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NOTES

The BFOQ Defense in ADEA Suits: The Scope of "Duties of the Job"

*Typically statutory, the words "reasonably necessary to the normal operation of its business," are not normally of the variety that suggest hand-wringing, earth-shaking, heart-rendering decisions of great moment. Words can be deceiving though . . .*¹

Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA)² in response to the President's and the public's disapproval of employment practices that correlate age with ability.³ In *EEOC v. Wyoming*,⁴ the Supreme Court described the findings of the Secretary of Labor in support of the ADEA: "Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes."⁵ The ADEA makes it illegal for an employer to discriminate on the basis of age in hiring, firing, or terms of employment;⁶ or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."⁷ Congress amended the ADEA in 1974 to extend protection to employees of state and local governments,⁸ in 1978 to extend coverage to federal employees and to persons from age forty through sixty-nine,⁹ and in 1986 to ex-

1. *Usery v. Tamiami Trail Tours*, 531 F.2d 224, 226 (5th Cir. 1976) (interpreting the Age Discrimination in Employment Act in a case where a job applicant was denied consideration based on age).

2. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982 & Supp. II 1984)).

3. See 113 CONG. REC. 34,743-44 (1967) (quoting President Johnson's Older American Message to Congress of Jan. 23, 1967).

4. 460 U.S. 226 (1983).

5. 460 U.S. at 231. The ADEA states: "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." 29 U.S.C. § 621(b) (1982).

6. 29 U.S.C. § 623(a)(1) (1982).

7. 29 U.S.C. § 623(a)(2) (1982).

8. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74 (codified at 29 U.S.C. § 630(b)(2) (1982)).

9. Age Discrimination in Employment Act Amendment of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189 (codified at 29 U.S.C. § 631(a)-(b) (1982)). Prior to the 1978 amendments, the ADEA covered persons from age 40 through age 64. The statute was slightly modified again in 1982 and 1984. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat.

tend coverage to most employees over age 40, no matter how old.¹⁰

The ADEA provides a defense to a plaintiff's claim of age discrimination through an age-based employment decision "where age is a *bona fide occupational qualification* reasonably necessary to the normal operation of the particular business."¹¹ In its recent *Western Air Lines v. Criswell* decision,¹² the Supreme Court adopted the test of *Usery v. Tamiami Trail Tours*¹³ as the standard a defendant-employer must meet in order to show that it has a valid bona fide occupational qualification (BFOQ) defense.¹⁴ Under *Criswell* and *Tamiami* the de-

353 (codified at 29 U.S.C. § 623(g) (1982)) (adjusting requirements for health plan coverage for workers aged 65 to 69); Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 1063 (codified at 29 U.S.C. § 623(g)(1) (Supp. II 1984)) (extending entitlement to coverage under group health plan to employees' spouses aged 65-69); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1792 (codified at 29 U.S.C. § 623(g) (Supp. II 1984)) (extending ADEA requirements to citizens working in foreign countries).

10. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342. The 1986 Amendments remove the age ceiling for applicability of the ADEA for all employers except executives or people in a high policymaking position (§ 2), faculty of colleges and universities (§ 6), and firefighters and law enforcement officers (§ 3). The 1986 Amendments temporarily suspend the ADEA protections for state employed firefighters and law enforcement officers for seven years during which time the EEOC and Department of Labor shall jointly study mental and physical fitness tests to determine whether they are valid measurements of ability and competency (§ 3(b) and § 5(a)). The study must be completed within four years at which time the Secretary of Labor and the EEOC will submit to Congress a report and recommendations (§ 5(a)). The seven-year suspension will not affect age discrimination claims already in progress (§ 7(b)).

The 1986 Amendments do not affect the developing case law discussed in this Note to the extent that it applies to: (1) private sector employees engaged in jobs affecting public safety (such as bus drivers), (2) pending police and firefighter cases, and (3) the cases that will arise after December 31, 1993.

11. 29 U.S.C. § 623(f)(1) (1982) (emphasis added).

The defense may be asserted by an employer after a plaintiff-employee shows age discrimination. This procedure is analogous to that used in litigation under Title VII of the Civil Rights Act of 1964 which promotes anti-discrimination principles with respect to race, color, religion, sex, or national origin. The bona fide occupational qualification (BFOQ) language in the ADEA is borrowed from Title VII, 42 U.S.C. § 2000e-2(e)(1) (1982). In Title VII cases, the Supreme Court has placed the burden on the plaintiff to make a prima facie case by establishing discrimination forbidden by the Act. The burden of proof then shifts to the defendant-employer to show a valid BFOQ defense to the discrimination or rebut the prima facie case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). For a description of the relationship between defenses and burdens of proof in Title VII cases and those under the ADEA, see Schickman, *The Strengths and Weaknesses of the McDonnell Douglas Formula in Jury Actions Under the ADEA*, 32 HASTINGS L.J. 1239 (1981).

