EXEMPTIONS FOR POLICE AND FIREFIGHTERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 12, 1986

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WEDNESDAY, MARCH 12, 1986

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to call, at 10:30 a.m., in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Members present: Representatives Martinez and Hayes.

Staff present: Eric Jensen, staff director; Valerie White, legal assistant; Sharon Hawley, presidential management intern; and Jeff Fox, minority counsel.

Mr. MARTINEZ. Congressman Hughes, why don't you sit down here at the table, and I will just make a brief opening statement and we will start then with your testimony, and as Congressman Rinaldo comes in, just make sure he sits down, and Mr. Hughes will be in his testimony and he can go ahead and join him, and then we will take him after we take Mr. Hughes.

Let me just start out by saying this segment of our hearing this morning on retirement age ceilings of the Age Discrimination in Employment Act will focus on proposed exemptions to the ADEA for police and firefighters.

Although the current ADEA mandatory retirement ceiling is placed at age 70, if age can be shown to be a bona fide occupational qualification for a job, then an exemption from the coverage of ADEA can be granted allowing the employer to lower the mandatory retirement ceiling.

Recently, however, the Equal Employment Opportunity Commission, responsible for administering and enforcing the ADEA, has been limiting the BFOQ's to narrow and specific job categories, rather than for whole occupational job forces.

In addition, the courts, under the Supreme Court rulings, have reinforced the EEOC's position in limiting the BFOQ's, even though certain Federal employees have been given statutory lower retirement ceilings than similarly situated employees in the private sector.

One of the bills introduced in this Congress is H.R. 1435 by Mr. Hughes. It would make police and firefighters in States and localities permanently exempt from the coverage of the ADEA.

In this portion of the hearing, we will hear witnesses address both sides of this issue.

We will start now with Mr. Hughes.

STATEMENT OF HON. WILLIAM HUGHES, MEMBER OF CONGRESS

Mr. HUGHES. Thank you, Mr. Chairman. I want to express my appreciation on behalf of our colleague, Matt Rinaldo and myself for giving us this opportunity to present testimony on this important issue.

The legislation we have introduced, as you have aptly described, is a bill to exempt State and local governments from the Age Discrimination in Employment Act in their hiring and retirement of public safety officers.

I would like to begin by stressing my strong support of the Age Discrimination in Employment Act and my general opposition to age discrimination.

Ability, not age, should be the criteria used to obtain and retain a job. I firmly believe, though, that as a simple matter of public safety and policy, those engaged in law enforcement and firefighting must be treated differently.

In fact, Congress has already acknowledged this to be the case by including provisions in the ADEA which permit the establishment of special hiring and retirement guidelines for Federal public safety officers, firefighters and others who regularly face unique mental and physical demands.

Air traffic controllers, for instance, must retire at age 56, foreign service officers at age 65, and Federal firefighters and law enforcement officers, including employees of the FBI, Secret Service, and Federal Prison System, must retire at the age of 55.

Until the Supreme Court decided in 1983 that the ADEA could be applied to State and local governments, most States and localities had established similar guidelines with regard to the hiring and retirement of their public safety officers.

While the Supreme Court's decision in the case of *EEOC* v. *Wyoming* had the laudable effect of extending ADEA coverage to the large majority of State and local employees whose jobs don't entail extraordinary physical stress, it had the undesireable side effect of denying States and localities the same ability to ensure the public safety that Congress has reserved for the Federal Government.

Congress did not provide an ADEA exemption for Federal public safety officers without careful deliberation. This exemption has been reconsidered as recently as 1978, when the ADEA was amended to eliminate mandatory retirement for other Federal employees.

The House Education and Labor Committee's report on this legislation noted, and I quote from that report:

> Certain mental and physical capabilities may decline with age and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining older workers. For example, jobs such as some of those in air traffic control and in law enforcement and in firefighting have very strict physical requirements on which the public safety depends.

The corresponding Senate report included a similar observation, and my statement in full that contains that particular quote from the Senate report. I will not repeat it here, Mr. Chairman.

Clearly, there was a strong belief that the Federal public safety officer exemption contained in the original ADEA should continue to exist. It is equally clear to me that this same exception should apply to their state and local counterparts, who also regularly face unusual mental and physical demands.

Before addressing any questions that members of this committee may have, I would like first of all to ask that my statement be received in the record in full, and I would also like to acknowledge my colleague, Matt Rinaldo, who just joined me here at the witness table, who likewise is a prime sponsor, has worked very hard in developing H.R. 1435.

Thank you, Mr. Chairman.

Mr. MARTINEZ. At this time I would like to turn to the honorable Matthew Rinaldo. Would you like to give us a statement?

STATEMENT OF HON. MATTHEW RINALDO, MEMBER OF CONGRESS

Mr. RINALDO. Yes, I would, Mr. Chairman.

I want to commend Congressman Hughes for his hard work with regard to this legislation, and I certainly appreciate this opportunity to testify in favor of H.R. 1435.

Opponents of the bill argue that medical testing offers a reliable substitute for pre-established age limitations for public safety officers. Unfortunately, that is simply not the case.

Distinguished medical experts have testified that medical science and technology have simply not advanced to the point where we can safely eliminate age limitations and rely exclusively on individual testing. I would like to share some of that expert testimony with you this morning, because I think it is particularly important.

In a recent hearing conducted by the House Select Committee on Aging, Dr. Donald Flinn of Texas Tech University Health Sciences Center stated that a uniform age at which airline pilots should retire is justified because—and I quote—"no age-related psychophysiological index of intellectual and psychomotor functions exists at present."

Similarly, Col. Earl W. Ferguson, a former U.S. Air Force flight surgeon and military consultant to the Surgeon General of the U.S. Air Force, testified that firefighters above the age of 55, who may be required to exert themselves maximally as part of their job, are likely to have significant coronary artery disease which cannot be detected by testing.

As a result, not only is a firefighter's ability to perform a given amount of work lessened, but his chance of being incapacitated and unable to perform his job at a critical phase increases greatly.

Dr. Albert Antlitz, head of the Division of Cardiology and the Department of Electrocardiology at Mercy Hospital in Baltimore, also reported that most police officers 55 years of age and older are unable to carry out their duties safety and efficiently due to coronary disease not easily detectable by current medical techniques.

Those who question the need for passage of H.R. 1435 also argue that the bona fide occupational qualification exemption contained in the Age Discrimination in Employment Act already permits State and local governments to establish maximum entry ages of

less than 40 and retirement ages of less than 70 for their public safety officers.

It is true that the BFOQ provision allows such guidelines if they are "reasonably necessary to the normal operation of the particular business."

However, the BFOQ defense is inadequate for State and local public safety officers and results in unnecessary expense, inconsistent interpretations, and confusion for State and local governments.

As of March, 1986 at least 33 States or localities have been or are being sued by the EEOC for the establishment of mandatory retirement or minimum hiring age laws.

These States and localities are often burdened by time-consuming and expensive litigation against private plaintiffs as well as the Equal Employment Opportunity Commission.

Jurisdictions wishing to retain the hiring and retirement standards they established for public safety officers prior to the *EEOC* v. *Wyoming* decision are now forced to engage in costly medical studies to support their standards.

Those States and localities lacking the financial resources to defend their age limitations must consider forsaking them, thereby risking a threat to public safety that Congress carefully avoided by establishing age requirements for Federal public safety personnel.

Using the BFOQ exemption, some State and local courts have upheld their pre-established entrance and retirement ages while courts in other States and localities have overruled hiring and retirement age requirements for the same occupations.

Significantly, H.R. 1435 is strongly supported by those whose careers and livelihoods will be most affected by this legislation, the individual State trooper, sheriff, police officer, and firefighter.

I have made available, Mr. Chairman, to the subcommittee a list of the organizations that have endorsed H.R. 1435 and request unanimous consent that it be made part of the record.

Mr. MARTINEZ. Without objection, so ordered.

[The prepared statement of Hon. Matthew J. Rinaldo follows:]

PREPARED STATEMENT OF HON. MATTHEW J. RINALDO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to testify in favor of H.R. 1435.

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Unfortunately, that is simply not the case.

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Significantly, H.R. 1435 is strongly supported by those whose careers and livelihoods will be most affected by this legislation—the individual State trooper, sheriff, police officers, and fire fighter.

I have made available to the subcommittee a list of the organizations that have endorsed H.R. 1435, and request that it be made part of the record.

I would also like to emphasize, however, that the groups supporting this bill include: the National Governors' Association, the National Association of Counties, the National Sheriffs' Association, the International Association of Firefighters and the International Association of Chiefs of Police.

In concluding, I want to echo Congressman Hughes' remarks with regard to age discrimination.

As the ranking minority member of the Select Committee on Aging, I strongly support efforts to ensure that job fitness is based on ability, not age.

In fact, I am an original co-sponsor of H.R. 4154, which was the subject of hearings before your subcommittee earlier this morning.

This bill would extend the protections of the ADEA to private sector employees over the age of 70.

This subcommittee, however, should rectify the current inconsistency in the law that treats State and local public safety officers differently from their Federal counterparts.

H.R. 1435 applies only to the very narrow area of hiring and retiring law enforcement officers, permitting State and local governments to make decisions that they feel are in the best interest of the general public safety.

It does not require a State or locality to establish a mandatory retirement age.

H.R. 1435 now has 78 co-sponsors and enjoys broad bipartisan support from more than half the States.

I urge this subcommittee to act favorably on this measure.

I will be happy to answer any questions the members might have.

Thank you.

Mr. RINALDO. I would like to emphasize that the groups supporting this bill include the National Governors Association, the National Association of Counties, the National Sheriffs Association,

the International Association of Firefighters, and the International Association of Chiefs of Police.

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It does not require a State or locality to establish a mandatory retirement age.

H.R. 1435, I might note, now has 78 cosponsors and enjoys broad bipartisan support from more than half the States.

I urge this subcommittee to act favorably on this measure, and thank you for allowing me to testify here this morning.

Mr. MARTINEZ. Thank you, Mr. Rinaldo.

I have listened and heard some of the arguments, pro and con, on this thing. One of them that keeps cropping up, even in my district among the people that I talk to there, is that there is a necessity to have certain abilities at a certain time although our physical, psychological makeup and ability to handle stress varies with age—and I am not so sure that that is altogether right, but that is the argument of some people.

We normally think of age-related ability in terms of jobs and activities associated with, let's say, the patrol officer or the firefighter who actually is on the ladder truck or actually involved in fighting the fire. But there are certainly jobs that, regardless of what age one attains, can be done by people at an older age without the physical fitness requirement, for example, administration jobs, both in the police department and fire department.

In a bill that simply allows the States to set a retirement age somewhat based on physical ability, how do you deal with those people that could go on being productive to a city or a State or county based on their experience and knowledge?

Mr. HUGHES. Mr. Chairman, let me just, if I could, address that, because that is an argument, and it is a legitimate argument, that is advanced. But most departments don't enjoy the luxury of being able to move personnel in that regard.

Many departments are already short manned and the ministerial jobs are often already handled by people that haven't gone through the training that police officers, for instance, or firefighters have gone through. And, frankly, there just isn't the capacity to move them into ministerial slots.

Mr. MARTINEZ. Well, let's use, for example, the case of a police department like Los Angeles, that at one time had over 6,000 offi-

cers. There is so much administration in a big department like that, more than, let's say, in the small department of the city of Monterey Park, having a total of maybe 60 officers. Those employees in the administration positions and in the detective bureau, or let's say the police chief himself, are expected to do a certain amount of physical activity, and I could understand the need for him to be of a certain physical ability.

But in the big departments like Los Angeles, let's say, and many others throughout the country, there are a lot of administrative jobs that are done by police officers who have moved into those jobs after being in the field for a certain period of time. They have gotten themselves educated, raised in rank and accepted responsibilities or control of units—really moved themselves into pretty much of a desk job, which doesn't require that physical activity.

And especially, let's say, in big departments like Los Angeles where you wouldn't expect the chief of police to run out and start trying to collar robbers and criminals in the street. You know he is strictly going to be an administrative officer. And people at a lower level are also going to obtain a certain amount of expertise and knowledge in handling a big department like that who probably should not be required to retire if they don't want to at the age of 55.

How do you deal with that?

Mr. HUGHES. Well, there is no question but that there would be situations where an officer could be moved into a ministerial or administrative position. Indeed, as you have pointed out, it happens quite frequently. People move into administrative positions. The chief of police has become more an administrator than, obviously, a person who works the street. And the same thing with other higher officers.

However, how would you develop a policy to deal with that?

Mr. MARTINEZ. I don't know. That is what I am asking.

Mr. HUGHES. Because it would be very difficult. How would you differentiate between those that you would select for that position and those that you would deny that opportunity? What do you do with people that already hold that position, with a police officer that may have seniority over somebody in an administrative position? Does he bump that individual?

It would just create a nightmare, it would seem to me. And in most instances you don't have that kind of flexibility within a department.

The beauty of the provision is that most of these departments need the flexibility to be able to have individuals go out, if need be, on a truck, on an emergency, or in a patrol car, and can serve both purposes. And I would say the vast majority of departments fall into that category.

Mr. MARTINEZ. Congressman Rinaldo.

Mr. RINALDO. The fact of the matter is that there are not enough administrative positions to put that type of plan into effect. Normally, in most departments and State police organizations, people do move up to higher ranking administrative positions, where they are in command posts and their duties are strictly ministerial, but they are a small percentage of the total work force. If they aren't, there is something inefficient about the operation.

So, I just don't think it could work. In many cases these people have told me that they want to retire. That is one of their conditions of employment.

For example, in my home State of New Jersey, the State police retire at 55. That is one of the things they look forward to, retirement at 55.

Mr. MARTINEZ. I think you are quite right, and most police officers even actually look forward to another kind of career they are going to go into after they retire; firefighters, likewise. But there are always those exceptions, those who do not want to retire for some reason or another—and because, as was testified in the earlier hearing, people age differently.

I have seen—in fact, in the city of Monterey Park, two particular police officers that both held on past the mandatory retirement age because these guys are a couple of little kids, Katzenjammer Kids. But they catch more people doing things wrong than anybody I know. They just seem to have an affinity for it. That experience doesn't want to be lost for that department. This example would be the exception.

Mr. RINALDO. I think you are completely correct, Mr. Chairman. I don't think it is possible to draft a bill that would satisfy all of the exceptions. I don't think there is any perfect system. But I think H.R. 1435 is closest to achieving the kind of maximum protection that we want for our citizens so that public safety officers are in the kind of physical condition that we expect them to be in.

Mr. MARTINEZ. I guess what I am asking is, have we thought about any way to allow for that exception? And I guess right now we haven't.

Mr. RINALDO. Well, I will tell you, there is one way in rare instances. I know in our State the head of the State police is over the mandatory retirement age and the State passed legislation allowing an exception. So, I guess you could do that in individual States. But I think it would create an administrative horror show if you tried to do it en masse.

I think in rare instances it could be done in that fashion.

Mr. MARTINEZ. Some special mechanism like that at the local level.

Mr. HUGHES. Can I just pick up on that? I think it is important to let the States develop and custom tailor their own approach to the problem.

We are faced with a gross inequity in that the Federal Government does make an exception for people in high-risk and high-stress employment—air traffic controllers, firefighters, police officers—but we deny that same right to States.

It seems to me that we do have a gross inequity that we have to address one way or the other. You know, either you believe that it is important for us to make a differentiation, and I believe it is important—I have worked with police now for some 25 years, and I know the kind of stress that they face and I know that the law has served at least my State well. And just from the support we have gotten around the country, I suspect that the law has served other States well. That accounts for all the support that we have from Governors and the Association of Counties, and all the other agencies that are concerned and wrestling with this problem.

But it is a gross inequity in the law. We make an exception for people that undergo high stress but we deny that to the States, and that is why we think that it is important for this committee to take a look at that and deal with it, and hopefully in the manner in which we have suggested in H.R. 1435.

Mr. MARTINEZ. On the basis of the inequity, I totally agree with you, that the States should at least have the rights that the Federal Government has given to Federal employees.

Although I agree with it, I am still always in the back of my mind thinking about those exceptions that I know about, that we all know about, that occur, and I guess maybe right now the way they are being handled is by exemptions at a local level. And although we can't always trust that the people in responsible positions will do the responsible thing, I was looking for some mechanism that might be added that might take care of that exception.

But, of course, as Congressman Rinaldo points out, it might create more of a nightmare and more of a hassle and hazard than if we just left it to the discrepancy of the locals.

Mr. HUGHES. It is a troubling issue, because I know police officers that, in my judgment, would probably be good risks, although you never know. The medical evidence suggests that even the people that appear to be the most healthy sometimes are prone to attacks.

I know of an individual situation right now where a lieutenant in the police in my community who was the picture of health, never suspected he had any problems, just had a major heart attack.

Because of their stressful positions, they are a risk to themselves and to others, because they are actively engaged in protecting the public interest, and that is why we differentiate, obviously, between those groups and other groups in our society.

I think it is a legitimate differentiation.

Mr. MARTINEZ. Thank you.

Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman.

I just want to indicate my support for the proposed legislation being presented by our two colleagues here.

Just to digress for a minute, I have opposed, except in the areas suggested, compulsory retirement through the years.

The person who happens to, as you well know, have the most difficult position or job, if that is what you want to call it, in the world is the President of the United States, and he is already past that bewitching age of 70, as you well know. So, age is not really the criteria in all instances when it comes to compulsory retirement. I just want to make that comment.

Mr. MARTINEZ. Thank you, Mr. Hayes.

Thank you both for appearing this morning and giving us this testimony. It is important, and I think we will try to have some more hearings on this bill to try to raise the level of public consciousness so that we might do something in the next session.

Mr. HUGHES. Thank you very much.

Mr. RINALDO. Thank you.

Mr. MARTINEZ. At this time I would like to call our panel, Col. Larry Furnas, assistant superintendent of Indiana State Police,

representing the National Association of Attorney Generals; Mr. Harold Schaitberger, Department of Government Affairs and Public Relations, International Association of Firefighters; Mr. Robert Kleismet, president, International Union of Police Association.

Col. Larry Furnas, would you like to begin?

STATEMENTS OF COL. LARRY FURNAS, ASSISTANT SUPERINTENDENT, INDIANA STATE POLICE, REPRESENTING THE NATIONAL ASSOCIATION OF ATTORNEY GENERALS; HAROLD SCHAITBERGER, DIRECTOR, DEPARTMENT OF GOVERNMENT AFFAIRS AND PUBLIC RELATIONS, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; AND ROBERT B. KLEISMET, PRESIDENT, INTERNATIONAL UNION OF POLICE ASSOCIATION

Colonel FURNAS. Thank you, Mr. Chairman, members of the committee.

My capacity here is somewhat unusual in that I am a State police officer in the State of Indiana, but I also am an attorney and have worked very actively with our Attorney General's Office in representation of various cases in which they are defending, in particular in defending the Indiana State Police and other local police and fire organizations in actions that have been brought by the Equal Employment Opportunity Commission as a result of mandatory retirement.

I would like to start with a few comments and some things that have been stated today, if I could, I would like to talk about a couple of those things, as well.

When we talk about things as how do you exclude or how do you make the exceptions for the individual, that is the difficult part of the entire EEOC position.

If I may, then, the impetus for this legislation is the 1983 Supreme Court decision under the *EEOC* v. *Wyoming*, which held that the ADEA prohibits discrimination against most workers between the ages of 40 and 70, and that it is also applicable to local units of government.

Well, we do not quarrel with the central stress of this decision, that State and local government employees should be protected from arbitrary age discrimination along with their Federal and private sector counterparts.

We point out that an exception to the act's application exists for public safety officers and maintain that the same exception should apply to State and local public safety officers.

When I refer to public safety, I do include both police and fire, as well, Mr. Chairman.

This bill would make it clear that State and local governments may set their own hiring and retirement ages for public safety officers, including police and firefighters, just as the Federal Government has done with Federal public safety officers who regularly face unique mental and physical demands.

The *Wyoming* decision has brought into litigation nearly every State and countless municipalities with the Equal Employment Opportunity Commission in defending a retirement age of less than 70 for their State and local public safety officers.

Missouri and California, for example, have mandatory retirement ages of 60, while Vermont, New Jersey, and my own State of Indiana have mandatory retirement of 55.

The mandatory retirement age will vary from State-to-State and often between State and local municipalities, and often even between municipalities within the States.

The reaction to raising the retirement age to 70 has been uniform. It has not been acceptable.

Numerous State and local organizations, as well as numerous law enforcement groups, have called on Congress to resolve this problem which so directly affects public safety for all of us.

The National Governors Association, the National Association of Attorneys General, the National Association of Counties have all endorsed this bill.

But, more importantly, those individuals who are affected by this, as stated by Congressman Rinaldo, the individual State trooper, the sheriff, the police officer, the firefighter, all strongly support this type legislation.

In fact, this is one of the very few things that I can recall where labor and management have come together uniformly throughout the country and stated without waiver that they support this type legislation.

I want to stress that I strongly oppose age discrimination and would extend the protections of the ADEA to most workers above the age of 70 and eradicate mandatory retirement at any age for nonpublic safety employees. Ability, not age, should be the criterion for obtaining and keeping a job.

However, public safety positions are unlike other employees in Government, and the needs of public safety in such positions outweigh the individual rights.

As we age, we are not all as fortunate as our President of the United States. For most of us, many gruesome things begin to happen to our body after the age of 30. Most of us begin to lose our hair, we are a little plumper, a little slower, a little more bald, and yet smarter than ever.

After 30 our bodies have passed their peak. In fact, the body has started dying a little every day, losing about 1 percent functional capacity every year. Cells are disappearing, tissues are stiffening, chemical reactions are slowing down. Our body temperature drops and we begin to shrink as much as one to two inches oftentimes by the time we reach age 70.

No matter what we do, our bodies begin to decay. True, with exercise we will feel better, but unfortunately there is no good evidence that exercise will make you live longer and it definitely will not cure cardiovascular disease.

In the area of public safety employment, the physiological changes become catastrophic. Weakened eyesight, higher amounts of body fat, loss of height, reduced stamina, muscles and strength weakened, slower reflexes, reduced lung capacity and reduced blood flow which stem from a heart muscle that has deteriorated, all lead to a situation which places not only the public safety officer in jeopardy but also the public whom he or she is sworn to serve.

The irony of all the above is that the EEOC, the agency charged with enforcing the ADEA, agrees with the State and local agencies that an officer not able to properly perform should be terminated.

Their position, however, is that each officer should be individually evaluated, rather than forced to retire upon reaching a certain age.

Such a position places enormous liability upon the agency to constantly monitor and observe every individual officer for signs of failing health. This is an impossible task to do for medical professionals, let alone police administrators, and it is a burden not placed on Federal public safety employees.

Federal agencies, such as the FBI, Secret Service, Drug Enforcement and military, all of whom often work side by side with the local police officer or fireman, have a mandatory retirement age of 55 or younger. Yet the demands placed on the Federal officer are usually much less strenuous and exerting than those require of this local counterpart.

A review of the legislative history reveals that Congress authorized age limits for Federal law enforcement officers because of the nature of their jobs and not because they were performed by Federal rather than State or local employees.

There is nothing in the legislative history to demonstrate a congressional belief or intent that age limits for State and local law enforcement personnel were to be treated any differently than those applicable to Federal employment.

The argument of the EEOC that State and local governments may maintain retirement ages of less than 70 or maximum entry ages pursuant to the bona fide occupational qualification exception of the ADEA is true if the entity seeking to uphold it can demonstrate that the age limit is reasonably necessary to the normal operation of the particular business.

This is an untenable position but it has been made even more difficult by the position of and the actions of the EEOC.

The EEOC has taken the BFOQ exemption from the Civil Rights Act and decided that age discrimination should be put in the same class as race and sex discrimination.

Indeed, the EEOC has codified into its regulations the following requirements: That an employer asserting a BFOQ defense has the burden of proving that, one, the age limit is reasonably necessary to the essence of the business; two, that all or substantially all individuals excluded from the job involved are in fact disqualified; or three, that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

Such a burden is impossible to overcome without expenditures of great sums of money, public time, and effort.

For these reasons, the exceptions should be carved into the ADEA allowing States to establish their own ages of hiring and retirement of their public safety officers.

Exclusionary language of this type would not compromise the basic purpose of the ADEA.

I guess at that gesture I would say that part of the problems with carving out exceptions on an individual basis is that the burden under the act is totally upon the employer. He cannot

remove anyone from that employment unless it is clearly evident that the person is incompetent to do the work.

Every study, every piece of expert material that I have seen, read, have reviewed, all indicate that that measure of performance is impossible to evaluate and cardiovascular conditions are impossible to evaluate without doing a full catherization of the heart. But we can't require people to submit to that form of surgery. That is something that an individual must do.

So, if any exceptions were going to be made, it should be that the individual should prove that he is able to continue employment after a certain age.

The standard adopted by the EEOC, particularly in cases involving public safety officers, has been interpreted differently from court to court. While some entrance and retirement ages have been upheld for sheriffs, police, firefighters, and State troopers, other involving the same occupations have been struck down. Conflicting judicial holdings have created a nightmare of chaos and confusion in State and local governments in the public safety sectors.

Jurisdictions wishing to uphold their standards must prepare for costly, time consuming and exhaustive litigation against the EEOC and/or private plaintiffs.

Those who lack the resources to defend their age limits must consider scrapping the limits, thereby suffering the very consequences Congress has avoided for itself and Federal public safety personnel.

In Indiana alone there are over 50 separate public safety entities under suit at the present time with the EEOC. The costs in defending the position of the Indiana State Police alone, which was an unsuccessful effort because we had no established BFOQ's, will approach $1 million when consideration is given to possible back pay awards.

The establishment of BFOQ's will not eliminate the legal battles between the EEOC and the State and local entities. The States must spend huge sums of money in establishing such qualifications, setting up periodic testing procedures of uncertain reliability, and yet will find themselves in Federal court defending each and every requirement set forth by them.

Indiana is not giving up its battle with the EEOC, however, in that we feel that the paramount interest of public safety must prevail, and for that reason a commission has been established under executive order of our Governor consisting of members of our State legislature, public safety officials, and laymen, to consider implementation of BFOQ's for public safety officers.

Experts from medicine, psychology, physiology, the military and others are being employed to aid in establishing the BFOQ's.

The cost of these experts will approach a quarter of a million dollars just in the initial stages of their study.

In the interim, however, older officers are being allowed to return or remain in the employ of the public safety agency, which has the additional effect of placing the employer, the employee and the public at heightened risk because of the increasing prevalence of cardiovascular and other diseases as one grows older, which creates an inability of that individual to perform.

Return of these officers has been traumatic in that it has forced displacement of persons promoted into the previously vacated positions.

Pension and insurance statisticians tell us that the increased age will also cause an increase in occupational injuries and disability pension costs, as well as it is requiring numerous modifications to retirement benefits for these public safety employees.

This particular bill, H.R. 1435, would halt this tragic situation. It would allow the states to implement the maximum hiring and mandatory retirement ages for those in the occupations involving public safety, in the area of police and fire, and for these reasons we would encourage your favorable consideration of the bill.

Thank you.

Mr. MARTINEZ. Thank you.

I would remind the other witnesses that they can summarize, and their written testimony will be entered into the record in its entirety.

Mr. Schaitberger.

Mr. SCHAITBERGER. Mr. Chairman, I will summarize our statement.

The International Association of Firefighters represents approximately 170,000 professional firefighters throughout the United States and Canada.

We, therefore, take a deep interest in the impact of Age Discrimination in Employment on public safety employees.

We would first like to express our appreciation to the subcommittee chairman for his timely scheduling of hearings on this important issue.

Let me state at the outset that the IAFF wholeheartedly supports the ADEA and all efforts to ban discrimination on account of age, race, religion, sex, or national origin.

However, there are professions in which a mandatory retirement age and a maximum hiring age are crucial to the competent performance of the job.

We believe that employment policies which consider age as an eligibility factor for professions such as firefighting, which require great physical exertion, are based on objective facts and hence have merit.

I would like to take just a few moments to examine the nature of firefighting.

Firefighters are constantly making transitions from the calm, peaceful environment of the firehouse to the hostile atmosphere of fire. These constant transformations from quiet to raging infernos have numerous physiological and psychological side effects.

Within 15 to 30 seconds after the fire alarm sounds, research studies have found that a firefighter's heart rate can increase by as much as 117 beats per minute. In addition, a firefighter's heart can beat twice its normal rate throughout the entire firefighting operation.

The temperature inside a burning structure can range anywhere from several hundred degrees to 1,500 degrees. The firefighter must be able to endure this extreme heat, intense smoke and fumes, and the psychological stress of being in a life-threatening

situation in order to successfully extinguish the fire and rescue any victim.

Data shows that firefighters contract heart and pulmonary disease almost twice as often as the general population.

The adverse health effects of firefighting are cumulative. Although firefighters as a population are healthier and in better physical condition than the general population for most of their adult lives, when they reach their fifties they are afflicted with chronic, debilitating diseases, such as heart and pulmonary disease, as a significantly higher rate than the general population.

In fact, the correlation between firefighting and these chronic diseases is so strong that 36 States have presumptive disability rules for firefighters who become afflicated with certain heart and pulmonary diseases.

We believe that there is ample evidence that the younger firefighters can better cope with the strains of firefighting than can older ones due to the physical infirmities that characteristically afflict older men and women.

The older the firefighter, the greater the odds are that he or she will become injured, disabled or die while on duty.

Placing older employees with a high risk of injury and disease into an emergency situation greatly increases the risk that they will suffer an injury or die in the line of duty. In a fire situation, this would not only endanger the older firefighter, but also the other members of the firefighting team.

Unfortunately, history has proven to all of us if one member of a firefighting unit fails to fulfill his duties, the lives of those who they are protecting and the lives of the other firefighters are seriously jeopardized, based on the team concept rule.

We believe that it is clear that considering the firefighter's duties and environment and the fact that younger men and women can more easily and more safely perform firefighting duties, it is only reasonable that rules which safeguard the youthful vigor be maintained.

Also, I want to note that our military forces have used age-based eligibility rules in the interest of maintaining young and vigorous armed forces.

A historical look back to Roman times shows that the armies of the modern world have always been comprised of young, physically fit individuals.

Our own armed forces have determined that this criteria is necessary in order to adequately protect our Nation. The age criteria for recruiting personnel into the U.S. Navy is ages 17 to 34; the U.S. Army is 17 to 35; the U.S. Marine Corps, 17 to 28; and the U.S. Air Force is 17 to 26.

I would like to emphasize that firefighting is like being at war, except that our people are fighting war every single day.

Beyond the safety issues, the IAFF believes there are financial considerations that support the concept of involuntary retirement.

Since older firefighters who are nearing their retirement tend to be more susceptible to physical infirmities, a greater proportion of employees in this age bracket receive disability benefits than employees in younger age brackets.

