commonwealth*, 1998 WL 518179, *1 (D. Mass. June 8, 1998). In addition, the officers filed a motion for summary judgement arguing that the provisions of the ADEA preempted the Consolidation Act. *Id.* Instead of responding to the specific arguments, the Commonwealth filed a motion to deny the summary judgement in order to give more time to its experts and the EEOC's experts to conduct more testing to determine whether age 55 is a BFOQ. *Id.* at 3.

¹³⁵ See *id.* at *5 (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986)) (clarifying that Commonwealth had burden of proving elements of BFOQ test). If the Commonwealth could not pass the BFOQ test, then the court must grant the officers their motion for summary judgement. *Id.*

¹³⁶ See *id.* at *3 (commenting that Commonwealth must pass first prong of test).

¹³⁷ See *id.* at *4 (establishing reason).

¹³⁸ See *id.* (implying this would violate ADEA).

was reasonably necessary to further the overriding interest of public safety, therefore allowing the Commonwealth to fulfill the first prong of the BFOQ test.¹³⁹

The Commonwealth attempted to fulfill the second prong by asserting that it had a factual basis that all or substantially all of the officers would be unable to perform their duties of the job.¹⁴⁰ Without any empirical data to back up these assertions, the Commonwealth's argument was unpersuasive.¹⁴¹ Additionally, the plaintiffs provided sufficient evidence demonstrating that the Commonwealth used age as an indicator of ability.¹⁴² For example, no municipal police department in Massachusetts retired their officers at age 55 or below.¹⁴³ Further, since the consolidation of the forces in 1992, there had not been one incident demonstrating that an officer endangered himself or the public while in the line of duty.¹⁴⁴ In addition, the Landy medical report found that there were efficient tests to indicate the fitness of an officer.¹⁴⁵ Likewise, Congress, by passing its 1996 Amendments to the ADEA, once again reinforced the notion that age was not a good predictor of ability.¹⁴⁶

The police officers argued that this mandatory retirement age should not be necessary because the Massachusetts State Police recently implemented a minimum fitness test, the Gebhardt-Landy Test, which examines medical and physical fitness for its officers.¹⁴⁷ This test advanced the goal of public safety with a less discriminatory impact than

¹³⁹ See *Gately v. Commonwealth*, 1998 WL 518179, at *4 (conceding point because both parties struggled to establish minimum physical fitness standard for officers).

¹⁴⁰ See *id.* at *5 (asserting factual basis for believing officers over 55 would be unable to perform job).

¹⁴¹ See *id.* at *6 (describing test results that some officers over 55 performed better than younger counterparts).

¹⁴² See *supra* notes 143-144 (presenting evidence proving Commonwealth used age as predictor of ability).

¹⁴³ See *Gately v. Commonwealth*, 1998 WL 518179, at *6 (questioning reasoning behind Commonwealth's implementation of new mandatory retirement plan).

¹⁴⁴ See *id.* (implying Commonwealth is using age as indicator of ability).

¹⁴⁵ See *Landy*, *supra* note 113, at 17-18 (asserting medical testing is effective in screening for potential health risks for people over 55).

¹⁴⁶ See *supra* note 115, (setting forth 1996 ADEA amendments).

¹⁴⁷ See *Gately v. Commonwealth*, 1998 WL 518179, at *3 (arguing efficient, individualized testing better than mandatory retirement scheme). This annual fitness test is necessary for any officer who wants to reenlist. *Id.* Meanwhile, the governor has been working to amend the Consolidation Act. *Id.* at *2. The proposed bill, H1260, would permit any officers over age 55 to remain on the force if they passed the Gebhardt-Landy Test. *Id.*

mandatory retirement.¹⁴⁸ The court agreed with this argument and granted a permanent injunction that precluded the Commonwealth from forcing officers to retire because of age, in addition to finding that the ADEA preempted and superseded the Consolidation Act.¹⁴⁹ By enjoining the Commonwealth from forcing the members of the now consolidated police force to retire at age 55, Massachusetts set a landmark equitable precedent.¹⁵⁰

VII. CONCLUSION

At the dawn of the 21st century, it appears that rigid age-based mandatory retirement systems for police officers will become a thing of the past. After the dissemination of comprehensive medical studies and the enactment of the 1996 ADEA amendments, employers must once and for all realize that just because a worker reaches a certain age that worker does not necessarily become a liability. Today, police officers who reach retirement age can prolong their careers by passing a fitness test. This individualized testing will effectuate the goal of the ADEA, to erase the notion that older employees are inherently less efficient than their younger counterparts. Finally, the ADEA will provide protection to state and local law enforcement personnel, protection that was unavailable when police departments mandated their officers to retire at a certain age.

It is time for America to embrace the idea that age is not a predictor of ability, even for police officers. Further, if a police officer can pass all the minimum fitness standards and withstand medical evaluations, then that officer should be allowed to continue to serve the public. Moreover, it is essential that these older police officers remain on the force because wisdom and experience can only be gained by age. As these officers instill this wisdom on their younger colleagues, everyone, including society in general will reap the benefit.

Eric Andrew Fox

¹⁴⁸ See *id.* at 7-8 (precluding Commonwealth from arguing there is no way to individually test).

¹⁴⁹ See *id.* at *12 (setting forth court's decision).

¹⁵⁰ See *id.* (holding Commonwealth may not retire officers based solely on age).