12. 472 U.S. 400 (1985). In *Criswell*, the Court ruled that the mandatory retirement age of 60 for flight engineers and the denial of reassignment of pilots aged 60 or over to flight engineering positions violated the ADEA.

13. 531 F.2d 224 (5th Cir. 1976).

14. The test competing with *Tamiami* was devised in *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). *Hodgson* held that a bus company's maximum hiring age for drivers met the BFOQ exception because the company was able to demonstrate a "rational basis in fact to believe that elimination of its maximum hiring age [would] increase the likelihood of risk of harm to its passengers." 499 F.2d at 863.

The *Tamiami* test was proposed in a situation identical to *Hodgson*. The *Tamiami* court found that the bus company's maximum hiring age policy for its drivers was lawful even though the Court's test was more stringent.

Other courts of appeals overwhelmingly have applied the *Tamiami* test. See *Criswell*, 472

fendant-employer must show first that the qualification is reasonably necessary to the essential operation of the business,¹⁵ and second, that there is a factual basis to believe that substantially all persons over the age established would be unable to perform safely or efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age on an individual basis.¹⁶ Lower courts remain divided over how broadly to define the scope of inquiry into the job characteristics (the "duties of the job") of an employee against whom the BFOQ defense is asserted.¹⁷

Three courts of appeals have addressed this question directly. The Seventh Circuit has held that a court may look only at the characteristics of the generic class of employees when considering whether age is a BFOQ under the ADEA.¹⁸ The Eighth Circuit requires an examina-

U.S. 400, 416 (1985) (citing cases); see also *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984) (upholding maximum hiring age of 32 for radio operators and state highway patrol members, and mandatory retirement age of 60 for patrol members as BFOQs because no substitute for an age test could adequately screen employees or candidates for employment), *cert. denied*, 106 S.Ct. 88 (1985); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir. 1983) (mandatory retirement age of 55 for assistant fire chief not a BFOQ because the city did not need to rely on age as a proxy for job qualifications), *cert. denied*, 464 U.S. 992 (1983). See Rosenblum, *Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions*, 32 HASTINGS L.J. 1261, 1266-67 (1981), and Schickman, *supra* note 11, at 1252-54, for general applicability of the BFOQ defense.

15. *Tamiami*, 531 F.2d at 235. Specifically, in *Tamiami* the employer was required to have a rational basis for believing that an age-based decision was necessary to prevent its operations from resulting in the diminution of public safety.

16. 531 F.2d at 236. The court derived the two-part test from two other Fifth Circuit cases challenging sex discrimination under Title VII. *Weeks v. Southern Bell Tel. & Tel.*, 408 F.2d 228 (5th Cir. 1969) (employer's refusal to hire a woman as "switchman" because of the strenuous nature of the job was based on stereotyped characterizations); *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.) (employer's refusal to hire men as flight attendants based on a mere business convenience), *cert. denied*, 404 U.S. 950 (1971). *Diaz* established as a threshold requirement for a BFOQ defense under Title VII that the employer's decision be reasonably necessary to the essence of the business. 442 F.2d at 388. *Weeks* required that the employer asserting a Title VII BFOQ defense have a "factual basis for believing . . . that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." 408 F.2d at 235. Although these cases interpret Title VII and not the ADEA, the statutory language and legislative histories of the two anti-discrimination laws are related and therefore suggest use of the same test. See note 11 *supra*.

17. *Compare Mahoney v. Trabucco*, 574 F. Supp. 955 (D. Mass. 1983), *revd.*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984); *EEOC v. City of St. Paul*, 500 F. Supp. 1135 (D. Minn. 1980), *affd.*, 671 F.2d 1162 (8th Cir. 1982); and *EEOC v. City of Janesville*, 480 F. Supp. 1375 (W.D. Wis. 1974), *revd.*, 630 F.2d 1254 (7th Cir. 1980), discussed in Part I *infra*. See Rosenblum, *supra* note 14 at 1270-71 (1981); Note, *The Scope of the Bona Fide Occupational Qualification Exception Under the Age Discrimination in Employment Act: EEOC v. Janesville*, 57 CHI. KENT L. REV. 1145 (1981) [hereinafter Note, *Scope of the BFOQ*]; Note, *Striking a Balance Between the Interests of Public Safety and the Rights of Older Workers: The Age BFOQ Defense*, 39 WASH. & LEE L. REV. 1371 (1982) [hereinafter Note, *Striking a Balance*]; Recent Development, *The Bona Fide Occupational Qualification Exception — Clarifying the Meaning of "Occupational Qualification"*, 38 VAND. L. REV. 1345 (1985) [hereinafter Recent Development, *Clarifying the Meaning*]; see also Comment, *A New Interpretation of the BFOQ Exception Under the ADEA: A Remedy for the Exception That Swallowed the Rule*, 31 AM. U. L. REV. 391 (1982).