The employer is now forced to spend more on older workers who were injured in the line of duty since disability benefits generally cost substantially more than normal retirement benefits.

The employer is additionally compelled to pay more for insuring the health of older workers because, as a group, they inevitably carry a higher than average risk of illness, particularly in our profession.

Some individuals have suggested that there are medical and scientific tests which could accurately determine a firefighter's ability to perform in emergency situations. We question the validity of such tests.

To date, there is absolutely no evidence to suggest that tests of this nature are accurate.

Where firefighting is concerned, the price of any error in these tests is far too high for society to pay.

The Age Discrimination in Employment Act provides that it is not unlawful for an employer to make age-based employment decisions where age is a bona fide occupational qualification reasonably necessary to the operation of that particular business.

We believe there is ample scientific and medical evidence available to successfully defend age rules for public safety workers.

Many courts have already recognized age as a BFOQ for public safety employees. As an example, the U.S. district court in Illinois decided in June of 1985 that the State's mandatory retirement rule for troopers was adequately supported by medical evidence that fitness declines with age and that there was an overriding public policy interest in having a young, physically fit trooper force.

The same conclusion was reached by the eighth circuit court of Appeals in 1982 in a case upholding a mandatory retirement rule in the Missouri Highway Patrol.

For these reasons, we urge Congress to act to exclude State and local government public employees from the provisions of ADEA.

The IAFF fully supports H.R. 1435 introduced on March 6, 1985 by Congressmen Bill Hughes and Matthew Rinaldo, and cosponsored by 78 additional Members of Congress.

The bill would allow States and municipalities to determine retirement ages for their own law enforcement officers and firefighters, just as Congress has done for certain classes of Federal Government workers who regularly face unique mental and physical demands.

That concludes my testimony, Mr. Chairman. I would be happy to answer any questions you may have.

Mr. MARTINEZ. We will probably have some questions.

[The prepared statement of Harold A. Schaitberger follows:]

PREPARED STATEMENT OF HAROLD A. SCHAITBERGER, DIRECTOR, DEPARTMENT OF GOVERNMENTAL AFFAIRS AND PUBLIC RELATIONS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

Mr. Chairman, members of the Subcommittee, my name is Harold Schaitberger and I am the Legislative Director of the International Association of Fire Fighters (IAFF), AFL-CIO-CLC. The IAFF represents approximately 170,000 professional fire fighters throughout the United States and Canada. We, therefore, take a deep interest in the impact of the Age Discrimination in Employment Act on public safety employees.

We would first like to express our appreciation to the Subcommittee Chairman for his timely scheduling of hearings on this important issue.

Let me state at the outset that the IAFF wholeheartedly supports the ADEA and all efforts to ban discrimination on account of age, race, religion, sex or national origin. Most arbitrary age discrimination occurs due to stereotyping that is largely unsupported by objective facts. It was precisely this sort of discrimination that the ADEA was created to prohibit.

However, there are professions in which a mandatory retirement age and a maximum hiring age are crucial to the competent performance of the job. Most often, great physical and mental demands are inherent elements of these professions. Fire fighting is one of those professions. We believe that employment policies which consider age an eligibility factor for professionals such as fire fighting, which require great physical exertion, are based on objective facts and hence have merit.

I would like to take the next few moments to examine the nature of fire fighting. Fire fighters are constantly making transitions from the calm, peaceful environment of the firehouse to the hostile atmosphere of a fire. These constant transformations from quiet to raging infernos have numerous psychological and physiological side effects. Within 15-30 seconds after the fire alarm sounds, research studies have found that a fire fighter's heart rate can increase by as much as 117 beats per minute. In addition, a fire fighter's heart can beat at twice its normal rate throughout the entire fire fighting operation.

The temperature inside a burning structure can range anywhere from several hundred degrees to 1,500 degrees. The fire fighter must be able to endure this extreme heat, intense smoke and fumes, and the psychological stress of being in a life threatening situation in order to successfully extinguish the fire and rescue the victims. To do so, the fire fighter must be in top physical condition and have superior mental acuity.

These extreme physiological and psychological stresses very often lead to severe coronary and pulmonary problems in fire fighters. Numerous studies have documented this correlation. The data shows that fire fighters contract heart and pulmonary disease almost twice as often as the general population. The adverse health effects of fire fighting are cumulative; although fire fighters as a population are healthier and in better physical condition than the general population for most of their adult lives, when they reach their 50's they are afflicted with chronic, debilitating diseases such as heart and pulmonary disease at a significantly higher rate than the general population.[1] In fact, the correlation between fire fighting and these chronic diseases is so strong, that 36 states have presumptive disability rules for fire fighters who become afflicted with certain heart or pulmonary diseases.

Complicating the problem is the fact that studies have shown that atherosclerotic coronary disease is often asymptomatic and the first indication of heart disease is a heart attack and/or sudden death.[2]

Fire fighting is one of the most dangerous professions in the world and fire fighters who are not in top physical condition endanger themselves, their co-workers and the communities they serve. To put the hazardous nature of fire fighting in perspective, it is important to note that deaths of fire fighters in the line of duty are the highest in the nation and outnumber law enforcement officers approximately two to one. This year alone it can be expected that over 40 percent of fire fighters will be injured to varying degrees in the line of duty. It is clear that fire fighting demands physical and mental acuity which should never be compromised.

We believe that there is ample evidence that younger fire fighters can better cope with the strains of fire fighting than can older ones due to the physical infirmities that characteristically afflict older men and women. In this respect, the data on fire fighters and heart and pulmonary disease is particularly compelling. The older the fire fighter, the greater the odds are that he or she will become injured, disabled, or die while on duty. Placing older employees with a high risk of injury and disease into an emergency situation, greatly increases the risk that they will suffer an

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[1] See for example, Bernard, R.J. Ph.D., "Heart Disease in Fire Fighters" Fire Command, August, 1979. Ferguson, E.W., M.D., Ph.D., "Detection of Coronary Artery Disease in Fire Fighters Without Symptoms" International Fire Chief, April 1981. Peters, J.M., M.D. "Chronic Effect of Fire Fighting on Pulmonary Function" New England Journal of Medicine, December 19, 1974.

[2] See for example, Myerburg, R.J., Davis, J.H., "The Medical Ecology of Public Safety: Sudden Death Due to Coronary Heart Disease" American Heart Journal 68:586, 1964. Waller, B.F., Roberts, W.C. "Sudden Death While Running in Conditioned Runners Aged 40 Years and Over" American Journal of Cardiology 45:1292-1300, 1980. Ferguson, E.W., M.D., Ph.D. "Detection of Coronary Artery Disease in Fire Fighters Without Symptoms" International Fire Chief, April, 1985.

injury or die in the line of duty. In a fire situation, this would not only endanger the older fire fighter, but also the other members of the fire fighting team.

To successfully meet the challenges of modern fires, fire fighters must work as a team. This means that each member of a fire fighting unit must rely on one another. Unfortunately, history has proven to us that if one member of a fire fighting unit fails to fulfill his duties, the lives of those who they are protecting and the lives of the other fire fighters are seriously jeopardized. Where fire fighters are concerned, the older the fire fighter is, the greater the chance that others could be endangered.

We believe that it is clear that considering the fire fighters' duties and environment and the fact that younger men and women can more easily and more safely perform fire fighting duties, it is only reasonable that rules which safeguard the youthful vigor be maintained. Here we are discussing an issue of safety. Safety, not only for those endangered by fires and accidents, but also the lives of colleagues.

Also, I want to note that our military forces have used age-based eligibility rules in the interest of maintaining young and vigorous armed forces. A historical look back to Roman times shows that the armies of the modern world have always been comprised of young physically fit individuals. Our own armed forces have determined that this criteria is necessary in order to adequately protect our nation. The age criteria for recruiting personnel into the U.S. Navy is 17-34; U.S. Army is 17-35; U.S. Marine Corp is 17-28 and U.S. Air Force is 17-26. Fire fighting is much like being at war except that our people are fighting a war every day. The standards used by our armed services are adequate and necessary for our public safety employees.

It should be clear that fire fighters were not the first to bring to Congress' attention the adverse effects of ADEA may have on the operation of a physically demanding profession. Title 5 U.S. Code 8335 specifically acknowledges the physical and mental demands of air traffic controllers, federal law enforcement officers and federal fire fighters and logically exempts these professions from the ADEA.

No one would risk an aviation disaster by allowing physically suspect air traffic controllers to continue working and certainly no responsible individual would advocate an aged military force. So, when you consider disability and death rates it quickly becomes obvious that fire fighters, like air traffic controllers, federal law enforcement officers, federal fire fighters and military officers should be excluded from prohibitions against age requirements.

The notion that age is sometimes a legitimate occupational requirement is certainly not new. Indeed, the founding fathers recognized this when they drafted the Constitution and included minimum age requirements for holding the offices of President, Senator or Member of Congress.

Beyond the safety issues, the IAFF believes that there are financial considerations that support the concept of involuntary retirement. Since older employees who are nearing their retirement tend to be more susceptible to physical infirmities, a greater proportion of employees in this age bracket receive disability benefits than employees in younger age brackets. The employer is now forced to spend more on older workers who were injured in the line of duty since disability benefits cost substantially more than normal pension benefits. The employer is additionally compelled to pay more for insuring the health of older employees because, as a group, they inevitably carry a higher than average risk of illness.

Some individuals have suggested that there are medical and scientific tests which could accurately determine a fire fighter's ability to perform in emergency situations. We question the validity of such tests. To date, there is absolutely no evidence to suggest that tests of this nature are accurate. Where fire fighting is concerned, the price of any error in these tests is far too high for society to pay. We invite members of the medical community to examine these tests and to testify before this subcommittee on the accuracy of these tests. In the final analysis, we believe that you will find that medical tests cannot simulate the fire fighting atmosphere and that age is the safest predictor of ability to perform fire fighting functions. Moreover, even if there were a test which could accurately predict an individual fire fighter's fitness, it would create an unreasonable and impractical burden on municipalities who would be forced to regularly administer hundreds or thousands of tests in an attempt to properly man their departments.

The Age Discrimination in Employment Act provides that it is not unlawful for an employer to make age-based employment decisions "where age is a bona fide occupational qualification reasonably necessary to the operation of that particular business * * *" We believe there is ample scientific and medical evidence available to successfully defend age rules for public safety employees. Many courts have already recognized age as a BFOQ for public safety employees. As an example, the

U.S. District Court in Illinois decided in June, 1985 that the state's mand ' .y retirement rule for troopers was adequately supported by medical evidence that fitness declines with age and that there was an overriding public policy interest in having a young, physically fit trooper force. (*Popkins* v. *Zagel,* 611 F. Supp. 809 (D.C. Ill. (1985)). The same conclusion was reached by the 8th Circuit Court of Appeals in a 1982 case upholding a mandatory retirement rule in the Missouri Highway Patrol. (*EEOC* v. *Missouri State Highway Patrol,* 748 F. 2d 447 (1984)). However, this BFOQ exception for age-based employment rules will create a great deal of litigation as cities and states around the country are called upon one by one to defend their rules. The result will be an unreasonable and burdensome litigation load on our federal and state courts.

For these reasons, we urge Congress to act to exclude state and local government public safety employees from the provisions of ADEA. The IAFF fully supports H.R. 1435 introduced on March 6, 1985 by Congressmen Bill Hughes and Matthew Rinaldo. The bill would allow states and municipalities to determine retirement ages for their own law enforcement officers and fire fighters, just as Congress has done for certain classes of Federal government workers who regularly face unique mental and physical demands.

That concludes my testimony Mr. Chairman. I will be happy to answer any questions the committee may have.

Mr. MARTINEZ. We will hear from Robert Kleismet.

Mr. KLIESMET. Robert Kliesmet is my name, and I am the president of the International Union of Police Associations, AFL-CIO, the police union. I am also president of the Institute for Police Research.

I appear here today in support of H.R. 1435 on behalf of our local, State, and Federal law enforcement officers, members in 29 States.

While we oppose unlawful discrimination of any kind, we strongly feel that mandatory retirement laws and rules serve a legitimate purpose for the protection of our members and the public they serve.

As a 29-year veteran of the Milwaukee Police Department who retired 2 years ago, I can relay empirical evidence of the need for mandatory retirement laws in law enforcement.

These old bones are not able to handle the strenuous physical requirements of a practicing law enforcement officer in today's community environment.

When I was a 24-year-old recruit, I had no idea what the effect of occupational stress would be on me. As a matter of fact, I had never heard of occupational stress, stressors such as role ambiguity, work overload, work-related self-esteem, job satisfaction, lack of trust in the criminal justice system, lack of trust in the police department management, and so on.

Apparently, in that time in the history of this country, the era of common sense, as I call it, these factors must have been considered. That is probably why we had so many early retirement systems in the public safety services.

About 15 years ago I served as the director of research for our union. In that capacity I directed a study funded by the Police Foundation in conjunction with the U.S. Department of Health and Human Services.

That study revolved around the health effects, both physical and psychological, the job of law enforcement has on its practitioners, the police officers.

If the results of that study are extrapolated and compared to the average American working male, one would find that police offi-

cers show signs of cardiovascular, gastrointestinal and psychological health problems at an earlier age than the average American working male. In fact, 8 to 10 years earlier.

These are not the only problems caused by the high stress occupation of policing. Divorce rates are higher, we well as alcoholism, somatic complaints, and so on. All are much higher than the average American working male at much earlier age for law enforcement officers.

I bring this to your attention to highlight our contention that law enforcement needs mandatory rules and requirements for retirement.

Early retirement is an inducement to apply for the occupation of policing.

However, what is the correct age or proper age to be mandatorily retired should be the subject of negotiations on the local level by the employee representative and the employer.

There should be no significant legal, administrative, or cost impact because most law enforcement officers work under some existing retirement system which until a few years ago had mandatory rules and requirements.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Kliesmet.

[The prepared statement of Robert B. Kliesmet follows:]

PREPARED STATEMENT OF ROBERT B. KLIESMET, PRESIDENT, INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO

My name is Robert B. Kliesmet, and I the President of the International Union of Police Associations, AFL-CIO, the police Union.

I am also President of the Institute for Police Research.

I appear here today in support of H.R. 1435, The Age Discrimination in Employment Act Public Safety Officers Amendments of 1985, on behalf of our local, state and federal law enforcement members in twenty-nine (29) states.

While we oppose unlawful discriminaiton of any kind, we strongly feel that mandatory retirement laws and rules serve a legitimate purpose for the protection of our members and the public they serve. As a twenty-nine (29) year veteran of the Milwaukee Police Department, who retired two (2) years ago, I can relay empirical evidence of the need for mandatory retirement requirements in law enforcement. These old bones are not able to handle the strenuous physical requirements of a practicing law enforcement officer in today's community environment. When I was a twenty-four (24) year old recruit I had no idea just what effect occupational stress would have on me. No one ever told me about occupational stress. Strossors such as: role ambiguity; work overload; work related self-esteem; job classification; lack of trust in the criminal justice system, in police department, and so on. Apparently, in that time in the history of our contry, the era of "common sense," as I call it, these factors must have been considered. That is probably why we had so many early retirement programs in the public safety services.

About fifteen years I served as the Director of Research of our union. In that capacity, I directed a study funded by the Police Foundation in conjunction with the U.S. Department of Health and Human Services. (I have brought one copy of the results with me for the Committee. Others can be obtained from the Department). The study revolved around the health effects, both physical and psychological, the job of law enforcement has on its practitioners, the police officers. If the results of that study are extrapolated and compared to a similar study of the average working American male, one would find that police officers show signs of cardiovascular, gastronomical and psychological health problems at an earlier age than the average American working male; in fact, at least 8 to 10 years earlier. These are not the only problems caused by the high stress occupation of policing. Divorce rates are higher, as well as alcoholism, somatic complaints and so on—all are much higher than the average American working male.

I bring this to your attention to highlight our contention that law enforcement needs mandatory rules and requirements for retirement. Early retirement is an in-

ducement to apply for the occupation of policing. However, what is the correct or proper age to be madatorily retired should be the subject of negotiation on the local level by the employee representative and the employer. There should be no significant legal, adminstrative or cost impact because most law enforcement officers work under some existing retirement system which until a few years ago had mandatory rules and requirements.

Thank you, Mr. Chairman and Members of the Committee.

Mr. MARTINEZ. You had in your written testimony, which you did not read, "I have brought one copy of the results with me for the committee." Did you?

Mr. KLIESMET. I don't have it with me because I just came to Washington, and my secretary has the file and inadvertently left it out. But I will transmit it to the committee.

Mr. MARTINEZ. All right. Thank you.

Mr. KLIESMET. And I can give you as many as you may need.

Mr. MARTINEZ. All right. One is fine. Thank you.

One of the things you mentioned during your testimony, Colonel Furnas, was your assistance in fighting the EEOC cases and the extreme cost associated with the cases. This is one thing that this bill would eliminate, if it would allow for local entities to establish the retirement age and exemptions under the ADEA.

But a further thought arose in my mind. How many of these cases have been brought, that you are aware of, that actually are filed in favor of the employee, where the employee is allowed to continue employment? Or has that been the case?

Colonel FURNAS. You mean, how many of them have been allowed to?

Mr. MARTINEZ. Yes; in other words, evidently in the cases you are defending that the EEOC has brought, somebody has filed a complaint with the EEOC claiming that he was arbitrarily terminated at a certain age although he still feels he is able to do the job and that that is unfair under the current law, which is age 70.

Colonel FURNAS. Right.

Mr. MARTINEZ. No; in those cases, how many cases have been won by the person filing, or has EEOC won? Because I noticed in another testimony that EEOC has lost several. But in your case, how many have they won?

Colonel FURNAS. That is correct. In the State of Indiana, the EEOC has prevailed in every case. We had no mandatory BFOQ's that were established. It was all based strictly upon age and it was a statutory provision for local and municipal agencies. With the State agency, it was a contractual provision in a pension trust, and so we lost on all of those cases.

Mr. MARTINEZ. How many were there?

Colonel FURNAS. As I say, there were over 50 cases that had been filed.

Mr. MARTINEZ. What percentage is that of the total?

Colonel FURNAS. There are approximately 220-some police agencies throughout the State. The Indiana State Police was the major thrust in the EEOC's efforts, though, because if they get the giant the others tumble easily is the way they look at it.

Mr. MARTINEZ. The point that again crops up in that case is that EEOC did, evidently, prove that the complainants were still able to do the job, and EEOC won—or did they?

Colonel FURNAS. No; they did not prove that they could do the job. They proved that our——

Mr. MARTINEZ. That you couldn't force them to retire.

Colonel FURNAS. That is correct.

Mr. MARTINEZ. Has there been an adverse impact because of that?

Colonel FURNAS. Well, it was just——

Mr. MARTINEZ. In other words, I assume that they continued to work.

Colonel FURNAS. It just came into place on December 16, 1985. At the present time the adverse impact that has occurred has been to individuals who had been promoted into—every one of them had been promoted officers—individuals who were promoted in behind them upon their initial retirement, they have, in fact, been bumped back down into lower positions. And, yes, there are some adverse impacts in that.

Mr. MARTINEZ. Let me ask all of you this question, and you all respond from your perspective. You are in police, you are in fire, and you are in police.

I have some knowledge, serving on a local city council, and then the State senate, that some States have requirements for police officers to undergo annual physicals. And I imagine those physicals are extensive.

In your testimony you alluded to the fact that you couldn't predict coronary disease. I think that is wrong, because if you give an EKG or get a stress test, there are ways to determine whether stress is present in a person, and even the potential for—well, some coronary disease. You are right, you would have to go through the catherization to determine to what degree. But the fact that you can establish that there is coronary disease, or lack of coronary disease, through stress tests and EKG's, would, I imagine, be an automatic requirement of any physical that an officer is taking.

And if a person reaches a certain age and he is simply in robust health, even by very extensive measures, wouldn't that person still qualify for employment?

Colonel FURNAS. Mr. Chairman, again I guess in light of that, yes, if you could show truly that that was it, that might well be. However, the position of the EEOC, again, in these type of cases is that it does not matter unless you can show that a strong heart is necessary to be a police officer, it doesn't matter.

Mr. SCHAITBERGER. Mr. Chairman, I would like to point out one flaw in trying to rely on typical medical examination to use at least in firefighting, which I can speak to.

The type of tests which are performed to determine any degree of heart or pulmonary disease is not an adequate test to use as to whether an individual can perform under the situations they actually function in, and that is the area of the test that is missing, and that is the area where the scientific community and the medical community admit that they can't really correlate between the reaction and what the body can do under the type of situation that firefighters function when actually engaged in a firefighting operation.

It is not like running on the treadmill. It is not like walking up and down the stair test. When you are crawling through a building looking for a couple of children in total darkness with a fire on

your rear and the stress and the strain that that places on your body and your system, that really cannot be measured.

And because of the team concept, one individual that can't maintain their effort can, not only jeopardize the citizens that you are there to protect, but really jeopardizes the whole team.

So, that is why we really would ask the Congress and have asked this committee in the past to take a look at those medical and scientific tests that many allude to and they alluded to this morning. They cannot be correlated with the operation that our people work under.

If that could be the case, then I think you would be a little closer to making those kind of determinations in behalf of the exceptional individual.

Mr. MARTINEZ. That is a valid point.

Mr. KLIESMET. It is interesting that I just returned from Milwaukee where I visited two of my colleagues who both came on in the department with me and they both were in the hospital suffering with a heart attack, one more serious than the other.

However, they both had had an EKG and physical in the last year which didn't show any problem.

It is interesting that this hearing occurs at this time and what went on there, but it would clearly indicate that although one was 8 months and one was 1 year ago, it didn't show any signs of any problems, and it occurred.

You know, that is just one of the factors.

However, what I would like to address is a comment that was made earlier about finding places for elderly police officers in the police business.

The trend in American policing is to go to civilianization at lower pay. If you have a highly paid and trained police officer working in a clerical, nonpolice function, you would, at least in the unionized departments that I represent, be required to maintain them at their level of pay.

What may need to be done is to be able to create a situation where a member can retire, enjoy his pension benefit, and be reemployed by the community. Or, as occurred in New York several years ago, the city of New York trained police officers for other public service jobs, nursing, and other kinds of things.

Those kinds of items need to be addressed and haven't been addressed in American policing today.

So, yes; there are a lot of good police officers who are retiring and getting out of the business that could do other governmental functions. But that has not been looked at because with Gramm-Rudman coming down and the cutbacks in budgets, you are just not going to have any money available for those kinds of programs. And the cities are already gearing up to reduce the cost of maintaining police departments by privatization and civilianization, which is affecting our ability to negotiate for police officers who are past the retirement age.

Mr. MARTINEZ. Very good. I thank you.

Mr. Hayes.

Mr. HAYES. I don't really have any questions. I think we have heard testimony from excellent witnesses. I just glanced through the written testimony. Here are people who have actually had the

experience of working in those areas of public safety which we want to exclude from coverage and give the States and localities, the local groups, the right, I guess, to retire them at an early age than might be in other fields.

I, certainly, support the position that all of you have indicated who have testified here. I see no need for any further questioning on my part.

Mr. MARTINEZ. Thank you, Mr. Hayes.

I have to agree with Mr. Hayes that you have been very excellent and have given very excellent testimony.

The only reason I raise some of the questions I raise is because I know these questions are going to be raised as the debate goes on, not because I don't support the legislation.

I do believe the local governments in those instances have a better ability to determine what is best for their communities, and to some degree I do support the legislation.

The only thing that I am always looking for is exceptions. Nothing in life is ever just blatantly across the board, because you will find in every case exemptions.

But I would not risk the overall program just to satisfy those exemptions because they are, after all, just the rare exception.

Mr. SCHAITBERGER. Mr. Chairman, may I give for myself one final comment? I know that the committee in its deliberations is really looking at the mandatory retirement question, and a lot of the focus this morning and today is on the retirement end.

I would just add that the chairman and the committee, please look at the front end of the question, which we believe may even be the more serious of the two problems, and that is listing the maximum hiring age into the service.

So, we would just ask you in your deliberations to please focus on that.

Mr. MARTINEZ. Very good. You have actually given me some insight that I didn't have before, and I think that is very important.

This will be a part of the record for those that care to read the record and be educated.

It also gives us who may be arguing on the side of the bill some more ammunition to fight with.

Thank you very much for being here today.

One last thing. There was some opposition testimony and it was provided by the Commission on Human Rights and Opportunities for the State of Connecticut, Mr. Philip Murphy. He was not able to be here. But his testimony will be entered into the record also.

[The prepared statement of Philip Murphy follows:]

STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

90 WASHINGTON STREET HARTFORD, CONNECTICUT 06106

STATEMENT OF THE CONNECTICUT COMMISSION
ON HUMAN RIGHTS AND OPPORTUNITIES

before the

COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

regarding

H.R. 4154

To amend the Age Discrimination in Employment Act of 1967 to remove the maximum age limitation applicable to employees who are protected under such Act, and for other purposes.

and

H.R. 1435

To amend the Age Discrimination in Employment Act of 1967 to exclude from the operation of such Act matters relating to the age at which individuals may be hired, or discharged from employment, as firefighters and law enforcement officers by States and political subdivisions of States.

Statement Prepared By

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF COMMISSION COUNSEL

PHILIP A. MURPHY, JR.
COMMISSION COUNSEL

RAYMOND P. PECH
STAFF ATTORNEY

DEBORAH GREEN
STAFF ATTORNEY

The Connecticut Commission on Human Rights and Opportunities (hereinafter Commission) respectfully provides this paper in response to this Subcommittee's invitation to comment on two bills under your consideration. The Commission thanks this Subcommittee for the opportunity to comment on these two bills. After some brief comments on H.R. 4154, which the Commission wholeheartedly endorses, the body of this presentation will address H.R. 1435, to which the Commission is strongly opposed.

H.R. 4154

The Commission is charged with the enforcement of Connecticut's antidiscrimination laws. Section 46a-60(a)(1) of the Connecticut General Statutes prohibits, inter alia, employment discrimination based on age. Connecticut law does not contain an age seventy (70) cap except for employees who are entitled to benefits "under any pension or retirement plan or system provided for state or municipal employees or for teachers in the public schools of the state or under a pension or retirement plan or system provided for employees of an institution of higher education." Conn. Gen. Stat. Sec. 46a-60(b)(1),(A). The statute also contains an exception for executives analogous to that found at 29 U.S.C. Sections 631(c)(1) and (c)(2). Otherwise, under Connecticut law, most employees are protected from age discrimination even after their sixty-ninth (69th) birthday.

Removing the age seventy (70) cap from the Age Discrimination in Employment Act (hereinafter ADEA) will serve to further the goals of that legislation by expanding the ADEA's protections against the arbitrary termination of employment because of age. Further, it will free those state statutes, which currently protect the age seventy (70) or older employee, from the threat of preemption by the Employees Retirement Income Security Act (29 U.S.C. Section 1144(a), hereinafter ERISA). Without this change in the ADEA, state attempts to protect

workers over age sixty-nine (69) who are members of ERISA covered plans could be defeated. However, were the ADEA to protect these older workers, ERISA would cease to be a threat, since statutory provisions of the ADEA are not preempted by ERISA.

H.R. 1435

This bill proposes to completely deny state and municipal police and fire personnel the important protections of the ADEA. The bill is all inclusive; it would deny ADEA protection to applicants for employment as well as to incumbent employees facing arbitrarily low mandatory retirement ages. Further, this bill makes no distinction between line firefighters or police officers and supervisory or administrative personnel.

The Commission strongly opposes this legislation. We believe it is ill advised in its entirety. This proposed exemption from ADEA coverage is completely at odds with past Congressional action concerning the ADEA, and with judicial interpretation of that law. Further, there is no overriding administrative or medical justification for such an extreme departure from established law.

The ADEA was enacted in 1967 "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. Section 621(b). Since 1967, Congress has amended the ADEA several times. Originally, the Act did not apply to the federal Government, to the states or their political subdivisions, or to employers with fewer than twenty-five (25) employees. However, in 1974, Congress extended coverage to federal, state and local governmental employees. 29 U.S.C. Section 630(b). At the same time, Congress extended coverage to employers with twenty (20) or more employees. 29 U.S.C. Section 630(b).

In 1978, Congress removed the general exemption permitting forced retirement pursuant to a bona fide pension plan. 29 U.S.C. Section 623(f)(2). In 1979, Congress extended protection to persons aged sixty-five through sixty-nine (65-69). 29 U.S.C. Section 631(a). In 1982, the provision permitting the age-based mandatory retirement of tenured teachers was repealed. 29 U.S.C. Section 623(g)(1). In short, the history of the ADEA has been one of steady expansion toward all older employees, in keeping with the underlying purpose of the Act. This bill represents a complete reversal of this trend.

The United States Supreme Court has consistently upheld these Congressional extensions of protection. In EEOC v. Wyoming, 460 U.S. 226 (1983), the Court upheld the extension of the ADEA to state and local governments and ruled that there was no Tenth Amendment violation.

In the Wyoming case, a suit was brought challenging Wyoming's policy of mandatorily retiring fish and game wardens at age fifty-five (55). The lower court held that the ADEA was unconstitutional as applied to state employees. As noted, the Supreme Court reversed. In so doing, the Court pointed out that its decision did not mean that Wyoming's retirement policy was necessarily unlawful. The Court noted:

> Perhaps more important, appellees remain free under the ADEA to continue to do precisely what they are doing now, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden... Thus,...even the State's discretion to achieve its goals in the way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard. 460 U.S., at 240 (emphasis in original)

Accordingly, the ADEA presently provides a solution, the bona fide occupational qualification (hereinafter BFOQ) defense, to the concerns expressed in Wyoming. These are the same concerns which underlie H.R. 1435.

The BFOQ is the long standing legitimate exception to ADEA coverage. The Supreme Court has recognized it as a reasonable federal standard in the Wyoming case, as well as in more recent decisions. In Johnson v. Mayor and City of Baltimore, ___ U.S. ____, 37 FEP Cases 1839 (1985), the Supreme Court reversed the Fourth Circuit Court of Appeals, and reinstated the decision of the Maryland District Court. The District Court ruled that the defendants had failed to establish a BFOQ for their policy of mandatorily retiring firefighters at age fifty-five (55). Unless a BFOQ is established, such a policy would clearly violate the ADEA. The ADEA permits a defendant to claim and prove a BFOQ for any position.

The BFOQ standard has consistently been narrowly construed, in both judicial and administrative forums. Western Airlines v. Criswell, ___U.S.___, 37 FEP Cases 1829 (1985). The legislative history of the ADEA repeatedly states that the degeneration that accompanies aging is an individual matter. Western Airlines v. Criswell, 37 FEP Cases at 1833. The individual nature of the effects of the aging process, and the statute's clear reliance on job requirements mandate an individual approach to forced, age-based retirement. The proposed blanket exemption for police and firefighters hiring and termination decisions evades the entire purpose of the ADEA.