18. *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980).

tion of the specific duties performed by the individual employee to determine whether age is a BFOQ reasonably necessary to the normal operation of the particular business.¹⁹ The First Circuit's standard lies between that of the Seventh and Eighth Circuits, and requires courts to look to discrete "vocations" within the business.²⁰

This Note examines these three possible interpretations of which job characteristics a court must examine when determining the validity of a BFOQ defense to an ADEA suit and concludes that the Eighth Circuit's standard is correct. Because disputes over which interpretation is proper arise almost exclusively in cases involving public safety occupations,²¹ this Note discusses the standards for measuring that scope within the framework of the policy considerations associated with public safety. Part I of this Note discusses the three current standards used to determine the scope of the BFOQ defense. Part II illuminates the problems inherent in having three different standards and argues that a single standard most fully effectuates the goals of the ADEA. Furthermore, Part II argues that in light of the statutory language, legislative history, and policy concerns behind the ADEA, courts should follow the Eighth Circuit and define "duties of the job" to mean the specific duties performed by the employee.

I. JOB CHARACTERISTICS EXAMINED: THREE STANDARDS

The definition of "the duties of the job" in the *Criswell-Tamiami* test for the BFOQ defense is extremely important to litigants under the ADEA. The court's choice of how broadly to define the employee's job duties determined the outcome of each of the three appellate decisions that directly addressed this issue. This section briefly describes the facts and reasoning of these three cases.

A. EEOC v. City of Janesville

In 1980, the Seventh Circuit became the first court of appeals to ask which job characteristics a court must examine under the BFOQ defense. In *EEOC v. City of Janesville*,²² the chief of police of Janes-

19. *EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-66 (8th Cir. 1982).

20. *Mahoney v. Trabucco*, 738 F.2d 35, 39 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984).

21. See Rosenblum, *supra* note 14, at 1269 ("ADEA litigation involving age as a BFOQ in both hiring and mandatory retirement has focused primarily on three occupations: police officers, firefighters, and airline pilots."); Note, *Striking a Balance*, *supra* note 17, at 1374-75 ("[T]he interests of public safety [are] found in nearly all the litigated BFOQ cases."); Recent Development, *Clarifying the Meaning*, *supra* note 17, at 1346 n.6 ("Thus far, courts have addressed this problem only in cases concerning protective service employees — law enforcement personnel and firefighters."). The author has not found reference to any hiring or mandatory retirement case involving the ADEA's BFOQ defense that did not also involve public safety.

22. 630 F.2d 1254 (7th Cir. 1980). Because *Janesville* was decided before the Supreme Court adopted the standard set forth in *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976), in *Western Airlines v. Criswell*, 472 U.S. 400 (1985), the court chose to follow *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). However, the

ville, Wisconsin claimed that the city violated the ADEA when it discharged him, pursuant to city policy, nine days after his fifty-fifth birthday.²³ The city described his job at trial as "responsible administrative work directing all activities and employees of the City Police Department."²⁴ The job description for the position required knowledge of police regulations, organization, management, and evaluation standards; an ability to communicate, supervise, and command respect; and good physical health.²⁵

In reversing the district court,²⁶ the court of appeals held that the "plain meaning" of the ADEA mandated a broad examination of the primary function of the particular business — law enforcement.²⁷ The court deferred to the state legislature's statutory presumption that age is legitimately related to an employee's ability to perform the general business of law enforcement. Consequently, the court upheld the mandatory retirement age for the Police Chief, without reference to whether age was a BFOQ for *his position*. The court conceded that the BFOQ exception should be construed narrowly, given Congress' intent that the ADEA would prohibit discrimination, but maintained that its own interpretation was narrow enough. The court indicated that considerations of public safety expand the otherwise narrow BFOQ defense. The court preferred to err on the side of caution by ensuring that all law enforcement personnel were fit to perform all jobs in that "business." Because the court decided it had no expertise to judge how high that standard of fitness should be, it deferred to the state's

scope of examination employed by the court was based entirely on statutory language and not on a judicial test. "Nor do we find reliance on our decision in *Hodgson* . . . dispositive . . ." 630 F.2d at 1258.

23. *EEOC v. City of Janesville*, 480 F. Supp. 1375, 1376-77 (W.D. Wis. 1979), *revd.*, 630 F.2d 1254 (7th Cir. 1980) (reversing order granting preliminary injunction to reinstate the Chief of Police). City policy, which was based on state law, WIS. STAT. ANN. §§ 41.02(23), 41.11(1) (West 1979), required protective service employees to retire at the end of the calendar quarter in which they turned 55. The statute defined a protective service employee as "any participant whose principal duties involve active law enforcement or active fire suppression or prevention, provided such duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning." WIS. STAT. ANN. § 41.02(11)(a) (West 1979). Despite its frequent-exposure requirement, the statute specifically includes *all* policemen including the chief. WIS. STAT. ANN. § 41.02(11)(a) (West 1979). The city policy contained provisions to permit an employee to work an extra year after age 55 under certain hardship circumstances. The City argued that the legislature's judgment defined the public interest and established a valid BFOQ; therefore, the city did no studies to obtain empirical data supporting its policy. 480 F. Supp. at 1377.

24. 480 F. Supp. 1375, 1377 (W.D. Wis. 1979), *revd.*, 630 F.2d 1254 (7th Cir. 1980).

25. 480 F. Supp. at 1377.

26. The district court found that the BFOQ review requires examination of the duties of the individual employee. The district court ordered a preliminary injunction reinstating the plaintiff pending a full trial because (1) there was a reasonable likelihood that the City would not establish, at trial, a relationship between age and the qualifications required of the police chief, and (2) the irreparable hardship plaintiff would suffer by staying away from the job until trial outweighed the possible disruption to the department by reinstating him. 480 F. Supp. at 1380.

27. 630 F.2d at 1258. See text at note 54 *infra*.

determination as implemented by the city.²⁸

B. EEOC v. City of St. Paul

In 1982, the Eighth Circuit in *EEOC v. City of St. Paul*²⁹ endorsed reasoning in direct conflict with that of *Janesville*. In *St. Paul*, the Equal Employment Opportunity Commission (EEOC) intervened on behalf of a district fire chief forced to retire, pursuant to a city ordinance, at age sixty-five.³⁰ The St. Paul fire department provides firefighting, paramedic, and rescue services for the city. Age is relevant to an individual's ability to perform these services, which require physical stamina. Thus, under the *Janesville* standard, the city could have required its district chief to retire at age sixty-five. The district court, however, examined the characteristics of the chief's *particular assignments* in the fire department and found that age was a BFOQ for captains and firefighters but not for district chiefs.³¹ Many of the fire captains' and firefighters' duties involved the physically strenuous tasks of combatting fires and saving lives,³² whereas the district chief was primarily responsible for supervision, discipline, communication, and training. His duties at a fire generally involved command and management responsibilities. Occasionally, however, the district chief performed physically demanding work at a fire since he would enter a burning building if necessary to save lives.³³ The district chief (as well as captains and firefighters) performed his duties during a twenty-four hour shift, more demanding than a standard eight-hour work day.

Recognizing that different readings of the BFOQ exception are possible, the Eighth Circuit stressed the importance of the legislative history of the ADEA and the Act's goal of eliminating age discrimina-

28. 630 F.2d at 1258-59.

29. *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982), *affg.* 500 F. Supp. 1135 (D. Minn. 1980).

30. The city ordinance was an application of state law. The pattern is similar to that in *Janesville*: a state law required the retirement at age 65 of all employees or officers of police or fire departments who participated in the state pension scheme. MINN. STAT. ANN. § 423.075 (West 1958) (amended 1981); *see St. Paul*, 500 F. Supp. at 1137.

31. *St. Paul*, 500 F. Supp. at 1142-43.

32. The fire department hierarchy of uniformed officers is capped with a fire chief and his two assistant chiefs, followed by district chiefs, deputy chiefs, captains, and, finally, the firefighters. 500 F. Supp. at 1138.

33. 500 F. Supp. at 1139. *EEOC v. City of Minneapolis*, 537 F. Supp. 750 (D. Minn. 1982), closely followed the lead of *St. Paul* in an analogous case which held that police department captains cannot be forced to retire at age 65. Like district chiefs in the St. Paul fire department, captains in the Minneapolis police department have primarily supervisory responsibilities. Although there are no medical or physical requirements for the position of police captain, he sometimes fills a "command" role in "street situations." 537 F. Supp. at 752-53. Like any police officer, when a captain observes a crime, he is obligated to respond. The court held that the BFOQ defense required the court to examine the specific duties of the supervisory captain. 537 F. Supp. at 756. *Minneapolis* is a municipal police case similar to *Janesville* except that it may present an even stronger case for a BFOQ if the position of police captain requires more physical exertion than the position of police chief.

tion based on broad stereotyping across occupations within a business.³⁴ The court noted that forcing a district chief fully able to meet the demands of his position to retire solely because he is unable to fulfill the duties of other positions is inconsistent with the thrust of the ADEA.³⁵ The court stated, "We cannot believe that the ADEA was intended to allow a city to retire a police dispatcher because that person is too old to serve on a SWAT team."³⁶

C. Mahoney v. Trabucco

Like *Janesville* and *St. Paul*, *Mahoney v. Trabucco*³⁷ involved a challenge to a statute setting a mandatory retirement age for certain public service employees.³⁸ The plaintiff, Sergeant Mahoney, was in the uniformed branch of the Massachusetts state police, where he held a desk job as a telecommunication specialist. In contrast to Mahoney, most sergeants in the state police were assigned strenuous road duties. The state forced Mahoney, like all members of the state police, to retire at age fifty. Mahoney had a continuing, although rarely exercised, duty to aid citizens on state highways,³⁹ and was subject to transfer to another assignment that might involve demanding road work or emergency duty.⁴⁰