Since this bill is a radical departure from almost twenty years of Congressional, administrative and judicial action, it must seek justification in medical and, perhaps, fiscal concerns. A proponent of the bill might say that although aging varies with the individual, physical ability cannot be individually determined. A proponent might argue that it would be prohibitively expensive to individually determine physical ability in the police and fire contexts. Several courts have considered such claims in the context of the ADEA. These courts have heard

extensive medical testimony both on the effects of aging and on the expense and reliability of medical evaluations of physical capacity. See, e.g., Hahn v. City of Buffalo, 596 F. Supp. 939 (W.D.N.Y. 1984), aff'd 770 F.2d 12 (2d Cir. 1985); Johnson v. Mayor and City of Baltimore, 515 F.Supp. 1287 (D.Md. 1981); rev'd. 731 F.2d 209 (4th Cir. 1984); rev'd. ___U.S.___, 37 FEP Cases 1839 (S.Ct. 1985).

These courts found that physical capacity varied widely from person to person and that age could not be used as a BFOQ, particularly when a relatively young age was dictated for retirement or as a maximum hiring age. The courts further found that physical condition could readily and inexpensively be determined on an individual basis. This same medical testimony counsels against the wholesale exclusion of police and fire personnel from the coverage of the ADEA. Police and fire departments must monitor the physical condition of applicants and employees regardless of their age. There is no reason why a person should be denied an individual evaluation of continued ability to serve, merely because he or she has celebrated a particular birthday. The Connecticut fair employment practices statute, Connecticut General Statute Section 46a-60(b)(3), specifically allows an employer to examine an employee to determine ability for continued employment on an individual basis. Similarly, there is no reason not to assess an applicant for protective service work on the basis of his or her individual ability, instead of disqualifying him or her entirely on the basis of an arbitrarily set maximum hiring age. This bill does not allow for individual consideration at all, and it resurrects fallacious stereotypes about older persons, stereotypes the ADEA was intended to put to rest.

Implicit in the introduction of this Bill, H.R. 1435, is an assumption that all firefighters and law enforcement officers are physically unable to work to the usual retirement age, typically sixty-five (65) or seventy (70), provided

for other state or municipal employees. In considering this legislation, therefore, it is worthwhile to carefully examine that assumption. Through litigation already waged over the BFOQ exception of the ADEA, you have the benefit of a substantial amount of expert medical opinion as to the physical capabilities of older police and fire workers. (Exhibit A is an excerpt of some of that testimony and is dicussed infra). We have attached some of the decisions on this issue. (See Exhibits B and C, attached. Exhibit B is the District Court of Maryland's decision in Johnson v. Mayor and City of Baltimore, cited earlier as eventually sustained by the Supreme Court. Exhibit C is the District Court of New York's decision in Hahn v. City of Buffalo, also cited earlier.) From the review of the findings in these decisions, two key points emerge, regardless of whose experts one considers. First, some firefighters and law enforcement officers are fully competent to perform their jobs well into their sixties. Equally clear is the fact that it is not impractical to determine medically which personnel represent a risk to public safety, and should therefore be removed from service.

There is no real dispute that, with age, overall physical ability tends to decline, and the possibility of a heart condition increases. These tendencies are gradual and linear; in other words, for the general population, neither tendency shows a marked change at any given age. There is no one age at which there is a marked fall off, for the general population, of physical endurance, nor a marked increase in the incidence of heart disease. Given these gradual tendencies, however, it is a different matter entirely, to assert that they occur because of age. An objective look at the expert opinions in these exhibits leaves little doubt that such an assertion may not be valid for significant portions of our population.

The experts identify several "risk factors" which contribut to both ones physical ability and ones susceptibility to heart ailments. Three of these are identified as major factors--hypertension, excess body cholesterol, and cigarette smoking. Somewhat less important, but still a major consideration, is ones family history. Other contributing factors, although of less importance, are sex, age, physical inactivity and the presence of diabetes. In light of these factors, it seems inappropriate to consider legislation that would focus exclusively on age as the barometer by which to measure ones continued fitness to serve in the protective services.

It is also inappropriate to consider legislation such as this when you reflect on some of the statistics presented in the cases which belie the gradual tendency toward declining physical ability with age. In one study of the general population, thirty percent (30%) of males in their fifties had body fat levels equivalent to the average man in his twenties. Twenty percent (20%) of men in their fifties could assimilate oxygen into their bloodstreams at the same rate as the man in his twenties. Looking at raw strength, between fifteen to twenty percent (15-20%) of men in their fifties are stronger than the average man in his twenties. These are not insignificant numbers. Clearly a sizable number of the general population remains physically competent despit advancing age. In nonsedentary occupations such as firefighting and law enforcement, one would hardly expect a decline in these significant percentages.

The attached exhibits also point to additional factors which contribute to any perceived decline in performance among protective service workers. One is tenure in the position--the so-called "burnout" factor. Another is a decline in morale brought on by the fact of limited opportunity for advancement through the ranks. Finally, one must consider testimony that the older, more experienced

worker's judgment may compensate for any perceived or actual, decline in physical stamina. In at least one case (see Exhibit B), the injury rate for younger firefighters was significantly higher than that sustained by older, more experienced personnel.

The evidence in these exhibits also shows that it is not a difficult burden to determine, with a high degree of medical certainty, which protective service workers of a given age are physically competent to continue in their duties, and which are not. This Committee's attention is specifically called to the testimony of Doctor Samuel Fox in the Johnson v. Baltimore case. (See Exhibit A. The complete transcript of Dr. Fox's testimony runs to some one-hundred-sixty (160) pages. For obvious reasons of economy, we have included as Exhibit A only pages 477-481, which speak directly to the issue of identifying those workers at significant risk.) In summary, Dr. Fox describes a procedure of medical tests, nonburdensome in terms of both time and expense, by which a determination as to continued physical fitness to serve could be made on ninety-five percent (95%) of all firefighters who took it. Further determinations could be made on the remaining five percent (5%) through the use of one or two additional tests, for an increased, but not prohibitive, expense.

It is significant that none of the experts referenced in the attached exhibits assert that distinguishing between those older protective service workers who are physically able to continue, and those who are not, is impossible or impractical from a medical standpoint. We believe that it is practical from an administrative standpoint as well. It must be considered at the outset that not all workers will desire to work past the earliest date at which they can retire. Many, perhaps most, protective service workers look forward to and count on retirement at age fifty (50), sixty (60) or whatever other age is provided for

voluntary retirement. Therefore, a large number of workers will not require any testing at all. For those that do wish to continue, an investment of two to three (2-3) hours and less than two-hundred dollars ($200) does not constitute an excessive burden, in light of the fundamental right involved.

These tests can predict, with a high degree of medical accuracy, the older worker's capacity to continue satisfactorily in the protective services. Are they risk free? No test result can guarantee future performance. However, they can predict future performance with a high degree of confidence. We all function, as persons or as governmental bodies, with full knowledge that many of our decisions entail certain risks. We can, as in the instance of determining the continued competence of protective service workers, however, reduce those risks to acceptable levels.

CONCLUSION

In short, while some older firefighters and law enforcement personnel may no longer be physically competent to perform their duties, it is obvious that many others are more than capable of continued service. It is equally apparent that it is medically and administratively feasible to distinguish between the two. It is for this reason that the Connecticut Commission on Human Rights and Opportunities opposes H.R. 1435.

We are not testifying as a medical expert. Those who have the expertise in the fields of aging and physical ability have told the courts and can tell you that individual determinations of fitness can be made practically and at relatively low cost. Those opinions do not give support to the underlying assumptions behind this bill. Yes, there is a gradual trend toward physical decline and increased risk of heart disease that accompanies age. There are, however, significant numbers of individual exceptions to these trends. This bill sacrifices the rights

of each of those individuals to continued employment in his or her chosen field. It does so to the benefit of no one, for the evidence does not show that public safety would be enhanced.

H.R. 1435 opens the door to the codification of other stereotypes, which are often false and are always blind to the individual. This bill stands in direct counterpoint to the noble goal of ensuring the employment of older persons based on their individual ability instead of their age, which was the purpose behind the enactment of the ADEA almost twenty years ago. The Connecticut Commission on Human Rights and Opportunities urges your favorable action on H.R. 4154 and urges your rejection of H.R. 1435. Thank you.

Exhibit A

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

ROBERT W. JOHNSON, et al	)	
	)	
vs	)	NO. H79-998, CIVIL
	)	
MAYOR AND CITY COUNCIL OF BALTIMORE, etc., et al.	)	

Baltimore, Maryland

April 29, 1981

Before the HONORABLE ALEXANDER HARVEY, II, U. S. District Judge, for further trial proceedings, at 10:00 a.m.

APPEARANCES:

PAUL D. BEKMAN, ESQ.
WILLIAM ENGELMAN, ESQ.
Attorneys for Plaintiffs

AMBROSE T. HARTMAN, ESQ.
LESLIE W. GAWLIK, ESQ.
GLENN M. GROSSMAN, ESQ.
Attorneys for Defendants

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own interest to know if they have a problem before they experience any difficulties and yet at acceptable low cost to the system or individuals, and at very acceptable low hazard, which we always have to consider relative to undertaking any procedure.

We do not have to go to angiograms today, but even if one did wish to do that, the well-run laboratory doing angiograms has one-tenth of one percent mortality rate on an average in the United States.

Q Now, in terms of designing a type of objective test in the way of a medical test, in order to determine whether or not a firefighter could in fact safely and efficiently perform his job, could you describe for the Court what you believe to be the basic type of tests which would be necessary in order to do that?

A Yes, certainly height and weight would be relevant. But we know that weight by itself is not too strong an indicator. In laboratory data, the cholesterol and triglyceride determinations are available widely and as discussed earlier, high density lipid protein cholesterol determinations are coming under high quality standards. But fortunately here in Baltimore, we have one of the 12th national lipid research center units at Hopkins, under Dr. Flitterovich, that does superb work in the lipid definition. And I think is open to approach at a reasonable

cost, as is an equivalent unit at George Washington University in Washington.

So that definition of lipid, the fasting blood sugar or two hour after eating, so-called, post-pranial blood sugar determination will also, in my mind, be cost effective.

Smoking history and blood pressure are easily obtained. But we have to depend on the subject's reporting for the veracity of the smoking history.

Family history is more difficult to work with but clearly is worth the brief amount of time for recording, and if there is suggestion of premature disease, it enhances the persuasion to look further.

The discussion of psychological stress and strain, I think, is one of the more difficult things, but clinicians can get a feel for the way in which individuals handle that type challenge at a useful level with very few questions.

Therefore, I think we have the first line of entry into a system, with laboratory tests, which should be available for less than $30, and very brief review of circumstances that need not be undertaken by physicians -- allied health science personnel can elicit history and take blood pressure.

After that, an exercise tolerance test on a treadmill to perceive symptomatic maximum is, in my mind, a

very worthwhile undertaking, can be negotiated, I think, on a group basis, for something a little over a hundred dollars -- clearly under $200 -- with a ten electrode 12-lead high quality recording capability, including computer averaging, which your high levels of exercises, this is very important -- there are four manufacturers of machines that provide that quality and they are widely available.

After that, if continued interest or concern exists, the fluoroscopic evaluation for calcium and the distribution in the coronary arteries is not frequently performed but should be by all those -- and should be available at a cost no greater than $50.

The amount of radiation imposed on the subject with a brief image intensified fluoroscopic survey is very acceptable, low -- much less than the daily allowable dose.

The next stage of evaluation, if still questions remain, would be the radio nuclei ventriculogram, a procedure which was in large part resultant from the work of Dr. Henry Wagner at Hopkins in his very innovative leadership in developing radio nuclei applications to the field of cardiology. This is widely available in the Baltimore-Washington area, and you lie on your back in most configurations, peddling a resistance bicycle while the scintillation crystal that picks up the contained radiation or isotope in the heart is placed over the chest and with

increasing resistance imposed by the exercise bicycle settings, one gets up to a high level of exercise. This type evaluation is available for under $400 depending on whose accounting one is dependent upon in the Baltimore-Washington area.

Beyond that, there are other isotope studies. The Thallium profusion scan, so-called, which is a little more expensive, and heart catheterization, which we hope would not be necessary.

But, by building a series of sequential evaluations, one can determine with a very high degree of accuracy the probability of the existence of significant coronary disease.

Q Let me ask you this, Doctor: Is it necessary, in every case, to go to the lengths that you have just described?

A By no means. I think that less than 5 percent of the population of firemen, age 50 and above, would ever get into the hands of a nuclear cardiologist doing a nuclear test at 300 and 400 dollars.

Q So you think that 95 percent could be evaluated on the basis --

A And resolved.

Q And resolved up to and including the exercise stress test?

A Yes, because an hour of that test, as I think I demonstrated, when you look at more than just the simple S-T segment displacement, and you look at the manner in which the patient sustained his blood pressure, the -- his general appearance, the character of the blood pressure sounds as they come through, not just the arithmetic values -- many things that we, as clinicians, have learned to use and which are available to us, you do not need to go to the expensive sophisticated demanding techniques.

We have a slide illustrating this approach if that would be relevant.

THE COURT: I really don't think we need to go into the details. Do you want the doctor to be finished today? I think we're going into an awful lot of detail.

MR. BEKMAN: Your Honor, that's all the questions that I have for Dr. Fox.

THE COURT: Very well, cross-examination?

CROSS-EXAMINATION

BY MR. GROSSMAN:

Q Dr. Fox, you've been here throughout the whole trial, haven't you?

A I have.

Q Did you hear Dr. Davis yesterday say that persons reach their maximum oxygen -- their VO_2 Max at age 35 -- do you agree with that?

REPORTER'S CERTIFICATE

I, George G. Davis, Jr., certify the foregoing 149 * pages as the official transcript of the April 29, 1981 proceedings in No. 179-998, Civil, Johnson et al vs Mayor & City Council of Baltimore et al.

George G. Davis Jr.
OFFICIAL REPORTER

* pp 413-560 & 605

Exhibit B

Robert W. JOHNSON, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey and James Lee Porter, Plaintiffs,

and

Equal Employment Opportunity Commission, Intervening Plaintiff,

v.

The MAYOR AND CITY COUNCIL OF BALTIMORE and Hyman A. Pressman, as Chairman and Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul D. Wolman, Jr. and Curt Heinfelder, members of the Board of Trustees, Fire and Police Employees Retirement System of the City of Baltimore, Defendants.

Civ. A. No. H-79-998.

United States District Court,
District of Maryland.

June 9, 1981.

Six fire fighters brought suit challenging provisions of city code which required that certain fire department employees retire at ages 55 and 60. The District Court, Alexander Harvey, II, J., held that: (1) city was subject to provisions of Age Discrimination in Employment Act of 1967; (2) plaintiffs did not waive their rights under Act by joining fire and police employee's retirement system of city; (3) provisions of city code requiring that certain fire department employees retire at ages 55 and 60 violated ADEA; and (4) claim of 32-year-old plaintiff was ripe for adjudication.

Order accordingly.

1. Civil Rights ⇐9.15

City was subject to provisions of Age Discrimination in Employment Act of 1967, since 1974 amendment to ADEA to include states and political subdivisions within definition of term "employer" was constitutional. Age Discrimination in Employment Act of 1967, § 11(b) as amended 29 U.S.C.A. § 630(b).

2. Municipal Corporations ⇐53

If city ordinance conflicts with provisions of Age Discrimination in Employment Act of 1967, ordinance in question must fall. Age Discrimination in Employment Act of 1967, § 2 et seq. as amended 29 U.S.C.A. § 621 et seq.

3. Estoppel ⇐52.10(3)

Before court can find that federal right has been waived, it must be established that there was intentional relinquishment or abandonment of known right or privilege.

4. Estoppel ⇐116

Courts indulge every reasonable presumption against waiver of fundamental rights, and court cannot presume acquiescence in loss of a fundamental right.

5. Civil Rights ⇐9.15

Fire fighters, by joining, between 1962 and 1967, city fire and police employees retirement system, provisions of which required them to retire at ages 55 or 60, did not waive their right to rely on benefits conferred upon them by Age Discrimination in Employment Act which did not include employees of state and local governments until 1974 and did not preclude involuntary retirement of individual because of age pursuant to established pension plan or seniority system until 1978. Age Discrimination in Employment Act of 1967, § 2 et seq. as amended 29 U.S.C.A. § 621 et seq.

6. Civil Rights ⇐9.15

Fire fighters were not contractually bound to retire at ages 55 or 60 because they agreed to terms of city fire and police employees retirement system requiring them to retire at age 55 or 60, since such waiver or release contravened policy behind Age Discrimination in Employment Act of 1967. Age Discrimination in Employment Act of 1967, § 2 et seq. as amended 29 U.S.C.A. § 621 et seq.

7. Civil Rights ⇐44(6)

Prima facie case of age discrimination is made out where plaintiff proves that he is member of the protected group; that he

has been terminated; that he has been replaced by person outside protected group; and that he was qualified to do the job. Age Discrimination in Employment Act of 1967, § 2 et seq. as amended 29 U.S.C.A. § 621 et seq.

8. Civil Rights ⇐9.15, 44(6)

Provisions of city code requiring that certain fire department employees retire at ages 55 and 60 violated Age Discrimination in Employment Act of 1967; city failed to meet its burden of proving that age constituted bona fide occupational qualification or that it was impossible or highly impractical to deal with retirement of fire fighters between ages of 60 and 65 on an individualized basis. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 4(f)(1) as amended 29 U.S.C.A. §§ 621 et seq., 623(f)(1).

9. Civil Rights ⇐43

Once plaintiff has made out prima facie case of age discrimination under Age Discrimination in Employment Act of 1967, burden shifts to employer to establish bona fide occupational qualification defense. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 4(f)(1) as amended 29 U.S.C.A. §§ 621 et seq., 623(f)(1).

10. Declaratory Judgment ⇐209

Claim of 32-year-old fire fighter who, under provisions of city code would be required to retire at age 55, was ripe for adjudication, even though he would not be required to retire for 23 years, and therefore, fire fighter was entitled to declaratory judgment and injunction prohibiting defendants from enforcing those provisions of city code. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 12 as amended 29 U.S.C.A. §§ 621 et seq., 631.

11. Statutes ⇐64(1)

Act must fall entirely if effect of declaring portion of it invalid would render remainder incapable of affecting purpose for which act was enacted.

12. Constitutional Law ⇐253.2(2)

Legislation authorized by section five of the Fourteenth Amendment can prohibit practices which would pass muster under equal protection clause, absent an act of Congress. U.S.C.A.Const. Amend. 14.

Paul D. Bekman, William H. Engelman and Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., Baltimore, Md., for plaintiffs.

Frederick P. Charleston, Trial Atty., Equal Employment Opportunity Commission, Baltimore, Md., for intervening plaintiff.

Ambrose T. Hartman, Deputy City Sol., and Glenn M. Grossman and L. William Gawlik, Asst. City Sols., Baltimore, Md., for defendants.

ALEXANDER HARVEY, II, District Judge:

In this civil action, the six plaintiffs, who are Baltimore City firefighters, are challenging provisions of the Baltimore City Code which require that certain Fire Department employees retire at the ages of fifty-five and sixty. Plaintiffs contend that this legislation (1) violates provisions of the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621, *et seq*;[1] (2) contravenes 42 U.S.C. § 1983; and (3) is violative of the Fourteenth Amendment. As relief, plaintiffs are seeking a declaratory judgment, a permanent injunction, back pay for plaintiff Johnson, attorneys' fees and costs.

Five of the six plaintiffs are presently over sixty years of age.[2] Had they not filed this suit, each of these five plaintiffs would now have been mandatorily retired, pursuant to applicable provisions of the Baltimore City Code. However, with the con-

1. Plaintiffs also contend that the City ordinance violates 29 U.S.C. § 215. However, that provision of the Fair Labor Standards Act is merely an enforcement provision incorporated into the ADEA. *See* 29 U.S.C. § 626(b).

2. Plaintiffs Johnson, Stern, Doyle, Paris and Robey are all over sixty years of age. Plaintiffs have complied with the exhaustion requirements of 29 U.S.C. § 626(d).

sent of the defendants, a Temporary Restraining Order has been entered in this case, permitting these five plaintiffs to retain their jobs and their employment benefits during the pendency of this action. The sixth plaintiff, James Lee Porter, is presently thirty-two years of age. He will be required to retire under the Baltimore City law in question in the year 2003, when he becomes fifty-five.

Named as defendants are the Mayor and City Council of Baltimore and the Chairman and members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore (hereinafter the "FPERS"). Subsequent to the commencement of this action, the Equal Employment Opportunity Commission was permitted to intervene as a party plaintiff and has filed an intervening complaint. Following extensive pretrial proceedings, this case came on for trial before the undersigned Judge, sitting without a jury. Testimony was heard from expert and other witnesses, and numerous exhibits have been entered in evidence. Findings of fact and conclusions of law under Rule 52(a), F.R. Civ.P., are contained in this Opinion, whether or not expressly so designated.

I

The challenged provisions of law

Prior to 1962, employees of the Baltimore City Fire Department, like other municipal employees, were covered by the Employees Retirement System of the City of Baltimore (hereinafter the "ERS").[3] *See* Article 22, §§ 1–17, Baltimore City Code (as amended). This pension and retirement system contains a provision for mandatory retirement at age seventy.

Pursuant to enabling legislation enacted by the Maryland State Legislature, the Baltimore City Council, in 1962, approved an ordinance establishing a new retirement system for Fire Department and Police Department employees only, namely the FPERS, which is at issue here. The provisions applicable in this case, as set forth in Article 22, § 34(a), Baltimore City Code (as amended), are as follows:

> (2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.
>
> * * * * * *
>
> (4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in service on July 1, 1962, may be continued in service until attaining age 60.

In this suit, the plaintiffs contend that these provisions which require them to retire at ages fifty-five and sixty violate the ADEA, § 1983 and the Fourteenth Amendment.

II

Facts

Plaintiff Robert W. Johnson commenced his employment with the Baltimore City Fire Department in October of 1943. On April 29, 1979, Johnson attained the age of sixty years. Under § 34(a)(4), Johnson was retired involuntarily on May 1, 1979. This suit was filed on May 29, 1979. Pursuant to the Temporary Restraining Order entered by the Court, Johnson was restored to pay status on June 11, 1979.[4] In addition to the other relief sought by the other plaintiffs, Johnson seeks back pay from May 1 to June 11, 1979 in the amount of $1,000.00. Plaintiff August T. Stern, Jr. commenced his

3. Employees of the City of Baltimore other than firefighters and policemen continue to be covered by the ERS.

4. Plaintiff Johnson is the only one of the plaintiffs whose employment has been interrupted. Thus, he is the only plaintiff seeking back pay.

employment with the Fire Department in February 1946. He became sixty years of age on September 17, 1979. Plaintiff Thomas C. Doyle started working with the Fire Department in March of 1947, and became sixty years of age on October 7, 1979. Plaintiff Mitchell Paris commenced his employment with the Fire Department in December of 1946, and he attained the age of sixty on January 21, 1981. Plaintiff Robert L. Robey started working with the Fire Department on October 10, 1951, and became sixty on March 26, 1981. Plaintiffs Stern, Doyle, Paris and Robey have also been continued as Baltimore City firefighters pursuant to this Court's Temporary Restraining Order. Like plaintiff Johnson, they all desire to continue to work for the Baltimore City Fire Department beyond age sixty. Plaintiffs are not here challenging the right of the defendants to retire them involuntarily at age sixty-five, which is the mandatory retirement age under present law for Lieutenants and other officers of the Fire Department.

Plaintiff James Lee Porter commenced his employment with the Baltimore City Fire Department on May 6, 1969. On October 23, 2003, plaintiff Porter will attain the age of fifty-five. Since he did not become a firefighter until after July 1, 1962, he will be required under the aforementioned § 34(a)(2) and (4) to retire at age fifty-five whether he wishes to or not.

Plaintiffs Johnson, Stern, Doyle, Paris and Robey were all formerly members of the ERS. When the new ordinance establishing the FPERS was adopted by the City Council in 1962, these five plaintiffs, in 1962 or thereafter, chose to be covered by the new retirement system rather than the old.

III

The ADEA

When it enacted the ADEA in 1967, Congress included a statement of its findings and purpose in passing this legislation. 29 U.S.C. § 621 provides as follows:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 623(a)(1) is as follows:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to 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; * * *

As originally enacted in 1967, the ADEA was not applicable to governmental entities. However, in 1974, Congress amended the Act to include states and political subdivisions within its coverage. The term "employer" now includes "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State * * *" *See* 29 U.S.C. § 630(b).

Certain employer practices were recognized by the Act as being lawful. § 623(f)(1) provides as follows:

> (f) It shall not be unlawful for an employer * * * (1) to take any action otherwise prohibited under subsections (a) * * * of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; * * *

As originally enacted in 1967, § 623(f)(2) provided as follows:

> (f) It shall not be unlawful for an employer * * * (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

In 1978, § 623(f)(2) was amended so that it now reads:

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.* (Emphasis added.)

Congress added the language emphasized above for the express purpose of overruling the Supreme Court's decision in *United Air Lines, Inc. v. McMann*,[5] 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977). *See* House Conference Report 95-950, 95th Cong., 2d Session, [1978] U.S.Code Cong. and Admin. News, pp. 504, 529. In the *McMann* case, the Supreme Court had held that a bona fide pension plan established prior to the effective date of the ADEA could not be a subterfuge to evade the purposes of the Act. 434 U.S. at 203. The 1978 amendment to § 623(f)(2) makes it clear that the Act applies to FPERS, even though that retirement plan was established before the ADEA was enacted. Furthermore, as the Fourth Circuit noted in *EEOC v. Baltimore and Ohio R.R. Co.*, 632 F.2d 1107, 1112 (4th Cir. 1980), the 1978 amendment explicitly prohibits the provisions of § 623(f)(2) from being utilized as a defense to involuntary retirement of protected individuals.

In this suit, plaintiffs assert that § 34(a)(2) and (4) of Article 22 of the Baltimore City Code are contrary to § 623(a)(1) and § 623(f)(2) because the FPERS requires the involuntary retirement of each of them because of their age. Defendants contend (1) that the ADEA is unconstitutional; (2) that plaintiffs have waived their right to rely on the benefits of this federal statute; and (3) that pursuant to § 623(f)(1), age is a bona fide occupational qualification for firefighters which is reasonably necessary to the normal operation of the Baltimore City Fire Department.

IV

The constitutionality of the ADEA as applied to states and political subdivisions

Relying on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), defendants first contend that the ADEA may not be constitutionally applied to employees of a state or political subdivision. As noted hereinabove, Congress amended the Act in 1974 to include states and political subdivisions within the definition of the term "employer", as used in the Act. *See* 29 U.S.C. § 630(b).[6] Defendants contend that by extending the coverage of the ADEA to public employees in 1974, Congress has unconstitutionally usurped the regulation of essential government functions properly reserved to state and local governments.

5. This amendment became effective on May 1, 1974.

Defendants' constitutional argument was previously rejected by the Fourth Circuit in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). In that case, a police officer in Moundsville, West Virginia had been denied employment by that city because he was forty years of age and therefore ineligible to take the required physical and mental examinations under West Virginia law, which had established an eighteen to thirty-five year age limit for such applicants. In an opinion written by Judge Thomsen, the Fourth Circuit reversed the District Court's entry of summary judgment in favor of the defendants and remanded the case to the lower court for the development of a full factual record concerning plaintiff's claim that the West Virginia statute violated the ADEA.

As in this case, the defendants in *Arritt* argued that the Supreme Court decision in *National League of Cities v. Usery, supra*, invalidated the 1974 amendments to the ADEA which extended coverage of its anti-discrimination provisions to state and local government employers. That decision of the Supreme Court had held that the extension of provisions of the Fair Labor Standards Act to state and local government employees engaged in areas of traditional governmental functions could not be upheld as a constitutionally valid regulation of interstate commerce because the Tenth Amendment limits exercise of the powers of Congress under the commerce clause. After considering the legislative history of the ADEA and the Supreme Court's opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Fourth Circuit in *Arritt* upheld the 1974 amendments to the Act. Writing on behalf of the panel, Judge Thomsen concluded that in enacting the ADEA and extending it to the states, Congress had exercised its powers under § 5 of the Fourteenth Amendment rather than under the commerce clause. 567 F.2d at 1270–1271.

[1, 2] The recent *Arritt* decision is controlling in this case. As the Fourth Circuit there held, the 1974 amendments to the ADEA are not unconstitutional. Thus, the City of Baltimore is subject to the provisions of the ADEA, and if a city ordinance conflicts with provisions of this Congressional statute, the ordinance in question must fall.[6]

V

Waiver

Defendants next argue that even if the City of Baltimore and its Fire Department are subject to the provisions of the ADEA, the plaintiffs waived their right to rely on benefits conferred upon them by this Act when they voluntarily became members of the FPERS in 1962 or thereafter. In support of this contention, defendants assert that five of the plaintiffs contractually agreed to retire at age sixty when they became members of the FPERS.

In 1925, the City of Baltimore established the first actuarially funded pension system in Maryland for the general protection of municipal employees, known as "The Employees' Retirement System of the City of Baltimore" (the "ERS"). *See* Article 22, §§ 1–17, Baltimore City Code (as amended). That pension system, both then and now, contains a provision for mandatory retirement at age seventy. Both firefighters and policemen were covered by the ERS.

Following various studies supported by City firemen and their unions, a recommendation was made to the City Board of Estimates in 1960 that retirement benefits for members of the Fire Department should be liberalized. Following the enactment of enabling legislation by the State Legislature in 1961, an ordinance was introduced in 1962 before the Baltimore City Council, providing for the establishment of the Fire and Police Employees Retirement System (the "FPERS"). This legislation lowered the mandatory retirement age for firemen and

6. Other cases reaching the same conclusion include *Marshall v. Delaware River & Bay Authority*, 471 F.Supp. 886 (D.Del.1979); *Remmick v. Barnes County*, 435 F.Supp. 914 (D.N.D.1977); and *Usery v. Board of Education of Salt Lake City*, 421 F.Supp. 718 (D.Utah 1976).

police officers from age seventy to age fifty-five or sixty. A "grandfather clause" was included to permit firefighters, other than officers, who were in service on July 1, 1962 to continue to work until age sixty. Moreover, those in service on that date could, if they chose to do so, continue to be covered by the ERS. However, anyone who was employed after July 1, 1962 was required to retire at the age of fifty-five and was not permitted to be covered by the ERS. Officers of the Fire Department were permitted to continue until age sixty-five before being required to retire.