The district court determined that these facts were insufficient to make out a proper BFOQ defense under the *Criswell-Tamiami* test.⁴¹ The court reasoned, as in *St. Paul*, that the "duties of the job" should be defined as the daily duties of Mahoney and concluded that the possibility of his transfer or involvement in a strenuous highway-aid situation was remote and speculative.⁴²

The First Circuit reversed the district court and held that in this context "duties of the job" refers to duties of each discrete rank or

34. *St. Paul*, 671 F.2d at 1165, 1167 (citing H.R. REP. NO. 805, 90th Cong., 1st Sess., reprinted in 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214; H.R. REP. NO. 913, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 2811, 2850; 120 CONG. REC. 8768 (1974)).

35. 671 F.2d at 1165.

36. 671 F.2d at 1166. See notes 87-91 *infra* and accompanying text for discussion of this issue.

37. 574 F. Supp. 955 (D. Mass. 1983), *revd.*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984); see also *EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986).

38. MASS. ANN. LAWS ch. 32, § 26(3)(a) (Law. Co-op. 1983).

39. *Mahoney*, 574 F. Supp. 955, 959 (D. Mass. 1983).

40. 574 F. Supp. at 959.

41. The trial court quoted *EEOC v. Wyoming*, 460 U.S. 226, 239 (1983), stating that the ADEA requires states to make retirement rules "in a more individualized and careful manner. . . ." 574 F. Supp. at 961.

42. 574 F. Supp. at 962. This is similar to the position taken by the court deciding *EEOC v. City of Minneapolis*, 537 F. Supp. 750, 754 (D. Minn. 1982). See note 33 *supra*. Mahoney's prior transfers did not involve physically demanding work. During emergencies, his responsibilities involved telecommunication duties.

"vocation" within the state police organization.⁴³ The court did not examine variations in duties *within* ranks. Rather, the court looked at the duties of all officers in the rank or occupational category. The court described this approach as a middle ground between the approaches of the *Janesville* and *St. Paul* courts.⁴⁴

The court asserted that because all officers in a paramilitary force such as the state police are subject to reassignment to strenuous duty in an emergency, an officer's "occupation" (in the BFOQ sense) is his rank, and not his temporary or permanent assignment.⁴⁵ The court noted further that the district court's analysis would have impaired the operation of the state police by making staffing options less flexible and by prompting older officers to demand less strenuous assignments.⁴⁶

The *Mahoney* court, however, recognized some of the limitations

43. 738 F.2d at 39.

44. On a more general level, the *Mahoney* approach examines each level of the personnel pyramid by hierarchical rank while *Janesville* would examine the characteristics of the entire personnel pyramid and *St. Paul* would examine the duties of each officer. See notes 52-55 *infra* and accompanying text.

In *EEOC v. Pennsylvania*, 768 F.2d 514 (3d Cir. 1985), the Third Circuit announced its adoption of the *Mahoney* approach to the BFOQ defense. The plaintiff in this case was a state police officer who was forced to retire at age 60 pursuant to 71 PA. CONS. STAT. ANN. § 65(d) (Purdon Supp. 1986). The court ruled that it would not look at the "relatively sedentary administrative assignments" held by individual members of the force. 768 F.2d at 517. Rather, the court would look to the "occupation" of state police officers which includes some duties of the active trooper. It is important to note that although the court claimed to be applying the *Mahoney* standard of scope of the duties of the job, it did not discuss distinctions between ranks; its language was as similar to *Janesville* as it was to *Mahoney*. On remand, the district court made particularized findings to show that age is a BFOQ for state police generally. 645 F. Supp. 1545 (M.D. Pa. 1986).

45. The court ascribed meaning to the term "occupational qualification" as distinct from "particular business" in the BFOQ passage: "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (1982). The court defined "occupation" to mean a recognized and discrete "vocation" broader than a particular assignment.

The court gives an example of another application of its definition in the commercial airline business. It states that there are particular occupations within the business, such as captain, first officer, and flight engineer. 738 F.2d at 39. The application of the *Mahoney* definition is easier in the airline business case because the "ranks" of employees correspond to their duties. A captain is the pilot of a plane; the examination of particularized tasks in this application yields the same result as the application of the *Mahoney* standard.

46. *Mahoney*, 738 F.2d at 38; see text at notes 92-96 *infra*. The *Mahoney* court expressly rejected the *St. Paul* SWAT team analogy, quoted in text at note 36 *supra*. The court reasoned that fine distinctions between assignments that require different degrees of strenuous activity would paralyze a police force. The court described the difficulties of strict application of the *St. Paul* particularistic standard to the Massachusetts state police. It suggested that troopers engaged in tracking down car thieves would have different retirement standards than troopers who detected speeders, drunk drivers, and overweight trucks. 738 F.2d at 39. Although this example probably exaggerates the *St. Paul* analysis, as the difference in the levels of physical activity required for these tasks is much less than the difference between the physical demands upon a dispatcher and a SWAT team member, the supposedly absurd distinctions made in *St. Paul* are no less tenable than are distinctions based on rank. The *Mahoney* court does not explain why horizontal distinctions (among persons in a rank) are less desirable than vertical distinctions (between a sergeant who works a desk job and a captain who works a desk job, for example).

Despite its criticism of the *St. Paul* reasoning, the *Mahoney* court would have reached the same result. The *Mahoney* court characterized the district fire chief's job as a "position suffi-

of its middle standard. It observed that an employer could "sweep under one classification of employees many distinct vocations and occupations for which a low mandatory retirement age would be quite unjustified."⁴⁷ Although application of its standard may not be able to remedy all such instances of age discrimination, the court concluded that it could prevent "blatant or covert efforts to subvert the ADEA."⁴⁸

II. THE PARTICULARIZED STANDARD: THE MOST APPROPRIATE SCOPE

A single standard to determine which job duties a court must examine under a BFOQ defense in the public safety context will provide predictability to employers, employees, litigants, and the federal courts. Currently, with the exception of *Janesville, St. Paul*, and *Mahoney*, only two courts have settled on a standard.⁴⁹ The standard that will be applied in other circuits remains uncertain, even though the court's choice is often determinative.⁵⁰ The division in interpretation

ciently distinct to be considered an occupation separate from that of the rest of the department," *Mahoney*, 738 F.2d at 39.

If treatment of persons within the same rank depended on their assignment, the officers might seek the less physically strenuous assignments to avoid forced retirement. See text at notes 101-02 *infra*. The court stated that litigation in this area would probably increase as officers sought determination of whether their particular assignment was subject to a legal mandatory retirement age. *Mahoney*, 738 F.2d at 38; see text at notes 101-02 *infra*.

47. 738 F.2d at 42.

48. 738 F.2d at 42; see *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (applying a rationality standard in upholding the Massachusetts state police retirement age of 50 against an equal protection challenge).

49. *EEOC v. Pennsylvania*, 768 F.2d 514 (3d Cir. 1985); *EEOC v. City of Minneapolis*, 537 F. Supp. 750 (D. Minn. 1982). In *EEOC v. City of Minneapolis*, the city was contemplating changes in its law enforcement system that would have resulted in the assumption of more front-line duty and night/weekend work by the captains. The disruptive schedule of night/weekend duty may cause fatigue and stress, which affects an officer's ability to conduct physical tasks. The potential change strengthened the city's defense because the exemption of captains from mandatory retirement could lock the police department into its current system by diminishing its ability to change the duties of officers. In holding that the city did not demonstrate that age was a BFOQ, the court found the impact of these possible prospective changes too speculative. 537 F. Supp. at 754.

50. In *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976), the city of Little Rock was found to have violated the ADEA by forcing an assistant fire chief and a district chief to retire at the age of 62. Like the *St. Paul* court, the *Aaron* court determined that age was not a BFOQ for these positions by examining the specific duties of the persons in those positions. Unlike the *St. Paul* court, however, the *Aaron* court did not attempt to justify its approach to the problem.

Similarly, in *Hoefelman v. Conservation Commn. of Missouri*, 541 F. Supp. 272 (W.D. Mo. 1982), *aff'd*, 718 F.2d 281 (8th Cir. 1983), a state department's policy forbade employees over the age of 60 from serving as pilots, and resulted in the plaintiff's reassignment from Chief Aircraft Pilot to Equipment Supervisor. The policy was found to fall under the BFOQ exception. Although the court did not discuss its categorization of the relevant characteristics to be examined, it seems to have recognized the difference between the two assignments. The *Mahoney* approach would put a wrinkle in the *Hoefelman* reasoning because, for all purposes, the Chief Aircraft Pilot and the Equipment Supervisor were simply different assignments in the same rank. They both had the same salary, grade, and job benefits. The *Mahoney* reasoning rigidly applied may not have distinguished between the two assignments because they would be considered the

among the circuits may encourage extensive litigation on this issue.

Conflicting standards impede planning for both employees and employers: an employee nearing a mandatory retirement age may not be able to decide whether to litigate, a police or fire organization may have difficulty making assignments without knowing how long an employee can serve in a post, and a state pension system may be destabilized when the assumptions on which it was created are challenged.⁵¹ Employment practices that are legal in some jurisdictions and illegal in others make central enforcement and transjurisdiction employment planning difficult for private employers. A single standard is also more fair because employees and employers in identical situations in different circuits will be treated similarly.