The proposed new ordinance was presented to the membership of both the Fire Department and the Police Department, and some 59% of the Fire Department personnel affected voted in favor of the new system. In June of 1962, the ordinance was passed by the City Council. Some members of the City Fire Department chose not to join the new system, but continued to be covered by the ERS. Others, including the plaintiffs, elected to become members of the FPERS. Plaintiffs Stern and Doyle joined the new system in 1962, while plaintiffs Robey and Paris did so in 1967. Plaintiff Johnson, in July 1962, initially decided to remain in the ERS, but in June of 1963, he elected to become a member of the FPERS. Defendants contend that when the plaintiffs elected to become members of the new system, they waived any rights they might have under the ADEA and voluntarily agreed to retirement at age sixty.

[3, 4] Before a court can find that a federal right has been waived, it must be established that there was an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Courts indulge every reasonable presumption against waiver of fundamental rights, and a court cannot presume acquiescence in the loss of a fundamental right. *Id.* at 464, 58 S.Ct. at 1023.

These principles were recently applied by the Supreme Court in a case presenting the question of a claimed waiver of an employee's rights under Title VII of the Civil Rights Act of 1964. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). In that case, the Supreme Court concluded that there could be no prospective waiver of an employee's rights under Title VII. Noting that an individual's right to equal employment opportunities represented a Congressional command that each employee be free from discriminatory practices, the Supreme Court pointed out that waiver of such a right would result in defeating the paramount Congressional purpose behind Title VII. 415 U.S. at 51–52, 94 S.Ct. at 1021. Accordingly, the Supreme Court concluded that an employee's rights under Title VII are not susceptible of prospective waiver.

[5] These principles are equally applicable here. Plaintiffs made their decisions to join the FPERS in 1962, 1963 and 1967. The ADEA was enacted by Congress in 1967, but it was not until 1974 that employees of state and local governments were included within provisions of the statute. In 1978, the law was again amended to preclude the involuntary retirement of an individual because of age pursuant to an established pension plan or seniority system. Under these circumstances, it can hardly be concluded that plaintiffs waived their rights under the ADEA by joining the FPERS between 1962 and 1967. In those years, they had no right to challenge provisions of the FPERS which required them to retire at age sixty or fifty-five, and therefore there was no known right for them to relinquish when they decided to join the new retirement system. Under federal standards, one may not relinquish intentionally an unknown right. *Nelson v. Peyton*, 415 F.2d 1154, 1158 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970); *Dodge v. Turner*, 274 F.Supp. 285, 289 (D.Utah 1967); *see Walker v. Peppersack*, 316 F.2d 119, 127–28 (4th Cir. 1963).

This Court's conclusion that plaintiffs have not waived their rights under the ADEA is supported by the Fourth Circuit's opinion in *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976). In that

case, the Court placed no significance on the fact that the plaintiff could have chosen not to join the retirement plan claimed to violate the ADEA. 542 F.2d at 219, n.1.

[6] Nor is there merit to defendants' argument that plaintiffs are bound contractually to retire at ages sixty or fifty-five because they have agreed to the terms of the FPERS. A similar contention was rejected by Judge Miller of this Court in *Chastang v. Flynn & Emrich Co.*, 365 F.Supp. 957 (D.Md.1973). There, the argument had been made that the plaintiffs had waived their Title VII rights by executing releases. Judge Miller held that a statutory right "conferred upon a private party, but affecting the public interest may not be waived or released, if such waiver or release contravenes the statutory policy." 365 F.Supp. at 968. The same principles are applicable here.

For these reasons, this Court finds and concludes that the plaintiffs did not waive or surrender their rights under the ADEA when they joined the FPERS at various times between 1962 and 1967.

VI

The bona fide occupational qualification defense

The principal issue presented in this case and the one to which most of the evidence has been directed is whether age is a bona fide occupational qualification (hereinafter "BFOQ") for Baltimore City firefighters. This defense is specifically recognized by § 623(f)(1), which permits an employer to take any action otherwise prohibited by the Act where age is a bona fide occupational qualification "reasonably necessary to the normal operation of the particular business * * *" Relying on this statutory provision, defendants contend that the Act is not violated by provisions of the Baltimore City Code which require that five of the plaintiffs retire at age sixty, whether or not they wish to do so.[7]

(a) *Prima facie case*

[7] Plaintiffs initially have the burden of establishing that their rights under the ADEA have been violated. A *prima facie* case of age discrimination is made out where a plaintiff proves (1) that he is a member of the protected group; (2) that he has been terminated; (3) that he has been replaced by a person outside the protected group; and (4) that he was qualified to do the job. *Marshall v. Baltimore & Ohio Railroad Company*, 461 F.Supp. 362, 372 (D.Md. 1978), *aff'd in part and rev'd in part, EEOC v. Baltimore & Ohio Railroad Company*, 632 F.2d 1107 (4th Cir. 1980).

[8] In this case, there is little doubt that plaintiffs have fully satisfied this burden and have established a *prima facie* case under the ADEA. Plaintiffs, who are over sixty years of age, are members of the group protected by the Act. The employment of plaintiff Johnson has in fact been terminated, and the other plaintiffs would have been involuntarily terminated had this Court not entered a Temporary Restraining Order which continued their employment. Had the employment of the plaintiffs been terminated under the FPERS, younger persons would have taken their place. Finally, the evidence discloses that the plaintiffs, despite their age, are fully qualified to perform their duties as Baltimore City firefighters. No evidence to the contrary has been presented. Rather, the record in this case clearly establishes that plaintiffs' performance of their duties has been more than satisfactory.

For these reasons, this Court finds and concludes that plaintiffs have made out a *prima facie* case of age discrimination under the ADEA. As applied to them, the provisions of § 34(a) which require that they retire involuntarily at age sixty violate the ADEA, unless defendants can prove that their acts under the Ordinance are not unlawful pursuant to § 623(f)(1).

7. This portion of the Opinion (Section VI) will discuss only the claims of the five plaintiffs who are presently over sixty years of age. Accordingly, the term "plaintiffs", as used in this Section, refers to all plaintiffs except Porter, whose claim will be discussed hereinafter. The term "firefighters" as used herein, includes emergency vehicle drivers and pump operators.

(b) *Defendants' burden*

[9] Once a plaintiff has made out a *prima facie* case of age discrimination under the ADEA, the burden shifts to the employer to establish a BFOQ defense. *Arritt v. Grisell*, supra; *Houghton v. McDonnell Douglas Corporation*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966, 98 S.Ct. 506, 54 L.Ed.2d 451 (1977).[8] In *Arritt*, the Fourth Circuit rejected the standard adopted by the Seventh Circuit in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 822 (1975), for measuring the burden assumed by the employer when a *prima facie* case of age discrimination has been made out. Rather, the Fourth Circuit adopted the two-pronged test formulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). Thus, in this case, the defendants have the burden to show (1) that the BFOQ which it invokes is "reasonably necessary to the essence of its business" of operating an efficient fire department within the City of Baltimore, and (2) that defendants have "reasonable cause, i. e., a factual basis for believing that all or substantially all persons within the class * * * would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis." 567 F.2d at 1271. In this case, the class involved includes all Baltimore City firefighters, other than officers, who are sixty but not yet sixty-five years of age. Defendants here must prove that there is a factual basis for believing that all or substantially all Baltimore City firefighters between sixty and sixty-five are unable to perform their duties safely and efficiently, or that Baltimore City firefighters between those ages may not possibly or practically be dealt with on an individualized basis.

In considering whether defendants have in this case met their burden of establishing a BFOQ defense, this Court must be guided by the objectives which Congress had in mind when it enacted the ADEA. Congress went so far as to expressly incorporate into the statutory language itself its findings that older workers find themselves disadvantaged in their efforts to retain employment, that the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and that the employment problems of older workers are grave. § 621(a). Congress further expressly stated that the purpose of the ADEA is to promote the employment of older persons based on their ability rather than their age, to prohibit arbitrary age discrimination in employment and to assist employers and workers in finding ways to meet problems arising from the impact of age on employment. § 621(b).

Recent opinions discussing the BFOQ defense asserted by an employer under § 623(f)(1) indicate that the burden imposed on a defendant of establishing this affirmative defense is a substantial one. In *Houghton v. McDonnell Douglas Corporation*, supra, the Eighth Circuit reversed the finding of the District Court that the employer of a test pilot had properly terminated his employment at age fifty-two, because age was a BFOQ for test pilots. Citing *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), the Eighth Circuit concluded that to uphold the District Court's finding that defendant had met its burden in that case would allow the BFOQ exception to swallow the rule. 553 F.2d at 564. In *EEOC v. City of St. Paul*, 500 F.Supp. 1135, 1146 (D.Minn.1980), the Court, in concluding that age was not a BFOQ for fire chiefs of the City of St. Paul, noted that Congress "apparently intended that the bona fide occupational qualification be very narrowly construed, and thus applicable in very few cases. See 29 C.F.R. § 860.102 (1980)." In *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980), the Seventh Circuit, in considering § 623(f)(2), observed that exceptions of this sort to a remedial statute are to be narrowly and strictly construed.

8. In the *Houghton* case, the Eighth Circuit concluded that the employer's admission that the plaintiff's removal was solely on the basis of his age presented a *per se* violation of § 623(a).

(c) *Discussion*

On the record here, this Court finds and concludes that defendants have not met their burden of proving under § 623(f)(1) that age constitutes a BFOQ for the requirement of § 34(a) that the plaintiffs retire at age sixty. Defendants have not convinced this Court that the retirement of City firefighters at that age is reasonably necessary for the operation of an efficient fire department within the City of Baltimore. Furthermore, defendants have not shown, on this record, that there is a factual basis for them to believe that all or substantially all Baltimore City firefighters between the ages of sixty and sixty-five, other than officers, would be unable to perform their duties safely and efficiently. Finally, defendants have not proved that it is impossible or impractical to deal with firefighters between sixty and sixty-five on an individualized basis.

In attempting to meet their burden, defendants first emphasize the arduous nature of firefighting duties and the physical demands of the job. They point out that the duties of firefighters include periods of relative inactivity followed by those of intense physical activity. During a fire, plaintiffs and other firefighters are exposed to intense heat (or in winter, extreme cold), must work in smoke-filled environments in the presence of toxic substances and must perform their duties under great stress.

In the absence of other evidence in the record, these facts might have significance. However, when the record as a whole is considered, this Court is satisfied that defendants have not met their burden of proving that all or substantially all employees of the Baltimore City Fire Department cannot safely and efficiently perform their demanding duties between the ages of sixty and sixty-five.[9]

Insofar as five of the plaintiffs are concerned, this case involves their performance for a period of only five years, namely their ability to perform their duties adequately at ages sixty through sixty-four inclusive. Plaintiffs are not here challenging the right of the defendants to require their mandatory retirement at age sixty-five. That is the age when officers of the Fire Department must retire, and plaintiffs are not contending that they have the right under the ADEA to work as firefighters beyond that age.[9] For these reasons, nothing in this Opinion should be construed as deciding whether the City of Baltimore has the right to require the mandatory retirement of Fire Department employees at age sixty-five.

The starting point in evaluating the job performance of Baltimore City firefighters after age sixty is the manner in which the plaintiffs themselves have performed since they attained that age. The evidence is overwhelming that plaintiffs have not only performed satisfactorily since they became sixty, but in most instances their performance has been more than satisfactory and even exceptional. Plaintiff Johnson is sixty-two years of age, plaintiffs Stern and Doyle are sixty-one and plaintiffs Paris and Robey are sixty. The evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters. Indeed, defendants have not sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons. One Fire Department Captain testified that advancing age had not adversely affected plaintiff Stern's performance, and another Captain characterized Stern as being an "exceptional" firefighter today. Stern was rated as "outstanding" in his 1979–1980 performance evaluation report. Other evidence indicated that other plaintiffs were "good", "effective" or "very efficient" in the performance of their firefighting duties.

The testimony of firefighter Grove (who is not a plaintiff) supports that of the plain-

9. Indeed, plaintiffs' evidence indicates that officers regularly perform at fires the same duties as firefighters of lesser rank and, conversely, that firefighters undertake officers' duties in the absence of the latter. Essentially, plaintiffs are seeking in this case the same mandatory retirement age that the City applies to officers of the Fire Department.

tiffs and of the Fire Department officers who evaluated plaintiffs' performances. Grove is sixty-nine years of age and will have been with the Department for thirty-nine years when he retires in August of 1981 at age 70.[10] In a three-alarm fire that occurred in January 1981, Grove performed arduous firefighting duties over a period of four hours without difficulty. His testimony and that of the plaintiffs themselves supports this Court's findings on this record (1) that plaintiffs have performed their firefighting duties satisfactorily since they became sixty, and (2) that they may be expected to continue to so perform until they reach the age of sixty-five.[11]

Defendants' argument that substantially all Baltimore City firefighters would be unable at age sixty to perform their duties safely and efficiently is undercut by the fact that historically Baltimore firemen have always worked past that age and even up to age seventy. As discussed hereinabove, the ERS, established in 1925, did not require retirement until the age of seventy. Even when the FPERS became effective in 1962, many firefighters, like the witness Grove, chose to remain covered by the earlier system and, like Grove, have continued to perform their duties satisfactorily after they reached the age of sixty. This continued employment of firefighters beyond the age of sixty has in no way affected the high caliber of the services performed by the Baltimore City Fire Department. As Chief O'Connor testified, the Baltimore City Fire Department, prior to 1962, was rated as one of the best in the country, and it continues to be so rated. It is difficult to understand how such a rating could have been achieved if all or substantially all of the Department's firefighters over the age of sixty cannot now and could not for many years in the past perform their duties safely and efficiently.[12]

The further question raised is why an effort was not made at an earlier date to fix a retirement age of sixty, if the risk to the public was as great as defendants now contend. If anything, the burdens undertaken by an older firefighter are less today than they were in prior years. In 1953, firefighters worked a 66-hour week, but this has been reduced over the years to the present 48-hour week. Moreover, technological improvements over the years, including in particular the widespread use of oxygen breathing apparatus,[13] have made the job less onerous for both older and younger members of the Department.

Defendants' selection of the arbitrary age of sixty for the mandatory retirement of Baltimore firefighters is particularly suspect in view of what other municipal fire departments have done. A survey of the mandatory retirement ages of fire department personnel in thirty of the largest cities in the United States indicates that only four cities have a mandatory retirement age of sixty. Twenty-two cities have a retirement age of sixty-five or older or have no mandatory retirement age at all for firefighters.[14] Nothing in the record indicates that Baltimore Fire Department personnel perform duties any more arduous than those undertaken in other cities. To accept defendants' contention that substantially all firefighters above age sixty cannot safely and effectively perform their duties would indicate that a large number of fire departments across the country are inadequately or improperly manned.

10. Grove chose to remain a member of the ERS and is therefore not required to retire under City law until he becomes seventy years of age.

11. Plaintiff Robey was actively engaged in fighting a major fire between 12:00 midnight and 7:00 A.M. on April 24, 1981, which was only three days before this case came on for trial.

12. At the present time, there are eight City firefighters who are between the ages of sixty and seventy, and sixty-five who are between the ages of fifty-five and fifty-nine.

13. This apparatus is designed to protect firefighters from smoke, carbon monoxide and other harmful gases at the scene of a fire.

14. Three cities require retirement at age sixty-three or sixty-four. Baltimore was the only city with a fifty-five year old retirement age for firefighters.

Defendants rely very heavily in this case on the medical evidence they have produced. Defendants argue that disease processes in persons aged fifty-five or older preclude the safe and efficient performance of their duties by firefighters over that age and that these medical conditions cannot be ascertained by means other than knowledge of the individual's age. It is asserted that the mandatory requirement of City law that firefighters retire at age fifty-five or sixty is based on sound physiological and medical data and is the most reliable way to remove firefighters with coronary disease from the Fire Department. Defendants contend that the expert testimony presented by them proves that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters over sixty on an individualized basis.

On the record here, this Court finds and concludes that defendants have not met their burden of proving that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters between the ages of sixty and sixty-five on an individualized basis. As to this issue, the expert testimony presented by plaintiffs was much more convincing than that of defendants. In particular, this Court found Dr. Samuel M. Fox, III to be a most impressive witness, and his testimony will be credited in substantial part. Dr. Fox is an experienced cardiologist who specializes in exercise testing.[15] He testified that the chronological age of an individual must of course be considered but that it is not determinative of that individual's ability to perform duties such as those required of a firefighter. Rather, exercise tolerance tests, supplemented by other tests and procedures if necessary, should be and can be used to determine whether a firefighter is physically and medically fit to perform his duties. Because of technological improvements in recent years, physicians can today much more readily test for cardiological problems which a fireman or other similar worker might have.

The testimony of Dr. Fox is supported by that of both Dr. Paul O. Davis[16] and Dr. Ellsworth R. Buskirk.[17] Neither of these witnesses is a physician, but both have extensive experience in exercise physiology. This Court accepts their testimony that age should not be the determining factor in ascertaining whether an individual between sixty and sixty-five is capable of performing physical tasks such as those required of a firefighter.[18] These witnesses conceded that increasing age unquestionably has an effect on physical performance and that aerobic capacity decreases with age.[19] But decreasing physical ability is offset by the experience and knowledge which an older employee has gained over the years. An older, more experienced firefighter is better equipped to pace himself and is more knowledgeable concerning unnecessary risks than the younger. Indeed, the evidence in this case indicates that younger firefighters receive more physical injuries than do older ones, apparently because younger firefighters assume more unnecessary risks.

Plaintiffs' expert witnesses also readily concede that firefighters as a class are particularly subject to heart disease and that the risk of heart disease increases with age. But facts such as these do not under the ADEA permit defendants to stereotype

15. Dr. Fox is a Professor of Medicine at Georgetown University School of Medicine, was formerly a member of the President's Council on Physical Fitness and Sports and is a past President of the American College of Cardiology. These are only a few of his many accomplishments.

16. Dr. Davis is particularly well qualified to testify concerning the duties required of a firefighter. He has been an active member of the Takoma Park (Md.) Fire Department since 1966.

17. Dr. Buskirk is a Professor of Applied Physiology at The Pennsylvania State University.

18. It was Dr. Davis' opinion that it is both possible and practical to determine plaintiffs' capacity and ability to continue to perform their jobs safely and efficiently by means of medical examinations, periodic reviews of current job performance and other objective tests.

19. After age seventy, deterioration in physical performance is more rapid. This fact has little significance in this case.

City firefighters between the ages of sixty and sixty-five and conclude that all or substantially all of them are no longer capable of performing their assigned duties safely and efficiently. As the Court said in *Aaron v. Davis*, 414 F.Supp. 453 (E.D.Ark.1976), at page 461:

> Generally, it is the relative ease with which possibly incapacitating defects are detectable that determines whether the qualifications imposed by the employer are job-related or "reasonably necessary to the normal operation of the particular business," as provided in the Act. In this area, a claim for exemption from the statute's proscriptions will not be permitted on the basis of the employer's *stereotyping assumption* that most, or even many, employees in a particular type of job become physically unable to perform the duties of that job after reaching a certain age. *See Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). (Emphasis added)

The ADEA recognizes that stereotyping assumptions of an employer are not acceptable unless it is impossible or highly impractical to deal with members of a given class on an individualized basis. As the testimony of plaintiffs' experts indicate, it is both possible and practical to determine whether an individual firefighter between the ages of sixty and sixty-five is physically disabled from performing his assigned duties. In most cases, the cost of such testing is not great, and some of this cost will be paid under the Fire Department Health Care Program. Conventional risk factors can first be determined by way of interviews, and, in many instances where recognized risk factors are absent, further testing would not be required. Where indicated by the presence of one or more risk factors, a firefighter sixty years of age or older can take an exercise tolerance test (also referred to in testimony as an exercise stress test). As Dr. Fox testified, this is not an expensive test, and more expensive and more invasive testing mechanisms need be employed only in those instances where it is indicated that follow-up testing is required.[20]

The expert testimony relied upon by the defendants was less convincing than that of the plaintiffs. Neither Dr. Albert M. Antlitz nor Dr. Earl W. Ferguson has the experience that Dr. Fox has had in both cardiology and exercise tolerance testing. In his testimony, Dr. Antlitz indicated that he himself had examined a sixty-three year old officer of the Fire Department to determine whether that individual should be retired. Following his examination of sixty-three year old Fire Lieutenant Anthony V. Herr in 1978, Dr. Antlitz concluded that the cardiac status of this Fire Department officer, who had stopped working because of hypertension, would permit him to engage in his usual work as an officer with a truck company. However, at the trial, Dr. Antlitz testified that since 1978 he had learned what lieutenants now do in fire companies and that today he would not let Lt. Herr go back to fighting fires at age sixty-three. Thus, defendants' own evidence indicates that Fire Department personnel with cardiac problems can be evaluated on an individualized basis and retired if necessary. Other evidence in the record shows that examinations of the sort described by Dr. Antlitz (and testing, if necessary) could be successfully performed for plaintiffs and other firefighters between sixty and sixty-five years of age.

Dr. Alexander R. Lind, a physiologist called to testify by defendants, based his conclusion that substantially all firefighters over fifty-five could not properly perform their duties in large part on his study of miners in South Africa.[21] Such individuals hardly composed an appropriate class for comparison with Baltimore City firefight-

20. These more expensive and more invasive follow-up tests include radionuclide imaging and cardiac catheterization.

21. Dr. Lind testified in *Houghton v. McDonnell Douglas Corporation*, *supra*. In reversing the District Court's conclusion that defendant had met its burden in that case, the Eighth Circuit characterized the Company's evidence as being "of a general nature."

ers, since all of the miners studied were black and worked full eight-hour shifts in mines where it was very humid and where the temperature ranged from 85° to 100°.

What the ADEA requires in a case involving municipal workers like firefighters is a balancing of the right of each individual employee to continue to work in spite of his age against the risk to the public and to other employees created by the nature of the duties to be performed. As the Court said in *Aaron v. Davis, supra*, at 461:

> It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age.

In support of its conclusions in this case, this Court would cite and rely on both *Aaron v. Davis, supra* and *EEOC v. City of St. Paul, supra*. Both of those cases dealt with the rights of firefighters under the ADEA. In *Aaron*, an ordinance of the City of Little Rock required that all members of the fire department retire at age sixty-two. Following a trial, Chief Judge Eisele concluded that the record did not support the special relevance of the age sixty-two mandatory retirement requirement of the Little Rock ordinance. Accordingly, the Court held that the provisions of the ordinance in question were arbitrary, capricious and wholly lacking in any justifiable business necessity. 414 F.Supp. at 463.

In *City of St. Paul, supra*, a Minnesota statute and an ordinance of the City of St. Paul had established a mandatory retirement age of sixty-five for all uniformed fire department employees. Following a trial, District Judge Alsop held that provisions of this legislation requiring Fire Chiefs to retire at age sixty-five violated the ADEA. Noting that the only Chief over age sixty-four about whom testimony had been presented could adequately perform his duties, the Court found that the evidence in the case did not give the City of St. Paul a factual basis for believing that substantially all Chiefs were unable to perform their duties safely and efficiently after the age of sixty-four. 500 F.Supp. at 1145.

In *City of St. Paul*, the Court upheld the challenged legislation insofar as it required the retirement of firefighters and captains at age sixty-five. 500 F.Supp. at 1144. Defendants argue that this part of the decision supports their contention that age is a BFOQ for firefighters. This Court would disagree. There is no inconsistency between this Court's decision that defendants have not on the record here met their burden of proving that retirement at age sixty is a BFOQ for firefighters and Judge Alsop's conclusion that the defendants in *City of St. Paul* had met their burden concerning such compulsory retirement at age sixty-five. Certainly as an employee's age increases, there is a decrease in the quantum of proof necessary for an employer to meet its burden of proving a BFOQ under § 623(f)(1). *Aaron v. Davis, supra* at 461. Plaintiffs have not in this case (as did the plaintiffs in *City of St. Paul*) sought to work beyond age sixty-five. Nothing contained herein is intended to suggest that Baltimore firefighters could not be required by the City to retire at age sixty-five, since that question is not before the Court in this case. The issue here has been whether defendants have met their burden of proving that retirement at age sixty is a BFOQ for City firefighters. This Court finds that they have not.

In sum, the Baltimore City law in question, as applied to these plaintiffs and others like them, violates the ADEA because it sets an arbitrary age limit for terminating the plaintiffs' employment. As they have done all their lives, plaintiffs keenly wish to continue to work as firefighters until they are sixty-five. Section 84(a) does not permit plaintiffs' performance to be measured in terms of their ability. Rather, an arbi-

trary line has been drawn based on stereotyped assumptions. Plaintiffs have been told that solely because of their age, their services are no longer required. In this case, defendants have failed to meet their burden of proving that, when a firefighter becomes sixty, age is an occupational qualification reasonably necessary to the normal operation of the Baltimore City Fire Department. The provisions of § 34(a)(2) and (4) of Article 22 of the Baltimore City Code, as applied to plaintiffs and others like them, therefore violate the ADEA.

VII

The claim of plaintiff Porter

Plaintiff Porter is the only one of the six plaintiffs in this case who was not employed by the Fire Department on July 1, 1962. Under § 34(a)(2), he must therefore retire at age fifty-five. Defendants contend that since plaintiff Porter is presently thirty-two years of age, he is not a proper plaintiff in this suit.

Defendants argue that plaintiff Porter is not one of those persons protected by the ADEA, since the prohibitions of the Act are limited "to individuals who are at least forty years of age but less than seventy years of age."[22] 29 U.S.C. § 631. However, when read together with the rest of the statute, this provision does no more than define the acts prohibited by the statute and would not deprive plaintiff Porter of standing in this case. If Porter survives and is still employed by the Fire Department when he attains the age of fifty-five, he will clearly be protected by the Act. More importantly, since this Court has found that the provisions of § 34(a) which mandate retirement of a City firefighter at age sixty violate the ADEA, *a fortiori* the provisions of the legislation which mandate that plaintiff Porter must retire at age fifty-five are likewise invalid.

The essential question which must be addressed in determining whether plaintiff Porter has standing is whether his claim is now ripe for adjudication. Defendants assert that since Porter will not have to retire until the year 2003, his claim is too speculative to be considered by this Court at this time. Relying on *Eccles v. Peoples Bank*, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed.2d 784 (1948), defendants argue that there are many contingent events which might occur before plaintiff Porter is required to retire, and that the occurrence of any one of these events would render moot any decision made by this Court as to him.

[10, 11] When the legislation in question is considered from a practical point of view, this Court concludes that abstract concepts of justiciability should be disregarded. This suit challenges provisions of § 34(a) of Article 22 of the Baltimore City Code. Two groups of employees are affected by the legislation, those who joined the Fire Department prior to July 1, 1962 and those who, like plaintiff Porter, began their employment after that date. The provisions of the law applying to these two separate groups are hardly severable. Quite obviously, if the ADEA invalidates provisions of the City Code which require mandatory retirement of a firefighter at age sixty, that Act likewise invalidates similar provisions mandating retirement at age fifty-five. The principle of statutory severability plays a special role when a court is presented with questions of ripeness. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3532 at 258 (1975). Inseverability, therefore, may make ripe issues that otherwise would be better deferred. *Id.* at 259; *see Carter v. Carter Coal Company*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). As the Court of Appeals of Maryland said in *Heubeck v. Mayor and City Council of Baltimore*, 205 Md. 203, 211, 107 A.2d 99 (1954), "an Act must fall entirely if the effect of declaring a portion of it invalid would render the remainder incapable of effecting the purpose for which the Act was enacted."

Under the particular circumstances of this case, considerations of judicial economy lead this Court to the conclusion that plain-

22. The 1978 amendments to the Act increased the top age limit from sixty-five to seventy.

tiff Porter's claim is ripe for determination at this time. It would make little sense, in view of the findings and conclusions made herein, to defer consideration of Porter's claim until a later date. Accordingly, plaintiff Porter is entitled to a declaratory judgment and injunction prohibiting defendants from enforcing provisions of § 34(a) which mandate that he must retire at age fifty-five.

VIII

Plaintiffs' other claims

In view of this Court's conclusion that § 34(a)(2) and (4) of Article 22 of the Baltimore City Code violates provisions of the ADEA, it is not necessary to determine whether this City law likewise contravenes 42 U.S.C. § 1983 and the Fourteenth Amendment. However, it should be noted that the Fourth Circuit's decision in *Arritt v. Grisell, supra*, makes it very doubtful that plaintiffs would prevail insofar as their alternative claims are concerned.

[12] In the second part of the *Arritt* opinion (567 F.2d 1271–1272), the Fourth Circuit upheld the District Court's granting of summary judgment in favor of the defendants as to plaintiff's claim that the West Virginia statute violated § 1983 by denying the plaintiff's right to the equal protection of the laws. Relying on *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), the Fourth Circuit concluded that it could not be said that the age limitation contained in the West Virginia statute did not rationally further a legitimate state purpose insofar as the claim based on the equal protection clause, as distinguished from the statutory claim under the ADEA, was concerned. As Judge Thomsen pointed out, there is no inconsistency in concluding that a statute violates the ADEA but does not violate the Equal Protection Clause of the Fourteenth Amendment, since legislation "authorized by § 5 of the Fourteenth Amendment can prohibit practices which would pass muster under the Equal Protection Clause, absent an act of Congress." 567 F.2d at 1272.

In any event, in this case, it is not necessary to consider in detail the arguments presented by the plaintiffs in seeking to distinguish this case from *Arritt* and *Murgia*. Plaintiffs are entitled to the relief they seek under the ADEA, and there is therefore no need for this Court to go on and undertake to analyze the evidence in terms of plaintiffs' claims asserted under § 1983 and the Fourteenth Amendment.

IX

Conclusion

For the reasons stated, plaintiffs are entitled to the relief they seek. Plaintiff Johnson is entitled to a judgment in the amount of $1,000.00, representing back pay due him from May 1 to June 11, 1979. All plaintiffs are entitled to a declaratory judgment, a permanent injunction and costs. In addition, plaintiffs are entitled to attorneys' fees in an amount to be determined by the Court at a later date. Counsel should meet and undertake to agree on the form of an Order to be entered herein.

SIDARMA SOCIETA ITALIANA DI ARMAMENTO SPA, VENICE

v.

HOLT MARINE INDUSTRIES, INC., Holt Marine System Companies, Waterside Ocean Navigation of Pennsylvania, Thomas Holt, Holt Hauling and Warehousing Systems, Inc., Holt Marine Terminal, Inc., B. H. Sobelman, Inc. and Holt Cargo Systems.

No. 75 Civ. 6265 (RJW).

United States District Court,
S. D. New York.

June 9, 1981.

Plaintiff moved pursuant to Arbitration Act to vacate arbitration award, and

Exhibit C

Missouri statutes. Although the Court may have the power to decide these state claims under its pendent jurisdiction, *see United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1965), the exercise of its pendent jurisdiction is within the discretion of the Court. *Id.*, at 726, 86 S.Ct., at 1139; *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627, 94 S.Ct. 1323, 1336, 39 L.Ed.2d 630 (1974). The Court in *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139, indicated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the State claims should be dismissed as well." Given the fact that the federal claims have been dismissed, this Court will also dismiss the state claims.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion to dismiss be and is GRANTED.

IT IS FURTHER ORDERED that plaintiff's complaint be and is dismissed without prejudice.

IT IS FURTHER ORDERED that plaintiff's motion to compel state public safety director to revoke illegally obtained non-elected peace officer certification issued defendant, motion to compel election board officials to strike defendant's name off November 6, 1984, general election ballot as unlawful, invalid and disqualified candidate for Sheriff, and motion for summary judgment be and are DENIED as moot.

Suzanne M. HAHN, Patricia J. Koch, Mary Catherine O'Sullivan, Diane M. Smith, Sandra C. Walker, Linda D. Craig, Josephine M. Hodge, Shirley E. Bowers, Plaintiffs,

and

Equal Employment Opportunity Commission, et al., Plaintiffs-Intervenors,

v.

The CITY OF BUFFALO, a Municipal Corporation; James B. Cunningham, in his capacity as Police Commissioner, City of Buffalo Police Department; Anthony J. Collucci, Paschal C. Rubino, and Michael L. Broderick, in their capacities as Commissioners, City of Buffalo Civil Service; and The New York State Dept. of Civil Service, Defendants.

Thomas J. DOMINO, Plaintiff,

v.

John V. CLARK, New York State Department of Civil Service; Victor S. Bahou, in his capacity as President of the New York State Civil Service Commission and Head of the New York State Department of Civil Service; James G. McFarland, in his capacity as Commissioner of the New York State Civil Service Commission; and Josephine Gambino, in her capacity as Commissioner of the New York Civil Service Commission, Defendants.

Kenneth A. KUCZKA, Plaintiff,

v.

John V. CLARK, New York State Department of Civil Service; Victor S. Bahou, in his capacity as President of the New York State Civil Service Commission and as Head of the New York State Department of Civil Service; James G. McFarland, in his capacity as Commissioner of the New York State Civil Service Commission; and Josephine Gambino, in her capacity as Commissioner of the New York State Civil Service Commission, Defendants.

David R. KARNEY, Plaintiff,

v.

John V. CLARK, New York State Department of Civil Service; Victor S. Bahou, as President of the New York State Civil Service Commission and as Head of the New York State Department of Civil Service; James G. McFarland, as a Commissioner of the New York State Civil Service Commission; and Josephine L. Gambino, as a Commissioner of the New York State Civil Service Commission, and Kenneth J. Braun, as Sheriff of Erie County, Defendants.

Nos. CIV-80-874C, CIV-80-796C, CIV-80-797C and CIV-80-1184C.

United States District Court, W.D. New York.

Oct. 30, 1984.

Unsuccessful applicants for position of police officer filed suit against city charging age discrimination. The District Court, Curtin, Chief Judge, held that: (1) enforcement of New York statute providing that no person who is more than 29 years of age should be eligible for appointment as a police officer did not deny applicants over age 29 equal protection of the laws; (2) statute violated rights to which those unsuccessful applicants over age of 40 were entitled under Age Discrimination in Employment Act; and (3) unsuccessful applicants who had not reached age 40 did not have standing to assert claims under Age Discrimination in Employment Act.

Judgment accordingly.

1. Constitutional Law ⇐238.5

Applicable legal standard in constitutional challenge to New York State Civil Service Law section providing that no person more than 29 years of age was eligible for appointment as a police officer was a more relaxed standard than the "strict scrutiny" standard that would apply if case involved either a suspect classification or a fundamental right, requiring only that statute be rationally related to legitimate state interest. U.S.C.A. Const.Amend. 14; N.Y. McKinney's Civil Service Law § 58, subd. 1(a).

2. Constitutional Law ⇐238.5
Municipal Corporations ⇐176(3)

Enforcement of New York statute providing that no person who is more than 29 years of age shall be eligible for appointment as a police officer did not deny individuals over age of 40 equal protection of the laws in view of evidence clearly showing that facts upon which age classification was apparently based could reasonably be conceived to be true and in light of fact that statute was reasonably related to legitimate goal of maintaining a safe and efficient police department. U.S.C.A. Const.Amend. 14; N.Y.McKinney's Civil Service Law § 58, subd. 1(a).

3. States ⇐4.16

Tenth Amendment does not bar application of Age Discrimination in Employment Act to state and local governments. U.S.C.A. Const.Amend. 10; Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

4. Civil Rights ⇐9.15

To establish bona fide occupational qualification defense to charge of discrimination on basis of age, employer must show that job qualifications are reasonably necessary to essential operation of business and that there is a factual basis for believing that all or substantially all persons within class protected by Age Discrimination in Employment Act would be unable to perform job effectively and safely, or that it is impossible or impracticable to determine job fitness on an individualized basis. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

5. Civil Rights ⇐9.15

An employer's desire to have the most cost-effective work force cannot justify age discrimination where age is not a bona fide occupational qualification. Age Discrimination in Employment Act of 1967,

§ 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

6. Civil Rights ⇐9.15

New York statute providing that no person who is more than 29 years of age shall be eligible for appointment as a police officer violated rights to which applicants over age 40 were entitled under the Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

7. Civil Rights ⇐41

Applicants for position of police officer who had not yet reached age of 40 did not have standing to assert claim under Age Discrimination in Employment Act that their rights were violated by enforcement of New York statute providing that no person who is more than 29 years of age shall be eligible for appointment as a police officer. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

William A. Price, Buffalo, N.Y., for plaintiffs Hahn, Koch, O'Sullivan, Smith, Walker, Craig, Hodge, Bowers and plaintiffs-intervenors Brozyna, Nowaldy, Tobias, Shaw, Elliott Williams, Willis, Richter, Aston, Berry, Neiman, Bienko, Rindfleisch, Farley, Lema, Michel, Delano, Kerr, James, Betz, DeJesus, Harris, Wagstaff, Hokes, Gladden, Jordan, McDonald, Moore, Abdallah, Mack, Cusella, Shea, Tutuska, Arcara, Malaney, Mullen, Jones, Minor, Feaster, Hutcherson, Motley, Stallworth, Richardson, Ostrowski, Polakiewicz, Moulin, Collier, O'Sullivan and Witaszek.

Cohen, Swados, Wright, Hanifin, Bradford & Brett, Buffalo, N.Y. (Barbara R. Heck James, Buffalo, N.Y., of counsel), for plaintiffs-intervenors Luxenberg, Decker, Wolf, Klipfel, Davis, Emery Williams, M. Schmidt, B. Schmidt, Cotter, Lorenz and Wipperman (Cheryl S. Fisher, Buffalo, N.Y., of counsel), for plaintiffs-intervenors Wehner and McCabe; for plaintiff Domino in CIV-80-796C; and for plaintiff Kuczka in CIV-80-797.

Saperston, Day, Lustig, Gallick, Kirschner & Gaglione, Buffalo, N.Y. (Richard A. Clack, Buffalo, N.Y. of counsel), for plaintiffs-intervenors Hoy, Mikulski and Moore.

Edward A. Pace, Buffalo, N.Y., for plaintiffs-intervenors Clark, Cooper and Quinn.

William R. Hites, Buffalo, N.Y., for plaintiff-intervenor McMahon.

Dubin & Sommerstein, Buffalo, N.Y. (Edwin P. Hunter, Buffalo, N.Y., of counsel), for plaintiffs-intervenors Giacchino and Shea and for plaintiff-intervenor Karney in CIV-80-1184C.

Sargent & Repka, Buffalo, N.Y. (Nicholas J. Sargent, Buffalo, N.Y., of counsel), for plaintiffs-intervenors Dillon and Leone.

Garvey, Magner & Love, Buffalo, N.Y. (Jeffrey L. Taylor, Buffalo, N.Y., of counsel), for plaintiff-intervenor Breitnauer.

E.E.O.C., Buffalo, N.Y. (Saul Krenzel, New York City, of counsel), for plaintiff-intervenor E.E.O.C.

Robert Abrams, Atty. Gen., State of N.Y. (Douglas S. Cream, Asst. N.Y. State Atty. Gen., Buffalo, N.Y., of counsel), for defendant State of N.Y.

John Naples, Corp. Counsel, Buffalo, N.Y. (Peter J. Gerard, Asst. Corp. Counsel, Buffalo, N.Y., of counsel), for defendants City of Buffalo, Cunningham, Collucci, Rubino and Broderick.

Eugene F. Pigott, Jr., Erie County Atty., Buffalo, N.Y. (Robert E. Casey, Asst. County Atty., Buffalo, N.Y., of counsel), for defendant Braun in CIV-80-1184C and for defendant Clark in CIV-80-796C, CIV-80-797C, and CIV-80-1184C.

CURTIN, Chief Judge.

This case involves age discrimination in the hiring of police officers in Buffalo, New York, and other municipalities in the Buffalo area. Section 58(1)(a) of the New York State Civil Service Law provides that no person who is more than 29 years of age

shall be eligible for appointment as a police officer.[1]

The plaintiffs are individuals over the age of 29 whose age disqualifies them from employment in various police departments. Some of the plaintiffs are over 40 years old. These plaintiffs have standing to claim that section 58(1)(a) violates their rights under section 4(a)(1) of the Age Discrimination in Employment Act [ADEA], 29 U.S.C. § 623(a)(1).[2] The remaining plaintiffs are over age 29 but less than age 40. The plaintiffs between the ages of 29 and 40 claim that section 58(1)(a) denies them the equal protection of the laws. Plaintiffs under the age of 40 do not have standing to assert claims under the ADEA, because the act applies only to persons between the ages of 40 and 70.[3] The Equal Employment Opportunity Commission [EEOC] has intervened on behalf of those plaintiffs asserting claims under the ADEA.

The United States Court of Appeals for the Second Circuit has recently held that the presence of a one-house veto clause in the Reorganization Act of 1977, 5 U.S.C. § 901 *et seq.*, invalidates the authority of the EEOC to enforce the ADEA. *Equal Employment Opportunity Commission v. CBS, Inc.*, 743 F.2d 969 (2d Cir.1984). To avoid unnecessary disruption of the many enforcement cases now pending, the court stayed its judgment until December 31, 1984, so that Congress could correct the defect in the statute. Absent such correction, the complaint in that case would be dismissed.

The decision in *EEOC v. CBS* would not require dismissal of the complaint in the present case. Here, three of the original plaintiffs are over 40 years of age. The EEOC participated as an intervenor. This case is still viable without the participation of the EEOC, unlike *EEOC v. CBS*, in which the EEOC was the sole plaintiff. In any event, Congress has passed, and the President has signed into law, H.R. 6225, which has remedied the deficiency in the EEOC's authority to enforce the ADEA.

Critical to the claim under the ADEA is the issue of whether a maximum hiring age of less than 40 is a bona fide occupational qualification [BFOQ] reasonably necessary for the operation of municipal police departments. If age less than 40 is a BFOQ as defined in section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1),[4] then the continued

1. Section 58(1)(a) provides that:

> 1. Notwithstanding any other provision of this law or any general, special or local law to the contrary, no person shall be eligible for provisional or permanent appointment in the competitive class of the civil service as a police officer of the capital police force of the state office of general services after June first, nineteen hundred seventy-eight, or as a police officer of any police force, or police department of any county, city, town, village, housing authority or police district unless he shall satisfy the following basic requirements:
>
> (a) he is not less than twenty nor more than twenty-nine years of age, provided, however, that the time spent on military duty or on terminal leave, not exceeding a total of six years, shall be subtracted from the age of any applicant who has passed his twenty-ninth birthday as provided in subdivision ten-a of section two hundred forty-three of the military law, and provided further, however, that prior to June thirtieth, nineteen hundred seventy-two, the maximum qualifying age provided hereunder shall be determined as of the date when the applicant takes the written examination.

2. Section 4(a)(1), 29 U.S.C. § 623(a)(1), provides as follows:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to 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.

3. Although section 58(1)(a) requires that prospective appointees be less than 29, only persons between ages 40 and 70 are protected by the ADEA. 29 U.S.C. § 631(a). Therefore, for purposes of the ADEA, the court must consider the age limit only at age forty. *See, Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982).

4. Section 4(f)(1) provides that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under sections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or

enforcement of section 58(1)(a) does not violate the ADEA.

The court has heard the trial testimony of experts in the fields of medicine and law enforcement. The court's decision is therefore based upon a fully developed record of testimony and exhibits. Upon review of this record and the applicable law, I conclude that the enforcement of section 58(1)(a) does not deny plaintiffs the equal protection of the laws. However, I find that section 58(1)(a) violates the rights to which the plaintiffs over age 40 are entitled under the ADEA.

The court has granted preliminary relief to the eight original plaintiffs in this case. This relief has been extended to the more than 70 persons who have since intervened as plaintiffs. Under the terms of the orders granting such relief, the defendants have been enjoined from enforcing section 58(1)(a). Accordingly, the intervenors who have written the competitive examinations necessary to become police officers have been placed upon the eligibility lists from which officers are appointed. Some have been appointed and have taken jobs as police officers in spite of not meeting the age requirement.

In another procedural matter, the court has consolidated the cases of *Domino v. Clark*, CIV-80-796C; *Kuczka v. Clark*, CIV-80-797C; and *Karney v. Clark*, CIV-80-1184C, with the present action.

The following are the court's findings of fact and conclusions of law.

I. EQUAL PROTECTION

[1] Section 58(1)(a) concerns eligibility for government employment and discriminates against persons over age 29. Age classifications of this sort are not "suspect," and the right to government employment has been held not to be fundamental. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). If this case involved either a suspect classification or a fundamental right, then the court would be required to analyze section 58(1)(a) under the "strict scrutiny" standard, a difficult test which few statutes can pass. *Bernal v. Fainter*, — U.S. —, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984). However, the applicable legal standard in this case is a more relaxed standard which requires only that the statute be rationally related to a legitimate state interest. *Massachusetts Board of Retirement v. Murgia, supra.*

[2] Courts are reluctant to overturn state statutes in cases where suspect classifications and fundamental rights are not involved and where the "rationality" test applies. *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979). The evidence in the present case clearly shows that the facts upon which the age classification is apparently based could reasonably be conceived to be true. I also find that the statute is reasonably related to the legitimate goal of maintaining a safe and efficient police department. I must therefore conclude that section 58(1)(a) does not violate the equal protection clause.

Section 58(1)(a) has been the subject of equal protection analysis in at least four cases decided by federal district courts. The statute was upheld in three of these cases. *See, Tober v. Scofield*, CIV-82-51T (W.D.N.Y. December 29, 1983); *Sica v. County of Nassau*, CIV-81-3497 (E.D.N.Y. March 9, 1982); *Colon, et al. v. New York*, 535 F.Supp. 1108 (S.D.N.Y.1982). Section 58(1)(a) was held to be unconstitutional in *McMahon v. Barclay*, 510 F.Supp. 1114 (S.D.N.Y.1981), a case decided before the decisions were handed down in the other three cases. Each of the aforementioned cases was decided on a motion for summary judgment. The present case is the first in which an extensive record was developed.

There are some apparent incongruities in section 58(1)(a) which lend surface support to the argument that it is not rationally related to the State's interest. The statute generally forbids hiring persons older than 29, but it makes exceptions in certain cases.

where the differentiation is based on reasonable factors other than age.

One important exception is for persons over age 29 who have spent time in military service. The time spent in military service, not exceeding a period of six years, may be subtracted from the ages of these applicants. Civil Service Law § 58(1)(a). Another exception applies to police departments which experience "aggravated recruitment difficulties" which cause personnel shortages. The age limitation may be raised temporarily to 35 under such circumstances. Civil Service Law § 58, subd. 1-a.

The evidence in the present case indicates that the number of persons appointed under the exception for persons in military service is quite small. As for the exception concerning departments with "aggravated recruitment difficulties," this is an emergency provision which is not at all inconsistent with the defendants' contention that the appointment of young men and women is necessary for the operation of efficient and safe police departments.

The law enforcement experts who testified for the defendant State of New York all agreed that the age limit for appointing police officers should remain as it is. Charles F. Peterson, Deputy Commissioner of the Suffolk County Police Department, testified that younger men are easier to train for police work. [Tr. V, 71.] William G. McMahon, Deputy Commissioner of the New York State Division of Criminal Justice Services, testified that younger appointees are more highly motivated and better able to perform difficult assignments. [Tr. IV, 36.] There was also testimony to the effect that the average "street life" of a police officer was about ten years [Tr. IV, 54], and the medical evidence uniformly pointed to the plain fact that physical capabilities tend to decline somewhat after age 29. This evidence might suggest that the most capable and efficient police force is composed of officers who are hired at a young age and spend their best years on the force while in peak physical condition.

The issue before the court on the equal protection question is not whether the court believes that these facts and inferences are true. The court notes that this inquiry is vastly different from the analysis required by the plaintiffs' claim under the ADEA. As we shall see, the ADEA claim requires a far more searching scrutiny of the evidence. As for the equal protection claim, the question is whether the defendants' evidence could "reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. at 111, 99 S.Ct. at 949. The plaintiffs' burden is to convince the court that these facts cannot reasonably be believed. This burden is demanding, *Colon v. City of New York*, 535 F.Supp. at 1113, and the plaintiffs have failed to bear it in this case.

The facts upon which the age classification is apparently based are believable. Taken as true, they would indicate that the age requirement of section 58(1)(a) is rationally related to the goal of maintaining an efficient and safe police department. Therefore, section 58(1)(a) does not deny the plaintiffs the equal protection of the laws. *Accord, Arritt v. Grisell*, 567 F.2d 1267 (4th Cir.1977) (West Virginia statute prohibiting appointment of persons over age 35 to city police departments is constitutional).

II. ADEA

A. *Constitutionality As Applied to State and Local Governments*

[3] Until 1974, the substantive provisions of the ADEA did not apply to state and local governments. However, the Act was then amended to bring governmental entities within its scope. 29 U.S.C. § 630(b)(2). The State of New York has raised the threshold question of whether Congress acted constitutionally when it broadened the scope of the ADEA in this fashion. The State argues that the application of the ADEA to state and local governments violates the tenth amendment, citing *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). This argument need not detain us long. In *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), the Supreme Court held that the tenth amend-

ment did not preclude the application of the ADEA to a Wyoming law which required that game wardens retire at age 55. The Court noted that the great majority of courts had upheld the 1974 amendment to the ADEA. *Id.* 103 S.Ct. at 1059 and n.6. Since the Court's decision in *Wyoming*, many courts have upheld the application of the ADEA to state and local governments in cases similar to the case at bar. *See, e.g., Equal Employment Opportunity Commission v. City of Altoona, Pennsylvania*, 723 F.2d 4 (3d Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 2386, 81 L.Ed.2d 344 (1984); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694 (1st Cir. 1983); *Equal Employment Opportunity Commission v. Los Angeles County*, 706 F.2d 1039 (9th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *E.E.O.C. v. County of Allegheny*, 705 F.2d 679 (3d Cir.1983); *Mahoney v. Trabucco*, 574 F.Supp. 955 (D.Mass.1983), *rev'd on other grounds*, 738 F.2d 35 (1st Cir.1984). Accordingly, I hold that the tenth amendment does not bar the application of the ADEA to state and local governments in this case.

B. *The BFOQ Defense*

Since section 58(1)(a) expressly discriminates against prospective appointees to municipal police departments on the basis of age, there is no question as to whether the plaintiffs have stated a *prima facie* case under the ADEA. Rather, the question is whether the age restriction is defensible as a BFOQ. *Maki v. Commissioner of Education of State of New York*, 568 F.Supp. 252, 254 (N.D.N.Y.1983); *EEOC v. County of Los Angeles*, 526 F.Supp. 1135, 1138 (C.D.Cal.1981), *aff'd*, 706 F.2d 1039, *cert. denied*, — U.S. —, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

[4] "The BFOQ is an extremely narrow exception to the general prohibition against age discrimination." *Air Line Pilots Association, International v. Trans World Airlines*, 713 F.2d 940, 951 (2d Cir.1983), *cert. granted*, — U.S. —, 104 S.Ct. 1412, 79 L.Ed.2d 739 (1984), *citing Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir.1983). To establish the BFOQ defense, the employer must meet the requirements set forth in *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir.1976).[5] The employer must show 1) that the job qualifications are reasonably necessary to the essential operation of the business and 2) that there is a factual basis for believing that all or substantially all of the persons within the class protected by the ADEA would be unable to perform the job effectively and safely, *or* that it is impossible or impracticable to determine job fitness on an individualized basis. *Id.*, at 235–36; *EEOC v. County of Los Angeles*, 706 F.2d at 1042–43; *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d at 753; *E.E.O.C. v. City of St. Paul*, 671 F.2d 1162, 1166 (8th Cir. 1982).

It is clear that the safety of others is part of the essence of police work. Many courts have stated that the presence of a safety factor reduces the level of proof necessary to establish a BFOQ. *See, e.g., Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d at 755; *Tuohy v. Ford Motor Company*, 675 F.2d 842, 845 (6th Cir.1982); *E.E.O.C. v. Santa Barbara*, 666 F.2d 373, 377 (9th Cir.1982). However, this does not relieve the defendant of its burden of establishing both elements of the BFOQ defense; it only means that establishing the defense will normally be less difficult when safety is part of the essence of the defendant's business.

It should also be noted that third-party safety is not "essential" to all businesses in precisely the same way. In *Tamiami*, the Fifth Circuit noted that "[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of that

5. The State argues that the court should apply the less stringent test stated in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir.1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 822 (1975). However, in *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743 (1983), the Seventh Circuit rejected what it called an "expansive" reading of *Greyhound* and viewed *Greyhound* as being consistent with the test formulated by the Fifth Circuit in *Tamiami*.

harm in case of an accident, the more stringent may be the job qualifications." 531 F.2d at 236. Thus, the district court in *E.E.O.C. v. County of Los Angeles* noted that the safety of large numbers of persons is not continually dependent upon the "moment to moment physical vitality" of a police officer. 526 F.Supp. at 1141. This was in marked contrast to the *Tamiami* case, which involved intercity bus drivers. The nature of the safety factor differs widely among various types of employment. *Aaron v. Davis*, 414 F.Supp. 453, 462 (E.D.Ark.1976).

The first element of the BFOQ test is concerned with the relationship between the underlying job qualifications and the *essence* of the business. Here, the essence of the business is "the operation of an efficient police department for the protection of the public," and the primary function of a police officer is "to protect persons and property and to maintain law and order." *Arritt v. Grisell*, 567 F.2d at 1271, 1272. The first element of the BFOQ test does not present any difficulty in the present case. This is not a case like *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.1971), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (sex discrimination in employment as flight cabin attendants), where the essence of the job was disputed. The parties here are in basic agreement about what a police officer's duties are, and they agree that becoming a police officer requires good physical conditioning.

The plaintiffs do not attack the basic police officer job qualifications. Rather, they contend that there is no factual basis for believing that all or substantially all persons over age 40 are unable to meet these job qualifications and perform the job safely and effectively. They also contend that it is possible and practicable to determine job fitness on an individualized basis. These two contentions are the alternative prongs of the second element in the BFOQ standard.

The court finds that the defendants have not sustained their burden of proving that all or substantially all persons over age 40 could not perform the duties of a police officer safely and effectively. Several witnesses experienced in law enforcement testified for the State. All of them believed that the present age limit should be retained. However, none of these witnesses stated that all or nearly all persons over age 40 could not perform the duties of a police officer.

William G. McMahon, Deputy Commissioner of the New York State Division of Criminal Justice Services, acknowledged that there are officers in their forties and fifties who can outperform patrolmen who are in their twenties and thirties [Tr. IV, pp. 54–55]. Charles F. Peterson, Deputy Police Commissioner of the Suffolk County Police Department, stated that, although the body declines after age 40, he does not believe that there are physical traits possessed by the class of persons over 40 which preclude this class from performing patrol officer work. He noted that in some cases, officers over 40 do outstanding work. [Tr. V, pp. 116–118.]

However, the defendants' law enforcement experts sharply criticized the work of policemen who are in their forties. Deputy Commissioner Peterson said that older officers tend not to be "self starters," whereas younger officers are highly motivated. He also testified that appointees should be altruistic and that altruism declines with age. [Tr. V, pp. 69, 88–89.] Deputy Commissioner McMahon stated that younger officers are better able to do the more difficult assignments. He agreed that they are more highly motivated. [Tr. V, pp. 15–16.]

The law enforcement experts also testified that officers over 40 tend not to recover from injuries as quickly as younger officers. [Tr. V, p. 87.] Another criticism was that older officers were worse at handling emergency situations. Chief Oliva explained that a typical emergency would involve a civilian with a heart attack or other injury. He also spoke of accident prevention and traffic enforcement. Asked if an officer's "productivity" in these areas decreased with age, Chief Oliva answered:

> Yes, I think summarily from the top of my head I can see, you know, an avoidance of traffic enforcement, perhaps a nonchalant performance of his duties in terms of cultivating intelligence on the street, which is very critical in our operations, developing an ability to ignore certain things when perhaps they should be attended to[.] [T]hat may come with experience or it may come with age, I am not really sure, but it becomes ... apparent with the older officer.

[Tr. V, pp. 32–33.]

Deputy Commissioner McMahon also testified that younger officers were better at handling "crisis intervention" situations. He explained that these include such interpersonal conflicts as domestic violence, accidents, and robberies. A "team effort" is often required, and the safety of civilians and other officers sometimes depends upon one officer's performance. [Tr. IV, pp. 32–35.] McMahon then testified that the age restriction should be retained because "the younger the police officer you have, the more highly motivated that person is and the more able he is to perform in the difficult assignments." [Tr. IV, p. 36.]

McMahon's testimony raised another important point: the more physically able an officer is, the less likely he or she will have to resort to deadly physical force. [Tr. IV, p. 35.] A person's physical capacities tend to decline with age, and of course, the use of physical force should be minimized.

There are several factors which severely limit the probative force this evidence has in demonstrating that substantially all persons over age 40 cannot be safe and effective police officers. One factor has already been noted: officers over age 40 now serving in various police departments are doing competent police work. In some cases, their work is excellent. More than half of Buffalo's 797 police officers were over age 40 as of February 19, 1982. One hundred seventy-six of these are over age 50. [Stipulation, Item 104, p. 2.]

A second factor detracting from the weight of the opinions offered by the State's law enforcement experts is that the decline in performance appears to be due in large part to job tenure rather than age. Deputy Commissioner McMahon acknowledged that a decline in an officer's motivation could be attributed to his reaching the end of his seven-to-ten-year "street life." [Tr. IV, p. 53.] Deputy Commissioner Peterson said that altruism and enthusiasm decrease with age and that the older officers' performances were negatively affected as a result. However, age was only one factor he cited as a cause of the decline in an officer's enthusiasm. Peterson's testimony indicated that a police officer's having "seen it all before" is at least part of the reason why his enthusiasm waned. [Tr. V, p. 88.] Peterson explicitly stated: "There is no doubt that as a man goes through police work he loses some of his altruism and some of his enthusiasm for it." [Tr. V, p. 138.][6]

Chief Oliva, although he never changed his mind about the need for the hiring age limit, responded affirmatively when the court asked him if he believed that an officer's enthusiasm for the job decreases as he spends more time with the department. Chief Oliva also stated that there comes a "tenure time .. when they become ring wise." He added that loss of enthusiasm "is an inherent quality that develops with an individual who becomes seasoned." Finally, when asked about appointees who were hired while in their thirties under the exception for military service, Chief Oliva stated that these officers "have been satisfactory employees." [Tr. V, pp. 50–55.]

On balance, the testimony of the defendants' law enforcement experts has failed to persuade the court that all or substantially all persons over age 40 are either physically or emotionally unfit to perform the

6. Peterson made specific reference to the effect an officer's familiarity with the criminal justice system has upon his attitude. Familiarity with plea bargaining and absentee witnesses were two cynicism-engendering factors that were noted. Suppression of evidence was another. [Tr. V, pp. 69, 89.]

duties of a police officer safely and effectively. The perceived worsening of attitude appears to be induced much more by tenure than by age. I note in this connection that nearly all of the "older" officers upon whose performances this testimony was based were hired while in their twenties. They had been police officers more than 10 years before turning 40. I also note one expert's observation that 88 percent of all police officers fail to advance to the rank of sergeant. Failure to advance to higher ranks is also a major factor contributing to the decline in an officer's enthusiasm for the job. [Tr. V, p. 67.]

As previously noted, the law enforcement experts formed their opinions by observing officers who had served several years before turning 40. Each expert conceded that some officers over 40 have enough physical ability to do competent work. This is in spite of the fact that an officer's physical condition is not closely scrutinized after he or she is appointed. One expert even stated that the older officers who do not seek non-patrol duty are usually in better shape than policemen over ten years younger. [Tr. V, p. 117.]

The basic thrust of this expert testimony was only that there is a *tendency* toward physical decline in older officers. No one suggested that all or nearly all officers over age 40 actually deteriorate to the point of physical incompetence. This evidence cannot support the conclusion that all or nearly all persons over 40 who have not been subjected to the strain of police work are unable to become police officers.

The State also introduced statistical evidence for the purpose of showing that substantially all persons hired at or beyond age 40 could not be effective police officers. Roderick J. Bartell is a director of a management consultant firm that does research concerning law enforcement and criminal justice agencies. Bartell coordinated a study of the New York Housing Authority Police Department and the New York City Police Department. The data for this study was collected in 1980, and a report was issued in 1981. [Defendants' Exhibit 11, hereinafter referred to as DX 11.]

The most pertinent section of the report was concerned with the relationship between age and the level of performance achieved by New York City Police Officers. [DX 11, pp. 31, *et seq.*] The officers whose performances were studied were all patrolmen. The work product of superior officers and officers on special assignments was not considered. [DX 11, p. 9.]

The performance of police officers was evaluated in terms of number of arrests. Number of arrests was chosen as the indicator of officer-effectiveness, because the authority to make arrests is what distinguishes police work from other occupations. [DX 11, p. 31.] In a population of 16,536 male patrol officers, 139,000 arrests were made. This works out to an average of 8.4 arrests per officer per year. The Bartell study revealed that the mean number of arrests made by officers hired between ages 21 and 25 was 8.7. This is slightly higher than the average for all officers. The mean for those hired between ages 26 and 30 was 7.7. The figure for 31 to 35-year-old hirees was 6.8. These figures show that, as we move from one five-year age bracket to the next, the number of arrests per year will decrease by about one. Officers hired after age 25 fall below the 8.4 overall average. [DX 11, pp. 40–41.]