The narrow *St. Paul* approach is the most appropriate way to determine the "duties of the job" for the *Criswell-Tamiami* test. Analysis of a particular employee's duties is not only consistent with the legislative history of the ADEA, it also best resolves the tension between the anti-discriminatory purpose of the ADEA and the concern for public safety. Other policy considerations also support the choice of the particularized examination of an employee's duties as the proper BFOQ standard.

A. Statutory Language

An examination of the "plain meaning" of the words of the ADEA does not resolve the competition among the three theories of which job duties a court must examine under the BFOQ test. The cases that consider this issue focus on the language "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"⁵² Constructed with modifier upon modifier, the BFOQ clause is conducive to many "plain" interpretations.

same rank and therefore the same occupational class. That is not to argue that the *Mahoney* court would have found age not to be a BFOQ but rather that the *Mahoney* framework for examination of occupational categories is artificial and not always helpful in determining whether age is a BFOQ reasonably necessary to the normal operation of the particular business.

The *Mahoney* court discussed the situation of the commercial aviation age BFOQ for pilots where there is no conflict between compartmentalizing employees by their vocation and rank. In that instance, pilots are clearly in a different class from flight engineers who receive less compensation and fewer benefits. See *Mahoney*, 574 F. Supp. at 955.

In *EEOC v. Missouri State Highway Patrol*, 555 F. Supp. 97 (W.D. Mo. 1982), *affd. in part, revd. in part*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 106 S. Ct. 88 (1985), the district court used a *St. Paul* particularistic scope to examine the ability of each plaintiff to perform the duties of his job. The court did not accept generalized medical testimony. 555 F. Supp. 104-05. The court, however, did not discuss the reasons for employing the scope it used and was reversed without discussion of scope. The court of appeals' reasoning, however, was consistent with a shift in scope to a *Janesville* test (although *Mahoney* was cited for support).

51. *Mahoney*, 574 F. Supp. at 963 n.2. The Massachusetts pension system for state troopers is set up by the same state law that prescribes a mandatory retirement age. MASS. GEN. LAWS ANN. ch. 32, § 26(3)(a) (West 1984).

52. 29 U.S.C. § 623(f)(1) (1982).

The *St. Paul* court chose the most straightforward interpretation of the BFOQ language; it read the term "necessary" to modify "qualification."⁵³ The focus of the statutory language is on characteristics of the employee's job, not the employer's business. The *Janesville* court, however, stressed the connection between "necessary" and "business."⁵⁴ Indeed, the court declined to examine the legislative history because it believed the meaning of the statutory language was clear. The court first defined the business, then identified the primary function of that business, and finally determined whether the BFOQ exception applied to the business.⁵⁵

Either court's reading of the statutory language is plausible.⁵⁶ The ADEA's language simply does not define which job duties a court must examine under the BFOQ defense. To determine the meaning of the BFOQ language, a court must look both to the statute's legislative history and to other provisions in the ADEA, including statements of purpose.

B. *The Purpose of the ADEA*

The purpose of the ADEA is to eliminate age stereotyping in employment.⁵⁷ That much is clear. However, a search into the legislative history of the Act and its amendments fails to yield any definitive standard for the scope of judicial examination of job duties under the BFOQ exception.⁵⁸ Although Congress has not directly addressed the

53. *St. Paul*, 671 F.2d at 1165.

54. *Janesville*, 630 F.2d at 1258. In this sense, the *Janesville* district court was more honest in recognizing that the BFOQ test could conceivably be interpreted in a number of ways. The district court chose what it believed was the most reasonable interpretation in light of congressional intent. 480 F. Supp. at 1378.

55. The city used this argument. 480 F. Supp. at 1378-79.

56. The *Mahoney* court, 738 F.2d at 40-41, did not derive its scope solely from the "plain meaning" of the ADEA, but it used the statutory language to develop its scope of examination of discrete "vocations." See text at note 45 *supra*.

One should be careful not to get carried away with a plain meaning analysis. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 908 (1981) defines occupation as "[a]n activity that serves as one's regular source of livelihood; profession; vocation." This can be contrasted with the second definition listed for business as "[c]ommercial, industrial, or professional dealings" THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra*, at 180. The interpretation breaks down, however, with the adoption of the first definition of business which equates it with occupation. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra*, at 180. See *Mahoney*, 738 F.2d at 39 (court refers to dictionary definition of occupation without reference to the definition of business.) The ADEA section containing definitions, 29 U.S.C. § 630 (1982), defines neither occupation nor business.

57. The purpose as set out in the statute is quoted in note 5 *supra*. 29 U.S.C. § 621(b) (1982). See also note 5 *supra* and accompanying text.