Bartell also studied the relationship between arrests per year and an officer's chronological age. The mean number of arrests per year was highest (about 12.5) for officers between the ages of 31 and 35. Next highest were the officers in the 26–30 and 36–40 age brackets. The mean for both brackets was between 10 and 11 arrests per year, with the 26–30 group performing slightly better. [DX 11, p. 43.] Arrest totals dropped off significantly in the five-year age brackets beyond the 36–40 group. In the five five-year age brackets between the ages of 41 and 65, the mean number of arrests ranged from about 7.5 for the 41–45 bracket to 3.5 for officers between the ages of 61 and 65.

The relationship between job tenure and arrests per year was also studied. Officers with between four and nine years of experience apparently made significantly more arrests than officers in any of the other age brackets. The average for officers with between 13 and 15 years on the force was about 8.5 per year. The tenure group with the highest figure was the 4–6-year group, whose average number of arrests was slightly more than 13. [DX 11, p. 44.]

The court believes that the probative value of the Bartell study is severely limited by the narrowness of its focus. The study was effective in showing a link between age and arrests, but there was other evidence in the case which showed that arresting suspected criminals constitutes only a very small portion of a police officer's daily routine. Mr. Bartell conceded that less than 1 percent of the time a police officer spends on patrol duty is spent on criminal events worthy of the officer's attention. This factor is called "probability of apprehension and detection." The rest of an officer's time is spent doing other things, which Bartell's report concededly did not address.

Bartell also agreed that making arrests was not the only effective way of handling a volatile situation. Diffusing such incidents by calming down the participants might not result in an arrest, but it would be an effective means of bringing an incident under control.[7] However, effective police work of this nature was not measured in the Bartell study. [Tr. IV, pp. 159–175.] Mr. Bartell explained that breaking down arrests into felony and misdemeanor categories partially compensated for this defect in the report. There is a negative correlation between age increase and the number of felony arrests. However, this does not resolve the problem inherent in the study's narrow focus.

The report also did not measure the effect that precinct location and work shift had upon the arrest figures. The incidence of crime differs from one shift to another. Deputy Commissioner McMahon noted that the shift from 4 p.m. to 12 a.m. has the highest level of criminal activity. He also noted that officers with more tenure can successfully bid upon the "safer" shifts. [Tr. IV, p. 68.] This would reduce an older officer's probability of apprehension and detection. An officer first appointed at age 40 would not have the seniority to successfully bid upon the most sought-after work shifts.

I will not speculate upon what a more complete analysis would show. However, this analysis does not persuade me that individuals hired after age 40 could not perform the duties of a police officer safely and effectively.

The medical evidence in this case is relevant to both of the alternative prongs in the second element of the BFOQ test. I find that, by itself and in combination with the statistical and other expert testimony, the medical evidence does not show that all or substantially all persons over age 40 cannot perform the duties of a police officer safely and effectively.

Much of the medical evidence related to the degree of accuracy with which the existence of heart disease can be recognized. However, there was also considerable testimony concerning the ability of persons over age 40 to do police work. The physical requirements for the job include speed, muscle strength, power, limited body fat, and good health. [Tr. II, pp. 122–23.] The peak years for these physical requirements are the twenties or early thirties in most individuals.

However, the evidence showed that a significant percentage of persons over age 40 could perform at the level of the average person in his or her twenties. For example, the average maximum oxygen uptake level for men between the ages of 20 and 29 is about 39.1 milliliters per kilogram per minute [ml/kg-min.]. Dr. Michael Pollock, Director of Cardiac Rehabilitation and

7. Deputy Commissioner McMahon testified that skill in diffusing a tense situation is the most effective and desirable means of control. Arrests might not result when such methods are used. [Tr. IV, pp. 69–70.]

the Schuman Performance Laboratory at the University of Wisconsin, participated in a study which measured the correlation between age and fitness. Dr. Pollock was a most credible witness. He testified that about 45 percent of the males between the ages of 30 and 39 could achieve the 39.1 ml/kg-min level for oxygen uptake. Thirty-five percent of the persons between ages 40 and 49 and 20 percent of those between ages 50 and 59 could match the 39.1 figure. With respect to body fat, the average male in his twenties had a level of 20.1 percent. About 35 percent of the males in their forties attained the average for men 20 years younger. About 30 percent of the males in their fifties had body fat levels equivalent to the 20.1 percent average for men in their twenties. [Tr. II, pp. 47–52; PX 25.]

Persons over age 40 also compared favorably with younger men in terms of strength.[8] Dr. Pollock noted that strength declines somewhat with age but that the decline is very slight before age 44. The decline is more perceptible beyond age 44, but about 35 percent of the persons in the 45–49 age category have strength equal to that of the average man in his twenties. Between 15 and 20 percent of all men in their fifties are as strong as the average man in his twenties. [Tr. II, pp. 63–64.]

Age is a factor in physical conditioning which cannot be controlled. However, the evidence did not indicate that it is a factor which debilitates all or substantially all persons over age 40 to the point of being unable to do police work. Factors such as heredity differ widely among individuals and may or may not be advantageous. Other factors, such as diet, discipline, exercise, and life style, have great impact upon health and are controllable. Dr. Pollock testified that if a 40-year-old man whose physical characteristics were similar to those of an average man in his twenties were hired as a police officer, he could probably continue to perform the job at age 50. This assumes that this individual would continue to take care of himself. [Tr. II, p. 69.]

The court recognizes that this particular testimony is somewhat speculative. However, many individuals appointed as young men remain police officers well beyond age 40. A police department has very little control over the way officers hired in their twenties maintain their physical conditioning when, as veterans, they reach their forties. [Tr. V, pp. 100–03.] This is sometimes the result of provisions in collective bargaining agreements. On the other hand, the physical condition of an individual appointed at age 40 would be subject to scrutiny at the time of appointment and during a probationary period thereafter. It is reasonable to infer that if persons over age 40 can *remain* police officers after several years of being relatively unsupervised in matters of physical conditioning, then fit persons over age 40 can *become* police officers and perform officers' duties for a considerable length of time. I find that the defendants have failed to prove that all or substantially all persons over age 40 cannot perform the duties of a police officer safely and effectively.

An employer can also establish the BFOQ defense if it is able to prove that disqualifying physical traits are present in persons over age 40 and cannot be identified practicably and reliably by means other than automatic exclusion based upon age. The parties' medical evidence on this point was almost entirely directed at the degree of certainty with which latent heart disease can be identified and the ability to predict the occurrence of a heart attack within five or six years.

Dr. Samuel M. Fox III is a cardiologist who testified for the plaintiff-intervenor EEOC. His testimony was most credible and persuasive. He noted that there are certain factors which, if present, increase the probability that an individual has or will later have coronary artery disease. The presence of this disease in prospective officers is of particular concern, because it

8. On the subject of strength, Dr. Pollock was referring to a study conducted by Henry J. Montoye and Donald E. Lamphiear [PX 26]. The strength measured was grip and arm strength.

is a leading cause of death and appears to be more common in police officers than in the population generally.

The "risk factors" include cigarette smoking, high blood pressure, blood cholesterol, angina, family history, obesity, diabetes mellitus, sex, and age. [Tr. I, pp. 20, 40, 129.] Sex, age, and family history are the only risk factors which can never be controlled. Women are less susceptible to coronary artery disease than men, and the risk of the disease increases with age. [Tr. I, p. 110.] Family history is not controllable, but it is not always a clear indicator. Family members who previously had coronary artery disease might have had it in part because of tobacco use or obesity, factors which need not affect all family members. Use of cigarettes nearly doubles a person's chances of getting coronary artery disease. [Tr. I, p. 130, 44.]

Dr. Fox testified that the existence or later onset of coronary artery disease can be predicted upon an analysis of the risk factors. All of the risk factors are easily detectable by routine medical procedures no more invasive than drawing a small blood sample. Dr. Fox stated that the predictive value of the risk factor analysis is "highly useful, and particularly effective in screening personnel for service in various occupations." [Tr. I, pp. 21–22.]

Dr. Fox qualified his testimony about risk factor analysis with the observation that it lacks some additional information an examiner would like to have. This additional information can be obtained as a result of a symptom limited exercise stress test. The stress test involves an examination of an individual during and after exercising at a level beyond which he cannot go. This test is non-invasive. [Tr. I, p. 23.]

Dr. Fox testified that it is unnecessary to administer the stress test to persons whose pretest likelihood of having coronary artery disease is less than 8–10 percent. He said that a low reading after the risk factor analysis would "make more sophisticated studies unnecessary." [Tr. I, p. 57.] He went on to state that if a person's pretest probability for coronary artery disease was below 10 percent, a successful stress test will have a negative predictive value of 97 percent. This means that there is only a three percent post-test probability that the person has coronary artery disease or will develop it within six years. In the case of a person having a 20 percent pretest probability, the stress test will have a 90 percent negative predictive value. [Tr. I, pp. 60–61.]

Dr. Walter Zimdahl is a cardiologist who testified for the defendants. Dr. Zimdahl suggested that all persons 35 years old and over should be given a stress test if they desire to become police officers. [Tr. VI, pp. 23–23.] He agreed with Dr. Fox's general conclusion that the stress test is a useful device for identifying the existence of coronary artery disease and predicting its onset in the near future. [Tr. VI, pp. 17–18.] Dr. Zimdahl would administer the test to every applicant over age 35, whereas Dr. Fox would administer it only to those who have a pretest probability beyond the 8–10 percent range.

Dr. Zimdahl noted that coronary artery disease can appear very suddenly—often in the form of a fatal heart attack in persons who had previously been free of symptoms. Still, he testified that 80 percent of all symptomatic males over age 40 who have *each* of the five most important risk factors do *not* have coronary artery disease. Dr. Zimdahl listed hypertension, blood cholesterol leve, electro-cardiographic changes, cigarette smoking, and heredity as the five most critical risk factors.

Evidently, the risk of coronary artery disease increases with age, although age is only a secondary risk factor. [Tr. VI, p. 54.] However, the evidence also shows that an analysis of the risk factors can give a very useful estimate of whether or not an individual has the disease. The risk factor analysis is not invasive or impractical to administer.

On the basis of a risk factor analysis, one is able to determine whether more sophisticated testing is required. The evidence showed that a candidate can take a stress test and afterwards be more than 90 per-

cent certain that he or she is free of coronary artery disease. The cost of this test is about $215.00, but not all candidates would need to take it. A stress test is such a useful indicator of cardiovascular fitness that anyone (even if under age 40) who fails it should not become a police officer. [Tr. VI, pp. 23–24.]

Physically unqualified persons over age 40 can be identified with enough certainty that it cannot be said that age 40 at the time of hiring is a BFOQ for the job of police officer. The defendants have therefore failed to carry their burden of establishing this defense. It is true that the work of a police officer can be very strenuous at times. However, the evidence in this case shows that a significant amount of persons over age 40 can handle the rigors of police work, and those who cannot handle it can be identified with reasonable certainty.

In *E.E.O.C. v. Los Angeles County*, 706 F.2d 1039, *cert. denied*, — U.S. —, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984), the court held that age 35 at hire is not a BFOQ for deputy sheriffs. In that case, the trial judge found no difference in the evidence between age 35 and age 40. *See* 526 F.Supp. 1135, 1139 n. 4. A similar result was reached in *E.E.O.C. v. County of Allegheny*, 705 F.2d 679, where the court held that persons above age 35 could not be prevented from writing the police examination. However, a different result was reached in *E.E.O.C. v. Missouri State Highway Patrol*, 555 F.Supp. 97 (W.D.Mo. 1982), which upheld an age 35 hiring limit for highway patrol applicants.

In *Mahoney v. Trabucco*, *supra*, the plaintiff at the district court level successfully challenged a statute which mandated retirement at age 50 for members of the Massachusetts State Police. The plaintiff was an officer who had worked as a telecommunications specialist since 1969. The only medical evidence in the case was the testimony of the defendant's medical experts. One expert testified that substantially all persons over age 50 were unable to perform the job of police officer safely and effectively. Another testified that sufferers of asymptomatic coronary artery disease could be identified with only 1 percent accuracy. 574 F.Supp. at 960.

The plaintiff did not call any experts of his own to rebut this testimony. Accordingly, the district court stated that it would find that age less than 50 is a BFOQ for the general duties of a police officer. *Id.* However, the court specifically noted that its finding was only "a judgment on the evidence presented at trial" and that "individual cases are likely to turn on the medical evidence presented at trial." *Id.* at 960 n. 1.

The plaintiff in *Mahoney* prevailed at trial only because the district court accepted an interpretation of the ADEA which distinguished between the duties of policemen generally and the plaintiff's particular job assignment. The court noted that the plaintiff's particular job was very light. For that reason, the district court enjoined the defendants from applying the age 50 retirement mandate against the plaintiff.

The United States Court of Appeals for the First Circuit reversed. The court held that it was error to focus upon specific job requirements rather than the general duties of uniformed officers. The First Circuit's opinion is devoted almost entirely to that issue. It was noted that the plaintiff could have been reassigned to more strenuous duties at any time. Upon deciding that the correct view of the ADEA required focusing upon the duties of police officers generally, the Court of Appeals was constrained to accept the uncontradicted testimony of the defendants' medical experts that substantially all persons over age 50 could not handle a police officer's duties.

The instant case is vastly different. Here, the plaintiffs did not employ the risky strategy of preferring to rely upon a particular statutory interpretation instead of producing their own medical evidence. On the contrary, the plaintiffs in this case offered persuasive evidence that a significant number of persons over age 40 could

become police officers and perform regular police work effectively.

In another recent case, the United States Court of Appeals for the Fourth Circuit reversed a district court's finding that age 60 was not a BFOQ for the job of firefighter in the City of Baltimore. *Johnson v. Mayor and City of Baltimore*, 731 F.2d 209 (4th Cir.1984). That case also involved a maximum age of retirement, unlike the instant case which involves age at hire. Interestingly, the Fourth Circuit noted (albeit in an equal protection context, discussing their decision in *Arritt v. Grisell, supra*) that it would be irrational to treat a 40-year old applicant for a police officer appointment different than all police officers 40 years old or older. 731 F.2d at 214 n. 16.

The court is aware of the fact that public safety is an important element in police work. Arbitrary age limits become more justifiable as the likelihood of harm and the degree of harm likely to result increase. *Aaron v. Davis*, 414 F.Supp. at 461. The evidence here did not indicate that hiring persons over 40 would put the public or other police officers at an appreciably greater risk. Persons with coronary artery disease can be identified or cleared with great certainty, and the consequence of a mistake was not shown to be at all likely to result in harm to the public. Many persons over age 40 are patrolmen doing the same work new appointees do, and at no unacceptable risk to the public.

This case is distinguishable from *Tamiami*, where a maximum hiring age of 35 for intercity bus drivers was upheld. There was evidence in that case that work done by newly appointed drivers was far more strenuous than the work done by veterans. Veteran drivers testified that they could not do the more strenuous jobs and that nearly everyone opted out of those assignments when his seniority permitted. 531 F.2d at 288. The same is not true here. Persons over age 40 are doing patrol work safely and effectively.

The nature of police work is also different. Persons operating vehicles carrying many passengers continually have the safety of many people in their hands. A very slight physical defect of any kind could easily cause serious harm to many persons. Police work can be very strenuous, but the nature of the work does not require absolute certainty in screening applicants. *See E.E.O.C. v. Los Angeles County*, 526 F.Supp. 1135; *cf. Johnson v. Mayor and City Council of Baltimore*, 515 F.Supp. 1287 (D.Md.1981); *Aaron v. Davis*, 414 F.Supp. 453. The court finds that unfit applicants can be screened out with enough certainty to accommodate the public's need for a safe and efficient police department.

[5] An employer's desire to have the most cost-effective work force cannot justify age discrimination where age is not a BFOQ. Although it is reasonable to believe that persons hired younger will work longer and therefore be a better "investment", "economic considerations ... cannot be the basis of a BFOQ." *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir.1981), *cert. denied*, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982).

[6] For the foregoing reasons, I conclude that age 40 at hire is not a BFOQ. Section 58(1)(a) is therefore contrary to the ADEA. Accordingly, the defendants are hereby enjoined from enforcing section 58(1)(a).

The court notes that this order does not require lowering the standards for prospective police officers. These standards are not questioned. Today's order means only that the defendants cannot disqualify a candidate *solely* because of his or her age. If a candidate is unfit, his or her employment application can and ought to be rejected. Today's order works no change in the applicable physical standards; it only means that older persons cannot be foreclosed from competing under those standards for positions in municipal police departments. Moreover, nothing in this decision and order prevents the imposition of an entry level age limit at some age greater than 40.

III. VALIDITY OF SECTION 58(1)(a) UNDER STATE LAW

Some of the plaintiffs claim that section 58(1)(a) is invalid under applicable New York State law. This argument was rejected in *Sica v. County of Nassau*, CIV-81-3497, *supra*, where Judge Pratt held that a New York court would uphold the statute under state law. In *Figueroa v. Bronstein*, 38 N.Y.2d 533 (1976), the New York State Court of Appeals upheld a provision which set at 32 the maximum age for appointment as a correctional officer. In *Knapp v. Monroe County Civil Service Commission*, 77 A.D.2d 817, 437 N.Y.S.2d 136 (4th Dept.1980), the court held that section 58(1)(a) does not violate the federal or state constitutions or the age discrimination provisions of the Human Rights Law (N.Y.Exec. Law § 296 subd. 3-a). Accordingly, I hold that the pendent state law claims in this case must be dismissed.

IV. CONCLUSION

Section 58(1)(a) discriminates against individuals on the basis of age. The statute does not violate the equal protection clause of the fourteenth amendment or any provision of State law.

However, section 58(1)(a) violates the rights of the plaintiffs in this case who are over 40 years old and have standing to assert a claim under the ADEA. Plaintiffs Koch, Smith, and Walker in CIV-80-874C are in this category, the latter two having reached age 40 during the pendency of this action.

[7] The other plaintiffs in CIV-80-874C and the persons who were permitted to intervene in that action have not reached age 40 and did not have standing to assert claims under the ADEA. Their only viable claims were the equal protection and state law claims, which are dismissed for the reasons previously stated.

Thus, the complaint in CIV-80-874C must be dismissed as to plaintiffs Hahn, O'Sullivan, Craig, Hodge, and Bowers. The complaints in intervention in CIV-80-874C, except that of the EEOC, must also be dismissed.

The complaints in CIV-80-796C, CIV-80-797C, and CIV-80-1184C must be dismissed. The plaintiffs in those cases have not reached age 40. Of course, persons less than 40 years old will necessarily benefit from the result reached in this lawsuit.

Accordingly, in CIV-80-874C, the Clerk shall enter judgment in favor of plaintiffs Koch, Smith, and Walker, and plaintiff-intervenor EEOC. As to all others, the complaints shall be dismissed. The Clerk shall also enter judgments dismissing the complaints in CIV-80-796C, CIV-80-797C, and CIV-80-1184C.

So ordered.

CITY OF HARRISBURG and Stephen R. Reed, as Mayor and Individually, Plaintiffs,

v.

INTERNATIONAL SURPLUS LINES INSURANCE COMPANY and Woolf/Strite Associates, Inc., Defendants.

Civ. A. No. 84-1113.

United States District Court, M.D. Pennsylvania.

Oct. 31, 1984.

City and mayor brought action to recover under "claims-made" public officials and employees liability insurance policy the cost of attorney fees which they incurred in defending a liable and wrongful use of civil proceedings action brought against the mayor. Upon defendants' motion to dismiss, the District Court, Caldwell, J., held that: (1) a "claims-made" public officials and employees liability insurance policy which covered "lawfully elected" city officials did not cover the mayor-elect; thus, insurer was not required to defend libel

Mr. MARTINEZ. With that, we are hereby adjourned.
[Whereupon, at 11:46 a.m., the committee was adjourned.]
[Additional material submitted for the record follows:]

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE,
East Lansing, MI, March 11, 1986.

Hon. MATTHEW J. RINALDO,
House Office Building, Washington, DC.

DEAR REPRESENTATIVE RINALDO: It has come to my attention that you are one of the primary sponsors of HR 1435 which would amend the Age Discrimination and Employment Act of 1967.

The Michigan Department of State Police supports the concept of the bill; that is, it is the responsibility of the states, based upon bona fide occupational qualifications, to set the age criteria for hiring and for retirement of its fire fighters and law enforcement officers.

We have discussed the bona fide occupational qualifications, as they relate to retirement age, with numerous medical experts. These experts have explained to us that medical science and technology has not advanced to the point where we can rely exclusively on individual testing to measure the physical ability of a police officer. We feel that the demands and stresses of our profession are so strenuous and the necessity to perform physical tasks so great that we cannot leave to chance the physical condition of our officers to perform their critical job functions.

Therefore, we fully support this federal legislation as it leaves to the state the important decision of determining retirement age for fire fighters and law enforcement officers.

Sincerely,

GERALD HOUGH, *Director.*

STATE OF INDIANA,
GOV. ROBERT D. ORR,
GOVERNOR'S OVERSIGHT COMMITTEE FOR MANDATORY
RETIREMENT AGE OF PUBLIC SAFETY OFFICERS,
February 28, 1986.

Mr. ERIC JENSEN,
House Subcommittee on Education and Labor, Washington, DC.

DEAR SIR: The Governor's Oversight Committee for the Determination of Mandatory Retirement Age of Public Safety Officers respectfully requests to go on record in support of H.R. 1435.

The passage of this bill would relieve the financial burden to the various pension funds placed upon them in defending EEO complaints as well as help raise the morale of public safety officers. This particular bill is favored by both management and labor in that it allows for upward mobility and continued confidence in the ability of the individuals in command, ensures public safety and allows stability among the various public safety pension funds.

I urge passage of H.R. 1435 by the committee and action on the same by the full House. I further urge immediate consideration be given to S. 62, S. 698 and S. 1240, which deal with the same subject matter, if they receive favorable action in the Senate and pass to the House.

Sincerely,

BOB SMALL, *Chairman.*

PREPARED STATEMENT OF DONALD O. CHESWORTH, SUPERINTENDENT, NEW YORK STATE POLICE

Passage of HR 1435 is of critical importance for law enforcement employers, both to ensure the public safety as well as to permit the effective administration of law enforcement. The amendment in vital to enable law enforcement agencies to provide the most effective and efficient law enforcement services to the public. In addition, the amendment is necessary to put an end to needless and costly taxpayer funded litigation which has plagued law enforcement across this nation since 1978 and more particularly since 1983 when the Supreme Court held that the ADEA applies to the states and local governments.

The goals of the ADEA are most laudable and appropriate. Age discrimination in employment is clearly unacceptable and should properly be unlawful. The Congres-

sional findings which accompany the ADEA made clear the ills this legislation is designed to cure. However, through collective bargaining and legislative recognition that law enforcement is a profession which should be compensated with early pension benefits, most if not all law enforcement officers clearly do not come within the ambit of ills that the ADEA was designed to address. Law enforcement officers have substantial pension benefits after twenty or twenty-five years of service. Further, law enforcement officers are generally very re-employable in other careers after retirement.

The bona fide occupational qualification (BFOQ) exception, 29 USC § 623(f)(1), was designed to permit specific occupations such as public safety to retain age requirements that are reasonably necessary to their business. This justification simply has not been accepted by the Equal Employment Opportunity Commission (EEOC) as applying to law enforcement. To date, we know of no instance where EEOC has accepted the evidence presented by law enforcement that age indeed is a BFOQ for law enforcement.

Law enforcement across the nation is generally subject to a statutory entry age (usually age 35 or less) and a mandatory retirement age (age 55 for New York State Troopers, the FBI and many other police agencies). The United States Supreme Court has long held that such statutes are constitutional. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). These agencies recognize that law enforcement is usually a career employment profession in which the officer begins employment in his or her twenties and retires in his or her forties or fifties. Thus, under most systems an officer has twenty years of service or more and retires at a pension usually at one-half to three-quarters of the officers' salary. Usually these pensions have been achieved through the collective bargaining process and are essentially linked to the mandatory retirement age. The establishment of a maximum entry level age (also, a function of the retirement age) permits an officer to attain the requisite service years for retirement.

We know that usually five to seven years of service as a police officer is required before an officer is truly experienced. Usually, the next eight to twelve years of service are the most productive of the officers' career. After that officer's productivity often declines.

The establishment of a mandatory retirement age and of a pension system which allows retirement at half pay after twenty years of service is a recognition that police officers often "burn out" after twenty years of service and that police officers should be compensated for their unique, dangerous and stressful service by eligibility for an "early" pension.

We have a responsibility to provide the best law enforcement services available to the public. We believe that the states are in the best position to determine what the appropriate age of their law enforcement officers should be. Congress, it should be noted, has apparently agreed that younger police officers provide a better law enforcement service and has exempted its law enforcement officers and fire fighters from the ADEA, and has approved mandatory retirement of FBI agents at age 55.

Law enforcement is best served by younger men and women. Our records are replete with reports of heroic efforts of our Troopers to save the lives of people in burning cars or buildings or to rescue trapped victims from submerged vehicles and other similar emergency situations. We can, of course, never predict when these unfortunate circumstances will occur, but we can say, as a matter of informed professional judgment that younger officers are more likely—and able—to perform these strenuous emergency tasks.

In response to a questionnaire, nearly half (42%) of our officers responded that arresting and apprehending criminals was the most physically demanding task that they performed on a regular basis. Our officers reported to us that many of these defendants are intoxicated, under the influence of drugs or mentally ill. These defendants pose a threat to the public as well as the officer. In 1980 4,700 police officers nationwide were assaulted and eleven murdered in the line of duty. The average age of the defendants arrested on a nationwide basis is twenty-eight.

No one can deny the aging process and its effect on the ability of a law enforcement officer to perform his or her duties. Younger, more vigorous officers possess more stamina than older officers. The public is better served by a law enforcement agency which is made up of younger officers. This was noted by the Senate Report in passing legislation setting mandatory retirement ages for certain Federal law enforcement officers and fire fighters, PL 93-350 2 U.S. Cong. & Adm. News 3699 (1974).

A further report to Congress dated July 25, 1977 submitted by the Committee on Education and Labor concerning a further Amendment of the ADEA noted:

"While it is the primary purpose of this legislation to limit mandatory retirement and other employment discrimination for non-federal employees aged 40-49 . . . it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to normal operation of a particular activity. . . . It is recognized that certain mental and physical capacities may decline with age and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, *Jobs such as some of those in air traffic control and law enforcement and fire fighting have very strict physical requirements on which the public safety depends.*" (Emphasis supplied.) Former FBI Director Clarence M. Kelley in tesifying; before the Subcommittee on Compensation and Employee Benefits Committee on Post Office and Civil Service on September 29, 1977 noted:

"The officer faced with an armed or otherwise dangerous assailant is not concerned with 'minutes.' Unless physically and psychologically able to meet the demands of the situation the officer or others may lose their lives. Likewise, even more commonplace duties frequently make extraordinary demands upon physical and psychological capabilities."

"Long hours of surveillance in often hostile environments or the rigors of a hostage negotiation over many hours cannot be measured in pounds lifted."

State police officers like FBI officers must be able to meet the challenges that face them on a moments notice. In the words of former Director Kelley speaking in support of a retirement plan for FBI agents stated:

"For both the welfare of the individual and the safety of the public which counts on agents being able to adequately perform their duties—which may often include decisions affecting human life and personal property—we must strive to insure retirement before vigor and physical ability begin to ebb."

The New York State Police has conducted an in depth review and analysis of work performance of Troopers as effected by age. We have found that age does greatly effect the ability of the police officer to perform his or her duties. Our study has demonstrated: that as age increased—shooting scores decreased; use of and length of sick leave increases with age; driving skills decrease; disability retirement increases; work levels decrease; number of arrests and investigations decrease; and driver reaction time increases.

The great majority of New York State Police Officers "self retire" at an early age with the average retirement at age of 47. A questionnaire that was sent to all our retired police officers indicated that the vast majority of them felt that they could no longer physically do the job at age 53. The active officers' response to a questionnaire indicated a strong support for the present mandatory retirement provisions.

Police work is a twenty four hour a day business. Afternoon and night tours of duty and short swings (return to duty after an eight hour break) take their toll. We know that the police profession is an extremely stressful one and that police "burn out" is a difficult problem for police administrators.

We also know that this stress and other factors cause the police officer to be a leading candidate for a heart attack. One study has found that the life expectancy of a police officer is only eight years after retirement. There is an enormous increase in the likelihood at age 55 of being the victim of a heart attack, especially for police officers. However, no one that we are aware of, has been able to predict with a sufficient degree of accuracy which individual officers are at risk to suffer a heart attack.

Further, most people when entering the police profession do so with the hope that they will be able to work themselves up the career ladder. Mandatory retirement helps ensure that there are sufficient openings to keep the promotional aspirations of young officers alive. This, in turn, helps with motivation and morale, and thus helps improve the quality of police services.

Maximum entry level ages are required to ensure that officers begin their service when they are young enough to attain twenty years of service prior to retirement. We also know that younger officers are more trainable and adapt better to the paramilitary structure which characterizes most law enforcement agencies.

Perhaps there are some 40, 50, or 60 year old individuals who could meet the physical fitness requirements necessary to become a police officer. However, when the high cost of training including acquiring the experience necessary to become an effective police officer and disability pensions (our disability retirements increase greatly as age increases) are considered, it makes little sense to eliminate the statutory maximum entry level ages.

Under the "BFOQ defense" test as it is presently being interpreted by EEOC, we believe it improbable that any law enforcement employer will be able to prove the

applicability of this defense to an age discrimination claim against a maximum entry level age requirement.

EEOC has commenced a number of lawsuits around the country asserting that statutorily established maximum entry level ages and mandatory retirement ages violate the Age Discrimination Employment Act. These litigations are extremely costly and time consuming. To date the litigations have been largely a "battle of the experts." The litigations have consumed lengthy periods of time and have had differing results. Recently the Second Circuit Court of Appeals has upheld a finding of age discrimination by Judge Curtin, U.S. District Court Judge, Western District of New York, with respect to entry level age.

The Court noted, however, that each locality had the opportunity to relitigate the issue and commented "It seems somewhat anomalous for the lawfulness of maximum age limits on police hiring to depend on the particular evidence presented at various court trials throughout the Country." 770 F2d 12, 15.

Absent the passage of legislation to exempt law enforcement employers from the age discrimination provisions of the ADEA we anticipate that litigation on this issue will continue for many years to come with no clear judicial resolution of this issue. This issue we urge is clearly most appropriately determined by legislation.

Accordingly, I strongly urge your support of HR 1435 to resolve this issue and permit State legislatures to establish reasonable maximum entry level ages and mandatory retirement ages for state and local law enforcement officers.

League of California Cities

California Cities Work Together

Sacramento, CA
March 5, 1986

The Honorable Matthew G. Martinez
Chairman
House Subcommittee on Employment Opportunities
A518 HOB Annex 1
Washington, DC 20515

Dear Congressman Martinez:

The League of California Cities is an association of all the state's 441 incorporated cities. All the cities are members of this association which was formed by Mayor James Phelan of San Francisco in 1898.

We are pleased to have this opportunity to express our wholehearted support of HR 1435. The overwhelming majority of cities in California will be directly assisted by the approval of this narrowly drawn legislation to permit state and local governments to retire police and firefighters at an age below 70 and to impose a maximum entry level age on applicants for these public safety member positions. We agree that the Age Discrimination in Employment Act (ADEA) should continue to protect police and firefighters with respect to all other forms of age discrimination, i.e., promotions, transfers, compensation, fringe benefits, including pensions, and all other privileges and conditions of employment.

An examination of the purposes for which the ADEA was enacted in the light of truly civil rights issues makes it abundantly clear that the reasons for the Act no more apply to state and local law enforcement and firefighting personnel than to those federal firefighting and law enforcement officers Congress saw fit to exempt from the ADEA, or to the 60-year old airline pilots and bus drivers excluded from the below 70 mandatory retirement limits by EEOC. The Congressional statement of findings and purposes, 29 U.S.C. Section 621, declares that:

> "(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from their jobs;"
>
> "(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;"

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> "(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;"
>
> "(4) the existence in industries affecting commerce, or arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce."

First, older police and firefighters have not found themselves disadvantaged in their efforts to retain employment or, especially, to regain employment when displaced from jobs. It is a matter of common knowledge that police and firefighter pension systems provide substantially higher benefits at an earlier age because of the physical demands on those performing firefighting and law enforcement functions. It is seriously questioned whether public safety officers in and beyond the middle years can meet these demands. It is a fact that increased age is generally accompanied with higher risks, more incidents of job-related disability retirements and additional workers compensation costs. In California we not only have substantially higher pension benefits at an early retirement age for public safety members, but disability, death and survivor benefits are available on the first day of employment. In addition, full salary in lieu of lesser weekly workers' compensation benefits is provided for any service--connected injury or disease. These benefits are not shared by miscellaneous employees--all those other than police and firefighters. Nor is there any upper age limit for retirement of miscellaneous employees. When the California Legislature, prior to the Supreme Court Baltimore decision, without objection from any employers, removed the upper age limit of 70 for miscellaneous employees, it also refused to eliminate the mandatory ages of 60 and 65 for safety personnel.

Second, public agencies always have had an early retirement age for police and firefighters. It is not a recent trend nor is it an arbitrary age limit regardless of potential for job performance. As one of our appellate courts recently so noted in a handicap discrimination case:

> "firefighting involves not only a close relationship to the public interest and welfare, but also requires unique physical skills and technical knowledge. Firefighters must possess the physical abilities to climb ladders under dangerous conditions, carrying hoses or other heavy equipment necessary to extinguish flames and the physical ability necessary to safely carry persons from burning structures. During the course of their responsibilities, firefighters are called upon to perform many demanding tasks to avert physical harm to themselves--and to the public." Johnson v. Civil Service Commission of the City of San Diego, 84 Daily Journal D.A.R. 1078 (C.A. 4, March 23, 1984)

The court could have added that these strenuous duties often must be carried on for many hours under conditions of great stress. The physical demands on law enforcement personnel are equally great although differing in kind. We believe it is clear that the duties of public safety personnel are such that age is definitely a qualification for job performance.

Third, the incidents of unemployment, especially long term, while high among older workers, as noted by the ADEA, has been non-existent in California among police and firefighters even during our most recent recession or because of Proposition 13. If there were layoffs because of drastic budget cuts, the reductions in public services generally were made in departments other than those involved with public safety. As a matter of fact, in the last two fiscal years, many of our local agencies have increased the number of law enforcement officers while continuing to hold the line on other governmental services. The same taxpayers who resent and resist most governmental expenditures support and encourage increased firefighting and police protection services and additional compensation and fringe benefits for police and firefighters.

Finally, as to the finding of arbitrary age discrimination in employment in industries affecting the flow of commerce, the focus is on private business, not firefighting or law enforcement activities.

We agree with the U.S. Court of Appeals, Fourth Circuit, that Congress itself has established a bona fide occupational qualification (BFOQ) for law enforcement and firefighting personnel by subjecting federal police and firefighting employees to early retirement. In Johnson v. Mayor and City Council of Baltimore, the court said:

> "The same Congress that extended the ADEA to the states and their political subdivisions reinvigorated the requirement mandating retirement as a general matter at 55 for federal police and firefighting employees."
>
> "Where Congress itself has deemed age to be a bona fide occupational qualification for federal firefighters, we perceive no justification for ignoring the congressional mandate in ascertaining a reasonable federal standard by which to measure firefighting in the City of Baltimore. . . .
>
> "Both federal and city fire fighters are engaged in extremely stressful and hazardous activities designed to promote public safety. Absent a determination that age, specifically no more than 55 as a general rule, is a bona fide occupational qualification for firefighters, we would be compelled to conclude that Congress, in authorizing the automatic retirement of federal police and firefighting personnel, adopted an occupational qualification that is not, or might not be, bona fide. A court should not lightly make such a determination as to congressional purpose."

Again, we know that the physical demands on police are no less strenuous than on firefighters.

While the Supreme Court reached a different conclusion in the Baltimore case than the Circuit Court, it nevertheless had the candor to note:

> "As with the voluntary retirement scheme, one goal of the 1974 amendment was to maintain "relatively young, vigorous, and effective law enforcement and firefighting workforces. . .
>
> "Congress undoubtedly sought in significant part to maintain a youthful workforce and took steps through the civil service retirement provisions to make early retirement both attractive and financial rewarding." Johnson vs. Mayor and City Council of Baltimore, 86 L Ed. 2d 286, 295.

This is precisely why California and other states established early retirement for safety personnel and made it attractive and rewarding.

Most cities in California are members of the Public Employees Retirement System (359). The law was amended in 1939 to permit cities and other local entities to join the actuarially sound state retirement system. The PERS law permits retirement of safety personnel at ages 50 or 55 and, prior to September 1985 and the Baltimore Decision, required retirement at ages 60 or 65, depending on the retirement formula. Most safety personnel in PERS have the so-called CHP formula with permissive retirement at age 50 of 2 percent of final compensation for each year of service and retirement required at age 60. A less costly formula is 2 percent at age 55 with retirement required at 65. As indicated earlier, there is no mandatory retirement age for all other employees and the benefits are substantially less. We changed our law in 1985 only after Baltimore and after constant harassment by EEOC.

Many, and perhaps most, public safety retirements in California in the last 4 or 5 years have been disability and voluntary service retirements well in advance of the mandatory 60 or 65 retirement requirements. The ADEA and Baltimore have simply provided a windfall for a few highly paid and high ranking police and fire officials who came up through the ranks knowing and expecting early retirement with its greater benefits.

Why the problem, then, if we have so few mandatory retirements? First, our state law which for long-established policy reasons required retirement of safety personnel at ages 60 or 65 depending on benefit formulas. Second, EEOC has, during the last three years, vigorously pursued its investigation and enforcement policies against literally hundreds of PERS contract agencies even when there have been no complainant retirees. Even without complainant retirees, EEOC has followed up its "letters of violation" with "Conciliation agreements" when there has been nothing to conciliate. We have attached copies of the typical letters of investigation (with questionnaire) and letters of

violation. Granted EEOC has an enforcement responsibility, the mandatory retirement age for PERS cities was in a state law administered by the State Public Employees' Retirement System. EEOC should have pursued its enforcement responsibilities against the Legislature of the State of California and PERS rather than against hundreds of cities and other local entities that are powerless to change that law. We are confident that if EEOC in other areas of the United States had been as active under the same circumstances as in California, that the demands for H.R. 1435 would be overwhelming. We know, and have been advised, that there is a substantially similar problem in Oregon, Washington, and other states, and we hope that your Committee will have heard from these and other states during the time testimony may be submitted on H.R. 1435. Unfortunately, a significant amount of EEOC budget is still being used to pursue litigation against cities arising out of our former state law.

Many state and local law enforcement and firefighting agencies also fix a maximum entry level age from 31 to 36. It is apparent that the increasing level of technical skills and physical capabilities required of firefighters and police require a major investment by public agencies to place a police officer on the street or a firefighter at the scene of a fire. Two years ago, Police Chief Gates of the City of Los Angeles advised that it required an expenditure of $72,000 per recruit to take a police trainee through the probation period. If retirement at half pay after 20 or 25 years is permitted, it makes little sense to train older applicants who will lack the physical ability to perform all the functions of the position within a period of a few years. Whether half-pay levels for retirement are reached at ages 40, 50, or 55, the physical demands of the job and the stress situations frequently encountered require younger personnel.

Most small departments (less than 200) do not have enough administrative positions to accommodate older police or firefighters no longer capable of active front-line police protection or firefighting. To meet budget demands, the high costs of these two departments which generally take over half a municipal budget have been reduced by "civilianizing" many of the positions. The "light duty" assignments that are available are generally occupied by those who have suffered some disability and are not capable of performing all the duties of the position.

We have read where EEOC has a very limited budget and yet in using a substantial amount of it on this single issue less is available for discriminatory practices involving race, color, sex, religion, and national origin. Not only has an enormous amount of staff time and public funds been expended on responding to EEOC investigation charges and demands for conciliation agreements, but the time and funds expended could have been directed to more productive public use. H.R. 1435 is needed now not only to treat state and local police and firefighters as Congress has federal law enforcement and firefighting personnel, but to enable EEOC to direct its scarce funds to more fundamental civil rights violations.

Finally, we cannot help but note that H.R. 1435 is a labor-management measure. It has the support of firefighter and police unions and associations and it has the support of public employers and their associations.

Sincerely,

Pat Russell
President

Don Benninghoven
Executive Director

DB/KM/wg
kate.pub

Enclosures

CC: Congressman Matthew J. Rinaldo
Congressman William J. Hughes
Senator Don Nickles
Senator Bill Bradley
Senator J. Danforth Quayle

332-5330

EEOC

UNITED STATES GOVERNMENT
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

3255 WILSHIRE BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90010

IN REPLY REFER TO:

17 June 1983

Charge # 092832443

Dear Mayor:

The Equal Employment Opportunity Commission is responsible for the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, et seq. (ADEA). The ADEA protects workers aged 40 to 70 from discrimination in such matters as hiring, discharge, compensation, and other terms, conditions, or privileges of employment.

This is to advise you that the Commission has scheduled an investigation of your City to determine compliance with the ADEA. The review will be conducted under the authority of Section 7 of the ADEA and 29 C.F.R. Section 1627.

In order to facilitate this investigation, please send the information requested on the attached questionnaire to this office within 30 work days. Please call me at (213) 688-3483 if you have any questions concerning this process.

Sincerely,

Alec Anthony Gray Jr.

Equal Opportunity Specialist (Age)

Enclosures: ADEA

REQUEST FOR INFORMATION

The questions should be answered as to all employees employed by the City or any of its agencies.

1. Does the City employ employees who are required to retire before they reach the age of 70?

2. If so,

   Please list every job classification that is subject to mandatory retirement before the age of 70.

   State the date that retirement before the age of 70 was first required for each such job classification.

   State the age at which employees in each such job category are required to retire.

3. If any of the job classifications identified by you in your answer to question number 2 is subject to mandatory retirement before the age of 70 under a State or local law, please identify the job classification together with the applicable State or local law(s).

4. Does the City have a contract with the California State Public Employee's Retirement System to administer its retirement program?

5. For each job category listed in your response to question number 2, provide the following information for each employee that has retired since May, 1980:

   (a) Name;

   (b) Job Title on the date of retirement;

   (c) Last known home address;

   (d) Last known home telephone number;

   (e) Date of retirement;

   (f) Date of birth.

6. For each job category listed in your response to question number 2, provide the following information for each employee who is currently between the ages of 59 and 70:

   (a) Name;

   (b) Job Title on the date of retirement;

   (c) Last known home address;

   (d) Last known home telephone number;

   (e) Date that he/she will be required to retire;

   (f) Date of birth.

7. How may employees are currently employed by the City?

8. Separately for each job category listed in your answer to question number 2, state the reason(s) for the requirement that employees employed in that job category must retire before they reach the age of 70.

UNITED STATES GOVERNMENT
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

GOBIERNO DE LOS ESTADOS UNIDOS
COMISION DE IGUALDAD DE OPORTUNIDAD EN EL EMPLEO

3255 WILSHIRE BLVD., 9TH FLOOR
LOS ANGELES, CALIFORNIA 90010

IN REPLY REFER TO

Charge Number: 092832345

Equal Employment Opportunity Commission
3255 Wilshire Boulevard, 9th Floor (Age)
Los Angeles, California 90010 Charging Party

and

Mayor
City of San Clemente
100 Avenida Presidio
San Clemente, California 92672

Attention: George A. Caravalho
City Manager Respondent

LETTER OF VIOLATION

I issue on behalf of the Commission, the following findings as to subject respondent's compliance with the Age Discrimination in Employment Act of 1967, as amended (ADEA).

The Commission has determined that the above-named respondent has discriminated against its protected age group (PAG) employees by requiring that Safety Employees retire before the age of Seventy (70), in violation of Section 4(a)(1) and (2) of the ADEA.

Section 7(b) of the Act requires that before instituting any action, the Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of the Act through informal methods of conciliation, conference, and persuasion. Section 7(e)(2) of the Act provides that the statute of limitations period which is applicable to Commission enforcement will be tolled for up to one year after conciliation is begun.

This determination will serve as notification that the Commission is prepared to commence conciliation in accordance with §7(b). The period during which the statute of limitations is tolled, as provided by §7(e)(2), begins upon issuance of this letter.

It is the policy of the Commission to notify the person(s) aggrieved of the violations which are the subject of this determination of their independent right of action under the ADEA. However, we plan to withhold such action for at least 10 days in order to provide you with an opportunity to discuss this matter further. Equal Opportunity Specialist Fred Brown will contact you shortly to arrange a meeting concerning this matter.

ON BEHALF OF THE COMMISSION:

for Jesus Estrada-Melendez, Director
Los Angeles District Office

DATE: 1/6/84

Enclosure: ADEA

UNITED STATES GOVERNMENT
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

GOBIERNO DE LOS ESTADOS UNIDOS
COMISION DE IGUALDAD DE OPORTUNIDAD EN EL EMPLEO

3255 WILSHIRE BLVD., 9TH FLOOR
LOS ANGELES, CALIFORNIA 90010

IN REPLY REFER TO:

CONCILIATION AGREEMENT

In the matter of:

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Charge No.:

vs.

An investigation having been made under the Age Discrimination in Employment Act (ADEA) by the U.S. Equal Employment Opportunity Commission (the Commission) and a Letter of Violation having been issued, the parties do resolve and conciliate this matter as follows:

I. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by respondent of any violation of ADEA.

2. The Commission hereby waives, releases and covenants not to sue respondent with respect to any matter of specific relief conciliated in this Agreement; provided, however, that the Commission reserves all rights to proceed with respect to matters like and related to these matters but not covered in this Agreement and to secure relief on behalf of aggrieved persons not covered by the terms of this Agreement.

3. Nothing in this Agreement shall be construed to preclude the Comission and/or any aggrieved individuals from bringing suit to enforce this Agreement in the event that respondent fails to perform the promises and representations contained herein.

4. The respondent agrees that it shall comply with all requirements of the ADEA.

4. The Respondent agrees that it shall comply with all requirements of the ADEA.

5. The Parties agree that there shall be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under the ADEA, or because of the filing of a charge; giving of testimony or assistance; or participation in any manner in any investigation, proceeding, or hearing under the ADEA.

6. The respondent agrees that the Commission may review compliance with this Agreement. As a part of such review the Commission may require written reports governing compliance, may inspect the premises at reasonable times, interview employees, and examine and copy relevant documents.

PERMANENT RELIEF

7. a. City Policy:

The City of _____ agrees to announce as a City policy that it does not require an employee to retire prior to the age of Seventy (70). In the event that Public Employees Retirement System (PERS) requires a safety employee to retire at age Sixty (60) or sixty-five (65), the City will offer continued - employment in the same position. The above agreement does not preclude a safety employee who wishes to voluntarily retire at age sixty (60) or earlier from doing so.

b. Aggrieved Individual Relief:

Respondent agrees to reinstate _____ to the position of _____ and to pay _____ the gross amount of _____ in one installment which shall constitute full and complete satisfaction of any and all claims for employment or otherwise which she/he may have against respondent. Payment will be completed by the week ending _____.

8. The respondent agrees that it shall forward to Jesus Estrada-Melendez, District Director, satisfactory assurance(s) that it has complied with the terms of this Agreement by _____.

SIGNATURES

I have read the foregoing Agreement and accept and agree to its provisions.

_____ _____
Signature of Respondent Date

Approved on Behalf of the Commission:

_____ _____
JESUS ESTRADA-MELENDEZ, Director Date
Los Angeles District Office

PREPARED STATEMENT OF THE NATIONAL LEAGUE OF CITIES

The National League of Cities (NLC), the nation's largest and most representative municipal organization, represents 16,000 cities through direct membership and membership in 49 affiliated state municipal leagues. On March 9, NLC's Board of Directors adopted policy calling for the enactment of legislation to exempt state and local public safety employees from the Age Discrimination in Employment Act of 1967 (ADEA).

The ADEA prohibits age-based discrimination against workers between the ages of 40 and 70 and was extended to state and local employees by Congress in 1974. NLC strongly supports the basic objective of the ADEA: The prohibition of age-based discrimination in employment practices. However, we believe that the ADEA should be amended to recognize the unique conditions of employment as a police officer or firefighter. The ADEA includes a provision exempting employees from its protections if the employer establishes that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. Section 623(f)(1). This so-called BFOQ provision (which, on its face, would appear to cover public safety employees) has been applied inconsistently by the courts and regulatory agencies and, as a consequence, cities cannot readily use the provision for public safety purposes.

Mandatory early retirement for public safety employees is generally supported by both employees and employers. Because of the physically demanding and stressful nature of law enforcement and firefighting work, it is necessary for both health and public safety reasons. Additionally, a clear national policy defining the circumstances in which early retirement can be required for public safety employees should be established to enhance the ability of cities to develop long range plans for financing payroll and retirement costs.

There are many reasons why state and local employees engaged in public safety activities should be exempt from the ADEA, including the physically stressful character of the work and the difficulties involved in developing reliable, safe, and cost-efficient tests of an individual's physical fitness. In the absence of clear standards governing the circumstances in which a mandatory retirement age of less than 70 years of age can be used for police officers and firefighters, the ADEA will hamper the provision of basic public safety and fire protection services.

EXISTING RETIREMENT PRACTICES FOR PUBLIC SAFETY EMPLOYEES

States and localities have generally established compensation plans which provide high salaries and generous retirement benefits at an early age and are intended to reflect the risks and skills involved in fighting fires and crime. These plans are primarily financed by tax revenues and, as a consequence, states and localities must develop long-term plans to meet these financial obligations, including plans for financing the costs of pension benefits for retirees and salaries for public safety employees. Neither immediate nor long-term financial obligations can be readily determined if a uniform and predictable retirement age for firefighters and police officers cannot be established.

Retirement plans and benefits

In 1982, an estimated $1.555 billion was distributed to retired police officers and firefighters by pension systems of limited applicability (i.e., systems established solely for police officers and/or firefighters) as retirement benefits. Employee-Retirement Systems of State and Local Governments, 1982 Census of Governments, U.S. Dep't of Commerce, Bureau of the Census, Table 6. The total sum paid to retired police officers and firefighters in pension benefits is many times that amount when benefits received by police officers and firefighters each year from retirement systems of general applicability are taken into account. According to the Census Bureau, full time police officers and firefighters employed by states and localities nationwide numbered 853,000 and earned $21.048 billion in 1984. Public Employment in 1984, U.S. Dep't of Commerce, Bureau of the Census, Tables 3 and 4. Thus, the amount of state and local government revenues allocated to salaries and retirement benefits for state and local public safety personnel is substantial.

In numerous cases, firefighters and police officers are members of small separate retirement systems and retire at a relatively early age under these systems. Pension Task Force Report on Public Employee Retirement Systems, House Committee on Education and Labor, 95th Cong., 2d Sess. (March 15, 1978) at 103. For example, the number of retirement systems which specifically apply to public safety personnel is 1685, according to the Bureau of the Census. Employee-Retirement Systems of State and Local Government, 1982 Census of Governments, U.S. Department of Com-

merce, Bureau of the Census, Table 7. This number does not even include the larger retirement systems of general applicability which cover other public employees as well as public safety personnel.

The 1685 retirement systems which cover only public safety personnel have 338,254 public safety employees as members and assets of $18.104 billion. There are 675 systems covering firefighters, 802 covering police officers, and 208 which cover both firefighters and police officers. The fact that these systems are small (and therefore not broad-based) makes the establishment of clear standards for compulsory retirement all the more important.

The systems are usually small, having on the average only 201 members, and, as a result, increases in the payments to individual beneficiaries will have a major effect on the overall condition of the system and the ability to meet obligations to retirees. For example, if a 62-year old firefighter suffers a heart attack and is entitled to disability pay for the rest of his or her life, the cost to the city will be in excess of the normal cost of retirement.

State laws

Some 33 states require early retirement for police officers and/or firefigthers by state law. In many cases, these compulsory retirement requirements are part of laws establishing pension rights for police officers or firefighters and underscore a direct linkage between retirement age and retirement benefits. For example, in California, firefighters may be involuntarily retired at age 60 after 20 years of service and are entitled to 50 percent of the salary received in the year prior to retirement. Cal. Government Code Section 50870. In New Jersey, police officers and firefighters are required by state law to retire at age 65. N.J. Rev. Stat. Section 17:4-6.14.

Massachusetts' state law requires that police officers retire at 65 and provides pension benefits of 60 percent of the highest annual rate of compensation plus one percent of that compensation for every year worked in excess of 20 (but not to exceed 72 percent of the final year's pay). Mass. Gen. Laws Ann. ch. 32, Section 83A(d). In Wyoming, the mandatory retirement age for police officers is 60 percent and retirement benefits are calculated by multiplying 2.5 percent of the average salary during the five highest paid years times the number of years of service (but not to exceed 62.5 percent of the average salary during the five highest paid years). WYO. STAT. Section 15-5-307. Other states with similar laws which apply to city public safety personnel include Wisconsin and Minnesota.

In these states, cities are caught between a rock and a hard place, with the state setting one set of rules and the Federal Government setting another set of rules. In many cases, it is impossible to comply with both sets of requirements.

Retirement ages

A recent survey of 100 large cities show that 83 percent used a mandatory retirement age of 50 to 55. Flynn and Silver, "Police Selection" at 47. Assuming that this pattern also applies to fire departments, then, by applying the relevant percentage (*i.e.*, 83 percent) to the total number of police and fire retirement systems (i.e., 1685), it can be estimated that 1399 of those systems are not in compliance with the ADEA. Section 12(a) (29 U.S.C. Section 631(a)) defines the persons covered by the ADEA as "individuals who are at least 40 years of age but less than 70 years of age" and clearly covers any person who is required to retire at age 50 or 55.

Generally, public safety personnel are allowed to retire at age 50 or 55 after 20 years of service and, in some cases, after 20 years of service regardless of age. Pension Task Force Report on Public Employee Retirement Systems (Pension Task Force Report), House Committee on Education and Labor, 95th Cong., 2d Sess. (March 15, 1978) at 105. Virtually all other state and local employees are not eligible for a pension until a much later age (e.g., at age 65 for members of large municipal retirement systems). Id.

In order to operate a city police or fire department, a city must have the financial resources to compensate its police officers and firefighters properly, both while they are active members of the police or fire force and when they are retired. These are concurrent and related obligations. In other words, salaries and retirement benefits, including the number of employees and retirees eligible for each type of payment at any given time, must be determinable in order to run a city.

A mandatory retirement age for public safety employees clearly establishes the maximum number of years during which a police officer or a firefighter will be a salaried employee; it also establishes, with some degree of certainty, the date on which the city must begin making retirement payments. A mandatory retirement age also enables the city to determine the number of new police officers and fire-

fighters which it must hire in a given year in order to replace retiring public safety personnel and maintain the active force at the necessary level.

For example, if the mandatory retirement age for firefighters in a particular year is 55 and the city has 100 active firefighters who are 54 years of age this year, earn an average annual salary of $30,000, and have an average life expectancy of 70, two very important factors are readily determinable. First, the city will need to hire 100 new firefighters in 1987 to maintain current staffing levels and, assuming a retirement system that provides retirees with 60 percent of the final year's salary, the city will be obligated to pay those retirees the equivalent of $27 million in 1986 dollars (.60×$30,000=$18,000; $18,000×15 years=$270,000 per retired firefighter; $270,000×100 retired firefighters=$27,000,000) in retirement benefits. That fact is essential in determining how much money should be set aside to finance its retirement system.

If, on the other hand, the city is precluded from setting and enforcing a mandatory retirement age, as is effectively the case under the recent Supreme Court interpretations of the BFOQ provisions of the ADEA, it must assume that the retirement age is 70 and plan accordingly. The result will be widespread uncertainty, particularly where voluntary retirement is permitted and encouraged (retirement at an early age is authorized by state or local law or a collective bargaining agreement in virtually all cases). There will be uncertainty as to the number of firefighters which a city hire in a particular year because the number of vacancies caused by retirement will not be determinable.

Method for calculation of retirement benefits

The pension benefits paid to police officers and firefighters tend to be high because of the method used in calculation pension benefits. For example, nearly 33 percent of the police and fire pension plans tie retirement benefits directly to the employee's rate of pay for his or her final day of work or for the final year of employment; an additional 36 percent use the average pay for the final two to five years of work as the basis for calculating retirement benefits. Pension Task Force Report at 114. Moreover, the formula for calculating retirement benefits is normally based on a relatively large multiplier. For 35 percent of the systems, benefits are determined by multiplying the compensation base times 50 to 60 percent. Id.

In 53 percent of the systems, retirement benefits are calculated by multiplying the number of years of service times a specified percentage. Id. A single rate (i.e., the same rate is used for each year of service) is used for 17 percent of the systems and a variable rate (i.e., the rate applicable to the earlier years of service may be higher or lower than the rate applicable to later years) for 36 percent of the systems. Id. The benefit formulas used for police and fire retirement plans tend to be more favorable for retirees than those used for federal civil service retirees. For example, 70 percent of the police and fire retirement systems which use the single rate benefit systems use a multiplier of 2.5 percent or more while only 25 percent of similar federal retirement systems use a multiplier of that magnitude. Id. Thus, pension costs may be increased by allowing the deferral of retirement to a later date, thereby establishing a higher base salary than originally anticipated when the city planned on the employee retiring at an earlier retirement date and a lower salary.

ROLE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) has authority under the ADEA to promulgate rules and regulations implementing the provisions of the ADEA, including the authority to "establish such reasonable exemptions to and from any or all provisions of [the ADEA]." 29 U.S.C. Section 628. See also Section 2 of Reorg. Plan No. 1 of Feb. 23, 1978, 43 Fed. Reg. 19807, as provided by section 1-101 of Ex. Or. No. 12106 of Dec. 28, 1978, 44 Fed. Reg. 1053.

The regulations issued by EEOC in 1981 provide no guidance to states and localities as to the circumstances in which a mandatory retirement age of less than 70 years of age can be established and enforced as a BFOQ under section 4(f)(1) of the ADEA. Furthermore, EEOC's regulations are designed to require case-by-case adjudication of the validity of any mandatory retirement age which is less than 70, including retirement ages for police officers and firefighters:

Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of *all the pertinent facts surrounding each particular situation.* 29 C.F.R. Section 1625.6(a) (emphasis added).

That EEOC has interpreted section 4(f) of the ADEA as providing for case-by-case litigation on a standardless basis of every case involving an effort by state or local government to establish a mandatory early retirement age for public safety employees as a BFOQ is underscored by the following provision of the regulations:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. *If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must provide that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.* 29 C.F.R. Section 1625.6(b) (emphasis added).

The regulations provide no further guidance as to the circumstances in which a BFOQ can be established under the ADEA despite the fact that Congress authorized the use of BFOQ's "reasonably necessary to the normal operation of a particular business." EEOC's failure to promulgate regulations defining permissible BFOQ's has adversely affected the "normal operation" of city police and fire departments by creating uncertainty and confusion as to the circumstances in which mandatory early retirement ages can be utilized and underscores the need for a change in the underlying statute.

ROLE OF THE COURTS

The courts have not done any better than the EEOC, failing to develop readily applicable and understandable standards under section 4(f)(1) of the ADEA which define the circumstances in which age may be used as a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. Section 623(f)(1). As a result, the "standards" for the utilization of age as a BFOQ are being established on a case-by-case basis. *See EEOC* v. *St Paul,* 500 F. Supp. 1135 (D.C. Minn. 1980) (mandatory retirement age of 65 for uniformed employees of fire department is not a BFOQ); *Adams* v. *James,* 526 F. Supp. 80 (M.D. Ala. 1981) (mandatory retirement age of 60 for state troopers is not a BFOQ); *Orzel.* v. *Wauwatosa Fire Dep't,* 697 F.2d 743 (7th Cir. 1983) (mandatory retirement age of 55 for firefighters is not a BFOQ); *Campbell* v. *Connalie,* 542 F. Supp. 275 (N.D. N.Y. 1982) (mandatory retirement age of 55 for state police is not a BFOQ); *EEOC* v. *Minneapolis,* 537 F. Supp. 750 (D.C. Minn. 1982) (mandatory retirement age of 65 for police captains is not a BFOQ). *But see EEOC* v. *Commonwealth of Pennsylvania,* 596 F.2d 1333 (M.D. Pa. 1984) (mandatory retirement age of 60 for state policemen is a BFOQ); *Morgan* v. *Dep't of Offender Rehabilitation,* 305 S.E. 2d 130 (1983) (mandatory retirement age of 65 for state correctional officers is a BFOQ); *Mahoney* v. *Trabucco,* 738 F.2d 35 (1st Cir. 1984) (mandatory retirement age of 50 for state police is a BFOQ); *EEOC* v. *Missouri State Highway Patrol,* 748 F.2d 447 (8th Cir. 1984) (madatory retirement age of 60 for state troopers is a BFOQ).

If Congress does not exempt public safety employees from the ADEA, lawsuits may well be necessary in each case in which a state or local government establishes a mandatory early retirement age for public safety personnel. Two recent Supreme Court decisions interpreting the BFOQ provision of the ADEA have added to the confusion and further restricted the circumstances in which mandatory early retirement ages can be established for police officers and firefighers. In fact, prior to these Supreme Court decisions, many city officials believed that mandatory early retirement rules for public safety employees could be established under the ADEA's BFOQ provision.

In *Western Air Lines, Inc.* v. *Criswell,* 105 S.Ct. 2743 (1985), the Supreme Court established rules for the courts to use in applying the BFOQ exception in cases in which the employer claims that an early retirement age is justified by factors such as safety. At issue in the case was whether an airline could establish a mandatory retirement age for flight engineers of 60 without making an individualized determination of the employee's fitness to work as a flight engineer beyond that age.

In *Johnson* v. *Mayor and City Council of Baltimore,* 105 S.Ct. 2717 (1985), a related case decided on the same day which involved a mandatory retirement age of 55 for firefighters, the Supreme Court ruled that a federal statute mandating the retirement of federal firefighters at the age of 55 was not relevant in determining whether a mandatory retirement age of 55 for city firefighters was valid under the BFOQ exception to the ADEA.

Instead, the Supreme Court ruled 9 to 0 in an opinion by Justice Thurgood Marshall, that it would be "remiss, in light of Congress' indisputable intent to permit

deviations from the mandate of the ADEA only in light of a particularized, factual showing . . . to permit nonfederal employers to circumvent this plan by mere citation to an unrelated statutory provision that is not even mentioned in the ADEA."

Instead, the Supreme Court ruled in the *Baltimore* case that the relevant standards for determining whether the BFOQ exception is a valid defense are set forth in the *Western Airlines* case and cannot be derived by analogy from a federal statute establishing a mandatory retirement age for similarly situated federal employees.

In the *Western Airlines* case, the defendant airline sought a ruling that age could be used as a BFOQ if the employer could establish "'a rational basis in fact' for believing that identification of those persons lacking suitable qualifications cannot occur on an individualized basis." If this standard had been adopted by the Court, an employer would not have been required to make an individualized showing of the employee's lack of fitness to continue working.

In an 8 to 0 ruling, the Supreme Court, in an opinion written by Justice Paul Stevens, ratified a strict standard developed by the lower courts for determining the validity of an early retirement age under the BFOQ exception, relying primarily on a 1976 ruling by the Court of Appeals for the Fifth Circuit in the *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), case. Under the standard established by the Supreme Court in the *Western Airlines* case, an employer must base an early retirement age on one of two specified safety-related grounds.

First, the employer may establish a mandatory early retirement age if there was a "factual basis for believing, that all or substantially all [persons over a maximum age] would be unable to perform safely and efficiently the duties of the job involved." Second, an employer may use age as a BFOQ if it can be established that "age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or impractical' to deal with the older employees on an individualized basis."

In either case, the question is one which must be resolved by a jury. According to the Supreme Court, "Congress expressly decided that problems involving age discrimination in employment should be resolved on a 'case-by-case basis' by proof to a jury."

In other words, the employer must convince a jury that medical testing is impractical or that there is a "substantial basis of believing that all or nearly all employees above an age lack the qualifications required for the position." The Supreme Court's rulings in the *Baltimore* and *Western Airlines* cases mean that mandatory early retirement ages will be overturned unless one of the two tests established in the *Western Airlines* case is met to the satisfaction of a jury.

In each of these cases—as well as countless other cases—litigation will be necessary to determine whether or not the mandatory retirement age qualifies as a BFOQ under the ADEA. In fact, there are already numerous lawsuits pending which were brought against state and local governments by EEOC and other parties concerning the validity under the ADEA of mandatory early retirement ages for public safety personnel. See Exhibit A.

CONCLUSION

NLC strongly urges the enactment of legislation exempting state and local public safety employees from the ADEA. Congress has determined that federal firefighters and police officers may be required to retire at age 55. 5 U.S.C. Section 8335(b). Similarly, it requires air traffic controllers to retire by the age of 56. 5 U.S.C. Section 8335(a). The case for state and local authority to establish similar requirements for police officers and firefighters is no less compelling.

Legislation to exempt public safety employees from the ADEA is supported by both employer and employee groups. It is essential that Congress act immediately to eliminate the problems the ADEA is causing for the operation of police and fire departments and for police officers and firefighters. We urge immediate action on legislation which is narrowly crafted and limited to the public safety issue and are opposed to any effort to broaden the legislation to include other provisions.

EXHIBIT A.—PARTIAL LIST OF ADEA LAWSUITS FILED BY EEOC

EEOC v. *City of Allen Park*, No. 79-72986 (W.D. Mich., filed July 25, 1979) (mandatory retirement age of 57 for municipal police officers and firefighters).

EEOC v. *Janesville and State of Wisconsin*, No. 79-481 (W.D. Wisc., filed Oct. 19, 1979) (mandatory retirement age of 65 for "protective occupations").

EEOC v. *Marathon County Sheriff's Dep't and State of Wisconsin,* No. 79-599 (W.D. Wis., filed Dec. 11, 1979) (state law mandating retirement at age 55 for state and local police officers).

EEOC v. *City of St Paul and State of Minnesota,* No. 3-79-630 (D. Minn., filed Dec. 18, 1979) (state law mandating retirement for all firefighters at age 65).

EEOC v. *State of Louisiana and Louisiana State University,* No. 80-0280 (E.D. La., filed March 28, 1980) (state law mandating retirement at age 65 of state employees engaged in public safety occupations).

EEOC v. *City of Clintonville,* No. 80-C-708 (E.D. Wisc., filed Aug. 1, 1980) (mandatory retirement age of 57 for the city's police chief).

EEOC v. *City of Ecorse,* No. 80-7-3383 (E.D. Mich., filed Sept. 4, 1980) (mandatory retirement age of 60 for municipal fire chief).

EEOC v. *City of Fort Smith,* No. FS-C-80-2158 (W.D. Ark., filed Sept. 17, 1980) (mandatory retirement age of 62 for city's assistant fire chief and fire captain).

EEOC v. *County of Dane,* No. 80-C-578 (W.D. Wisc., filed Nov. 3, 1980) (mandatory retirement age of 60 for county law enforcement personnel).

EEOC v. *City of Altoona,* No. 80-418 (W.D. Pa., filed March 18, 1981) (state law mandating retirement of oldest firefighters first in any economically necessary personnel cutback).

EEOC v. *City of Hamtramck,* No. 81-71353 (E.D. Mich., filed April 29, 1981) (mandatory retirement after 30 years of service for chief of city's fire department).

EEOC v. *City of Lansing,* No. G81-281 (W.D. Mich., filed May 28, 1981) (mandatory retirement age of 60 for municipal firefighters).

EEOC v. *State of Wyoming,* No. C81-0180 (D. Wyo., filed July 9, 1981) (state law mandating retirement at age 65 for any state or local employee who is a member of the state retirement system).

EEOC v. *City of Riverview,* No. 81-72427 (E.D. Mich., filed July 16, 1981) (mandatory retirement age of 50 for police officers after 25 years of service).

EEOC v. *Town of Chesterton,* No. H-81-398 (N.D. Ind., filed July 7, 1981) (mandatory retirement age of 60 for law enforcement personnel).

EEOC v. *City of Highland Park,* No. 81-27260 (E.D. Mich., filed August 8, 1981) (mandatory retirement age for city police chief).

EEOC v. *City of Houston,* No. H-81-2485 (S.D. Tex., filed Sept. 25, 1981) (mandatory retirement age of 65 for all fire department personnel).

EEOC v. *State of Michigan,* No. G81-756-CA5 (W.D. Mich., filed Sept. 3, 1981) (state law mandating retirement of state police officers at age 56).

EEOC v. *City of Minneapolis and Minnesota Police Relief Association,* No. 4-81-660 (D. Minn., filed Oct. 9, 1981) (mandatory retirement age of 65 for police captain).

EEOC v. *Missouri State Highway Patrol,* No. 82-4129-CV-C-5 (W.D. Mo., filed July 7, 1982) (mandatory retirement age of 60 for state troopers).

EEOC v. *City of Newcastle and Commonwealth of Pennsylvania,* No. 82-1881 (W.D. Pa., filed Sept. 9, 1982) (state law requiring that the oldest firefighters be retired first if there is a reduction in force).

EEOC v. *City of Portland,* No. 83-50 (D. Ore., filed Jan. 13, 1983) (mandatory retirement age of 65 for police captains).

EEOC v. *Pennsylvania State Police,* No. 83-0321 (M.D. Pa., filed May 9, 1983) (state law mandating retirement at age 60 for state police officers).

EEOC v. *City of Knoxville,* No. 3-83-364 (E.D. Tenn., filed June 13, 1983) (mandatory retirement age of 60 for police officers and firefighters after 25 years of service).

EEOC v. *Indiana Dep't of Natural Resources,* No. IP83-858-C (S.D. Ind., filed June 27, 1983) (state law mandating retirement of state conservation law enforcement personnel at age 60).

EEOC v. *California Office of State Marshall,* No. 5-83-856-LKK (E.D. Cal., filed July 28, 1984) (mandatory retirement age of 65 for state fire marshals).

EEOC v. *City of New Castle,* No. 83-1899 (W.D. Pa., filed Aug. 11, 1983) (mandatory retirement age of 65 for police officers).

EEOC v. *California Public Employees Retirement System,* No. 83-943-MLS (E.D. Cal., filed Aug. 22, 1983) (state law mandating retirement of municipal public safety personnel at age 60).

EEOC v. *Indiana State Police,* No. IP-83-1207-C (S.D. Ind., filed Aug. 29, 1983) (state law mandating retirement of state police officers at age 55).

EEOC v. *Mississippi State Tax Commission,* No. J83-0717(B) (D.D. Miss., filed Sept. 9, 1983) (mandatory retirement age of 65 for revenue inspectors and enforcement officers).

Crevier v. *City of East Providence,* No. 83-0470-S (D. R.I./, intervenor motion filed on Sept. 28, 1983) (mandatory retirement age of 65 for police department personnel).

EEOC v. *City of Pittsburgh,* No. 83-2712 (W.D. Pa., filed Oct. 27, 1983) (mandatory retirement age of 65 for police officers).
EEOC v. *Port of Portland,* No. 83-1821 (D. Ore., filed Nov. 29, 1983) (mandatory retirement age of 60 for firefighters).
EEOC v. *State of New York,* No. 84-CV-12 (N.D. N.Y., filed Dec. 12, 1983) (mandatory retirement age of 55 or 60 depending on rank for state police).
EEOC v. *State of Florida,* No. 84-7039-WS (N.D. Fla., filed Feb. 6, 1984) (mandatory retirement age of 62 for state highway patrol officers).
EEOC v. *Borough of Coraopolis,* No. 84-736 (W.D. Pa., filed March 26, 1984) (state law mandating the retirement of the oldest firefighters during a reduction in force).
EEOC v. *Sayad,* No. 84-0894-C(3) (E.D. Mo., filed April 18, 1984) (mandatory retirement age of 65 for St. Louis police officers).
EEOC v. *County of Los Angeles,* No. 84-3181-KN (MCX) (mandatory retirement age of 60 for public safety personnel).
EEOC v. *New Mexicon State Police,* No. 84-797-BB (D. N. Mex., filed May 21, 1984) (state law mandating the retirement of state police personnel at age 62).
EEOC v. *New York City Housing Authority,* No. 84-CIV-4547 (S.D. N.Y., filed June 27, 1984) (mandatory retirement age of 63 after 20 years of service for housing authority police).
EEOC v. *Commonwealth of Massachusetts,* No. 84-2595-MA (D. Mass., filed Aug. 22, 1984) (mandatory retirement age of 65 for municipal firefighters).
EEOC v. *Commonwealth of Kentucky,* No. CA-84-62 (E.D. Ky., filed Aug. 29, 1984) (state law mandating the retirement of state police officers at age 55).
EEOC v. *City of St. Louis,* No. 84-2063-C(5) (E.D. Mo., filed Aug. 29, 1984) (mandatory retirement age of 60 for firefighters).
EEOC v. *City of Yonkers,* No. 84-CIV-6831 (S.D. N.Y., filed Sept. 21, 1984) (mandatory retirement age of 64 for police and firefighters).

NATIONAL GOVERNORS' ASSOCIATION,
Hall of the States, Washington, DC, March 10, 1986.

Hon. MATTHEW G. MARTINEZ,
Chairman, Subcommittee on Employment Opportunities,
Washington, DC.

DEAR MR. CHAIRMAN: At the 1983 annual meeting of the National Governors' Association, the Governors adopted policy urging changes in the Age Discrimination in Employment Act to permit state and local governments to establish hiring and retirement criteria consistent with the public safety. A copy of the policy is enclosed. HR 1435, on which a March 12 Subcommittee hearing has been set, will take care of the problem we identified.

NGA strongly opposes discrimination of any kind. However, we believe just as firmly that state and local governments must do all they can to assure the safety of the public. To this end, many states have established requirements affecting the retirement and entry ages of firefighters and law enforcement personnel. According to research undertaken by the staff of the sponsors, Mr. Hughes and Mr. Rinaldo, at least thirty-two states established such restrictions.

The Age Discrimination in Employment Act of 1967 makes it unlawful for an employer to discriminate against any employee or potential employee between the ages of 40 and 70 on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." In 1974, the definition of "employer" was extended to include state and local governments. However, federal law enforcement officers were excluded from coverage, and mandatory retirement requirements are in effect for federal firefighters, traffic controllers, the FBI, the Secret Service, and federal prison employees.

The current situation has spawned costly lawsuits at the state and local level, adding to the expenses incurred by those states which are reviewing their occupational qualifications standards to comply with the federal requirements. One state, West Virginia, reported that it had already spent almost $80,000 on the job standards review and in the meantime had paid more than $60,000 to settle lawsuits stemming from the ADEA. Government jurisdictions in twenty-one other states face similar lawsuits.

We believe that the rationale for exempting federal public safety officials from the ADEA is equally persuasive in support of an exemption of state and local public safety employees. Moreover, we believe that the federal government should avoid dictating the employment decisions of the states, even if it were willing to apply the same standards to its own workers.

HR 1435 strikes an excellent balance between the imperative of eliminating employment discrimination and the need to ensure the public safety. I urge the Subcommittee to favorably report HR 1435 at the earliest possible time.

Sincerely

RAYMOND C. SCHEPPACH, *Executive Director.*

Enclosure.

A-17.—RETIREMENT AND HIRING PROVISIONS AFFECTING STATE PUBLIC SAFETY OFFICIALS

The Supreme Court recently held in *EEOC* v. *Wyoming* that the federal Age Discrimination in Employment Act covers state and local governments as a valid exercise of Congress' commerce power. This 5-4 decision invalidated those states' statutes which require certain law enforcement officers to retire at age 55. In so ruling, the Court also rendered invalid state and municipal statutes which make retirement prior to age 70 mandatory for their law enforcement and/or fire fighting officials. The decision also has implications for states and municipalities which set maximum hiring ages for certain types of employment.

The National Governor's Association believes that federal policy in this area is inconsistent because it exempts certain federal law enforcement officials while mandating state compliance. The Association believes, further, that establishing employment criteria and selecting employees are traditional functions of state government which should be limited only by constitutional requirements. Finally, the Association believes that the public has the right to expect that both its federal and state law enforcement officers are capable of adequately performing their duties to insure protection of the public safety. Safeguarding this right may require the use of systems which could include retirement to those officials at under 70 years of age and use of maximum hiring age requirements.

The National Governors' Association urges adoption of legislation which exempts state law enforcement officials from the provisions of the Age Discrimination in Employment Act, thereby permitting states to establish hiring and retirement criteria consistent with public health and safety.

Adopted August 1983.

STATE OF ILLINOIS,
DEPARTMENT OF STATE POLICE,
Springfield, IL, March 6, 1986.

Hon. MATTHEW J. RINALDO,
U.S. Congressman, House Aging Committee, Washington, DC.

DEAR CONGRESSMAN RINALDO: I would like to take this opportunity to advise you that the Illinois Department of State Police supports HR 1435. The Department supports not only this particular piece of legislation, but also supports any other efforts to exclude or exempt police agencies from the Age Discrimination in Employment Act of 1976.

This legislation is necessary to help ensure the safety of the public in general and police officers in particular. We must all be confident that police officers are capable of performing the strenuous and stressful tasks with which they are often challenged. It this department should be forced to comply with the Age Discrimination in Employment Act of 1967, such a standard of safety would be compromised.

Additionally, to not exclude state law enforcement officers from the Act would be inconsistent with the exemption of certain police officers on the federal level. Consistent application of safety principles as discussed above requires the exemption of all law enforcement officers from the Act.

For these reasons, HR 1435 contains provisions which must become law. Your consideration and support of this legislation is appreciated.

Very truly yours,

JAMES B. ZAGEL, *Director.*
(By) JAMES A. FINLEY, *Deputy Superintendent/Legislative Liaison.*

PREPARED STATEMENT OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

The International Association of Chiefs of Police (IACP) would like to thank Chairman Martinez and the members of the Subcommittee on Employment Opportunities for providing us with the opportunity to submit our views on the proposed amendments to the Age Discrimination in Employment Act (ADEA). Because our

main concern is with H.R. 1435, the public safety officers amendment, we have restricted our comments to that measure.

The IACP is a voluntary professional organization established in 1893. It is comprised of chiefs of police and other law enforcement personnel from all sections of the United States and more than sixty nations. Command personnel within the United States constitute over seventy-five percent of the more than 13,500 members. Throughout its existence, the IACP has striven to achieve proper, conscientious and resolute law enforcement. In all of its activities, the IACP has been constantly devoted to the steady advancement of the Nation's best welfare and well-being. We address this subcommittee on behalf of the vast majority of our members who believe that the public's safety can be better protected if State and local governments have the authority to control age requirements for their own law enforcement personnel.

Let me first commend Representatives Hughes and Rinaldo for their efforts in introducing H.R. 1435. We believe that when Congress amended the ADEA in 1978, extending its application to the States, it did not intend for law enforcement agencies to be affected. Unfortunately, these agencies have been affected.

Congress was well aware ofthe demands placed on law enforcement officers when it authorized mandatory retirement of Federal law enforcement officers. Its intent, as indicated in legislative history, was "based on the nature of the work involved and the determination that (law enforcement and fire fighting agencies) should be composed, insofar as possible of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal service. They are occupations calling for the strength and stamina of the young, rather than the middle aged." (S. Rep. No. 93-948, 93d Cong. 2nd Sess. (1974) reprinted in 1974 in U.S. Code Cong. and Ad. News 3699, 3701.)

Congress attempted to achieve the goal of a younger, more active and more vigilant law enforcement and firefighting work force first by encouraging older officers to retire early. This was done through an attractive pension program. Congress soon learned, however, that this was only partially effective. In many cases the most alert and agressive employees found desirable jobs outside of Government and retired in their early fifties. Those who were less vigorous and less capable and therefore unable to find other employment tended to stay within the Federal service until much later in their lives. State and local law enforcement agencies are faced with this same problem if they attempt to encourage, rather than mandate, early retirement.

In *Equal Employment Opportunity Commission* v. *Wyoming*, the U.S. Supreme Court held that the ADEA does in fact apply to to State and local governments. Prior to that time most law enforcement agencies had established retirement schedules demanding the retirement of personnel somewhere between the ages of 50 to 75. Most also had policies setting a maximum hiring age. Subsequent to *Wyoming* many of these agencies have been forced to abandon these policies.

Clearly, when Congress extended the ADEA to State and local governments in 1978, it did not intend to hamper State and local law enforcement agencies. The act contains an exception, recognized in *Wyoming* allowing employers:

(1) To take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. 29 U.S.C. § 623(f)(1)

This is commonly termed the BFOQ exception. Congress apparently believed that compulsory retirement in law enforcement agencies would fall within the BFOQ. In the legislative history of the 1978 amendments it stated:

The committee intends to make clear that under this legislation an employer would not be required to retain anyone who is not qualified to perform a particular job. For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age. The committee also expressed its concern that litigation should not be the sole means of determining the validity of a bona fide occupational qualification. Although the Secretary is presently empowered to issue advi-

sory opinions on the applicability of BFOQ exception, the committee recommended that the Secretary examine the feasibility of issuing guidelines to aid employers in determining the applicability of section 4(f)(1) to their particular situations.

S. Rep. No. 94-493, 95th Cong. 2nd Sess. (1978) reprinted in 1978 in U.S. Code Cong. and Ad. News, 513-14.

Unfortunately, although Congress' intent is clear in the legislative history, it was not explicitly stated in the statute. Since the statute appears clear and unambiguous on its face, courts have not looked at the legislative history. Consequently, law enforcement has been treated as any other occupation by the courts.

What has resulted is that law enforcement agencies have had to justify their hiring and retirement policies on a case-by-case basis. This is an expensive and time consuming duplication of effort. Furthermore, conflicting judicial holdings have created a nightmare of chaos and confusion in State and local law enforcement agencies. While some agencies have had the resources needed to successfully prove that their age limits are a BFOQ, other similar agencies have not.

Police work is often active, physical and stressful. An officer's duties may involve handling verbal and physical resistance from suspects such as violent drunks or fleeing suspects. Apprehending a suspect may necessitate a chase during which the officer must drive at high speeds, maneuvering his vehicle through traffic. He may also become involved in a foot chase. In addition officers may be called upon to carry citizens to safety at an accident scene or to push a disabled vehicle or one that is stuck in the snow.

Even officers assigned to desk jobs may become involved in these situations. Any officer may be called out in an emergency. Furthermore, most officers are assigned a fully equipped law enforcement vehicle which is used in travelling to and from work. All officers, regardless of rank or assignment are required to handle any situation they encounter while in their vehicles—violations of traffic laws, someone committing a felony in their presence, a life threatening situation, et cetera.

It is a logical and necessary part of a successful law enforcement personnel program that officers not be past the age of effective physical reaction and performance. An officer may place both his life and the lives of others in considerable danger if he is unable to react quickly, physically and appropriately. No amount of fitness training can compensate for the natural decline in physical ability that comes with age.

Aerobic capacity, which refers to an individual's abililty to utilize oxygen, depends on the efficiency of the individual's lungs and cardiovascular system. This is very important in physical activity such as chasing a suspect or pushing a car. A reduction in aerobic capacity means that the oxygen supply is insufficient, which in turn reduces the ability of the muscles to work without fatigue. When the oxygen supply is insufficient an individual's muscles utilize an emergency reserve, a special metabolism by which the muscles generate their own energy. Using this emergency reserve, however, generates only limited muscular function, rapidly induces fatigues, and requires more time to recover from the exertion.

Generally, an individual loses about ten percent of his aerobic capacity each decade after age twenty: thus, by age sixty, he will have lost approximately thirty-five to forty percent. Although sustained exercise for twenty to thirty minutes, three times per week at sixty percent of maximum aerobic capabity, can increase an individual's capacity, the maximum increase is ten percent. Moreover, interruptions in training such as those caused by illness result in a loss of whatever benefit was gained by exercise.

Thus, as individuals age, physiological changes affect their ability to perform. The body's ability to make efficient use of oxygen declines, with a resulting decline in physical stamina. In addition, muscle strength, an isometric function, which is involved in pushing, pulling, and carrying, declines as a person ages. In addition, the aging process affects an individual's reaction time, hearing, and vision. This manifests itself, for example, in an individual's inabililty to adapt to sudden changes in lighting, such as the glare from headlights.

Coronary heart disease offers another potential problem for older law enforcement officers. Although age does not cause coronary heart disease, data reveals an increase in the number of initial discoveries of coronary heart disease as age increases. The average number of discoveries for the general population for persons thirty to thirty-nine is four per thousand. It is ten per thousand by age fifty and twenty per thousand by age sixty—a rate five times higher than that for persons thirty to thirty-nine. Latent coronary heart disease presents the danger that, in times of stress, such as sudden exertion in cold weather or during a confrontation, an officer's adrenaline response may push him into total body collapse from fatigue or may cause a heart attack.

There is no single test or battery of tests that safely measures an officer's ability to perform his duties and that identifies, with reasonable accuracy, the presence of coronary artery disease. Laboratory tests cannot recreate safely the stressful, sometimes life-threatening, situations in which law enforcement officers work. Officers will know that a test cannot be truly life-threatening. Some tests that might be used, such as pushing a car on a very cold day, carry unacceptably high risks of physical harm to the officers being tested. Preparation of the individual to be examined can also affect the reliability of testing. For example, persons who take their blood pressure medication shortly before an examination may show a satisfactory blood pressure level on the day of the examination even though they have not been taking the medication regularly.

If departments are denied the right to set their own age requirements, there will be economic costs. All governmental bodies provide pensions for public safety officers who retire, with increased pensions going to officers disabled in the line of duty. Keeping officers on after their age has made it more difficult and hazardous for them to perform increases the chance that the officer will be injured while on duty. Physical traumas that can be absorbed by younger officers may be major problems for older officers. State and local governments, many of which are struggling to remain solvent, cannot afford to bear the extra cost of paying disability pensions to officers who should have been retired earlier. Supreme Court Justice Powell was correct when he wrote in his concurrence in *E.E.O.C.* v. *Wyoming*: "I also believe, contrary to the popular view, that the burdens imposed on the national economy by legislative prohibitions against mandatory retirement on account of age exceed the potential benefits."

In the experience of a majority of public safety agencies, early retirement is viewed as a positive reward and is initially an incentive for employment. An early retirement with a very favorable pension is perceived by new employees as compensation for the rigors and demands of this stressful occupation. An officer's growth in an organization and his plans for the future hinge on the stability of retirement at a predetermined point in his life.

As officers approach the age of compulsory retirement or have completed the maximum number of years of service, they begin to fear leaving the security of the workplace they have gone to for twenty-five years or so. Early retirement and the job opportunities made available by it, which were once attractive, lose their appeal when weighed against the uncertainty of leaving. Yet it was precisely those things that made their careers as rewarding as they could be.

In *Vance* v. *Bradley*, 440 U.S. 93 (1979), the United States Supreme Court upheld legislation which permitted Foreign Service personnel to be retired at age 60. It recognized a legitimate and substantial Government interest in recruiting, training and assuring the professional competence, as well as the mental and physical reliability, of the corps of public servants who hold positions critical to our foreign relations. This interest was furthered by the compulsory retirement of employees, the Court held, because it created predictable promotion opportunities and thus spurred morale and stimulated superior performance in the ranks.

Another factor that should be considered by this subcommittee is the impact on minority groups and women, if compulsory retirement is not permitted. Affirmative action goals established by the States will, to some extent, be nullified. Currently, the typical public safety pension plan mandates retirement at age 55. If officers must now be retained to age 70, fewer retirements will occur over the next fifteen years. With fewer retirements, a law enforcement agency's authorized strength will not be depleted to the point which has historically allowed for the start of one or two recruit classes per year. In one State, law enforcement agencies currently operating under a consent decree, recruit training classes are made up of at least 33⅓ percent minorities and women. Clearly, the progress that has been made in the area of affirmative action will come to a halt. Furthermore, those minorities and women who are already in place in a public safety organization will not be denied the opportunity to advance to positions of higher responsibility, since fewer such positions will be available. In light of the above-stated facts, the IACP urges Congress to pass H.R. 1435. Only by exempting law enforcement from the ADEA will we be able to continue to provide our Nation's citizenry with the most qualified individuals to fulfill the mission of guarding the public safety.

Thank you for giving our views your consideration.

PREPARED STATEMENT OF THE NATIONAL SHERIFFS' ASSOCIATION

The National Sheriffs (NSA) is on record as supporting amendments to the Age Discrimination Act of 1967 which would allow the states and local units of government to determine for themselves the issue of age in the hiring and retirement for law enforcement officers.

We endorse the legislation on this issue as proposed by Congressmen Hughes and Rinaldo and co-sponsored by numerous other Members including: Volkmer, Lungren and Rangel. We thank each one of these Congressmen for their concern about the problems faced by law enforcement on this issue. We look for their continued support until this problem is remedied.

While the NSA strongly opposes age discrimination, we believe that states and local units of government should be allowed to determine age requirements for their own public safety officers. The court decisions have made this increasingly difficult. That is why we look to Congress to enact this legislation.

Let's examine the reasons that H.R. 1435 is needed:

DIFFERENT STANDARDS FOR FEDERAL V. STATE AND LOCAL LAW ENFORCEMENT OFFICIALS

The federal government has legally set a different mandatory retirement age for its law enforcement personnel from that of other federal employees because of the very different duties of public safety officers. However, the state and local units of government are not permitted this same flexibility. This is arbitrary in our view and unreasonable as there is no distinction between the duties and responsibilities of the federal law enforcement officer and the local officer that justify the difference in treatment.

PERFORMANCE ABILITIES AND AFFECTS OF AGE

The job of the law enforcement officer is different than that of other kinds of employees. He is called upon to perform rigorous physical tasks to protect the life and property of citizens. In his capacity as a law enforcement officer, he needs to have this physical ability to apprehend a fleeing person or restrain a violent individual. Let us remember, the reason an officer is called is due to the fact that there is trouble. That trouble frequently requires the use of physical force.

While we recognize that a standard based upon age alone may exclude some individuals who could satisfactorily perform physically strenuous work, in our opinion, it is currently the most viable standard available to us.

A STATES RIGHTS ISSUE

Federal protections against age discrimination interfere with state and local governments' ability to prescribe reasonable qualifications for their own public safety officers. There is a valid argument for allowing different jurisdictions to select the age of hiring and retirement based upon the differing crime problems in various parts of the country. In a rural area, a deputy sheriff may not face the same dangers or physical demands that an officer assigned to patrol in a major city would.

We urge the Members of this Committee to take a balanced look at this issue—weighing the rights of the elderly alongside the right of every citizen to have the best protection that our society can offer them.

Without the protection of this federal legislation, actions by states to enforce mandatory requirement will continue to be struck down by the courts. Elimination of mandatory retirement would inevitably result in a cadre of law enforcement officers who are physically unable to perform their public safety duties.

Attached you will find a copy of the Resolution passed by the Membership of the National Sheriffs' Association urging Congress to pass this legislation.

Mr. Chairman and Members of the Committee, we thank you for the opportunity to submit written testimony on this important issue.

RESOLUTION—AGE DISCRIMINATION IN EMPLOYMENT LEGISLATION

Whereas, The National Sheriffs' Association is concerned about the Supreme Court decision in *EEOC* v. *Wyoming* (29 USC 623 (F) 1), striking down the rights of individual states to determine mandatory hiring and retirement ages for law enforcement officers, and

Whereas, the Congress has exempted the Federal Bureau of Investigation, the Armed Forces, and the Foreign Service from inclusion in the Age Discrimination in Employment Act, and

Whereas, the same rationale of public safety exist for state and local law enforcement officers to be excluded from restrictions of the Age Discrimination in Employment Act;

Now therefore be it resolved, That the National Sheriffs' Association in convention assembled urges Congress to pass legislation which will return to the states the power to determine mandatory appointment and retirement ages for law enforcement officers.

Adopted by General Session June 20, 1984.