58. The legislative history did not set out the general standard for determining BFOQs until 1977. "Congress, in considering the 1978 Amendments, implicitly endorsed the two-part inquiry identified . . . in the *Tamiami* case." *Criswell*, 472 U.S. at 415. Senator Javits explained partially through the insertion of portions of S. REP. NO. 493, 95th Cong., 2d Sess. 10-11 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 513-14, into the Congressional Record that a *Tamiami*-type standard should be used to determine whether age is a BFOQ. 123 CONG. REC.

question, most of the legislative history suggests that Congress intended that the ADEA would require an analysis of a plaintiff's particular job duties under the BFOQ test.

Congress intended the BFOQ exception to be narrow. In discussing the exception, a House Report stated that "[t]he committee . . . expects that age will be a relevant criteria [sic] for only a limited number of jobs."⁵⁹ To be consistent with this intent, a court must not examine the job characteristics of the business or the occupation, but must consider only the job duties of the individual.⁶⁰ A broad application of the BFOQ defense that groups many distinct plaintiffs into a single category⁶¹ would endanger the very goals embodied in the ADEA. The Equal Employment Opportunity Commission⁶² promulgated regulations, authorized by the ADEA, that specifically mandate that the BFOQ "have [a] limited scope and application. [A]s this is an exception to the Act it must be narrowly construed."⁶³ This administrative interpretation runs parallel to congressional intent and is a model that the courts should accept.⁶⁴

34,319-20 (1977). The amendment specifically incorporating much of the *Tamiami* language was adopted by the Senate but ultimately deleted because the Conference Committee considered it surplusage. 472 U.S. at 415-16.

59. H.R. REP. NO. 527, 95th Cong., 1st Sess. 12 (1977). Senator Yarborough cited the safe, narrow example of the "pilot who flies a plane at many hundreds of miles an hour" as a situation in which age would be a BFOQ. 113 CONG. REC. 31,253 (1967). Yarborough did not suggest at what age these pilots might have to retire. See also 123 CONG. REC. 34,318 (1977) (statement of Sen. Javits). On the other hand, Senator Williams stated, "For some types of work, for example, law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age will be unable to continue performing their duties." 123 CONG. REC. 34,296 (1977). It is important to note that Williams refers to the nature of the duties (law enforcement activity) rather than to the business (the police force).

60. The Court in *Criswell*, 472 U.S. at 412 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)), found that "[t]he restrictive language of the statute, and the consistent interpretation of the administrative agencies charged with enforcing the statute convince us that . . . the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA."

61. See H.R. REP. NO. 527, 95th Cong., 1st Sess., pt. 1, at 26 (1977) (BFOQ described as "generally meant to exclude workers in hazardous occupations."); see also H.R. REP. NO. 527, 95th Cong., 1st Sess., pt. 1, at 28 (1977). This statement lends support to the *Mahoney* or *Janesville* analysis of examining broad categories of jobs rather than the individual employees; but this theme is absent from the rest of the legislative history.

To take specific language from legislative history as ultimately controlling, however, is unwise. When words are used to derive an overriding statutory theme that the writer or speaker did not intentionally express, an isolated portion of the legislative history that deals with the BFOQ exception may seem to contradict congressional intent.

62. Prior to 1979, the Department of Labor had responsibility for enforcing the ADEA. Department of Labor responsibilities were transferred to the EEOC by Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807, 92 Stat. 3781, set out in appendix 1 to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978).

63. 29 C.F.R. § 1625.6 (1985).

64. Courts tend to give a good deal of weight to EEOC regulations but vary as to their description of how much. See, e.g., *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 719 n.36 (1978) (the court will not give "conclusive weight to [an] EEOC guideline."); *EEOC v. Texas Indus.*, 782 F.2d 547, 551 (5th Cir. 1986) ("Although the EEOC's pro-

Almost every legislative statement about the purpose of the ADEA includes the theme that individuals should be judged by their abilities rather than classified through stereotypes. For example, the House Report for the 1977 amendments states that the "decline of capabilities experienced with age . . . varies with individuals as to age and intensity, varies in importance to particular jobs, and may be compensated for by other attributes which often increase with age, for example, experience and judgment."⁶⁵ The emphasis in these statements is on consideration of each particular individual and his or her job.

In *Western Air Lines v. Criswell*, the Supreme Court noted the preference for individual evaluation expressed in the language and legislative history of the ADEA.⁶⁶ *Criswell* summarizes the legislative history by observing that "one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. 'The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age.'"⁶⁷ *Criswell* also cites the Senate Report describing the BFOQ defense:

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 . . . periodic reviews of current job performance . . . the employees' capacity or ability to continue to perform . . . safely . . .⁶⁸

nouncement does not have the effect of law, . . . it is entitled to a measure of deference unless 'it can be said not to be a reasoned and supportable interpretation of the Act.' ") (quoting *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980)); *Weeks v. Southern Bell Tel. and Tel.*, 408 F.2d 228, 235 (5th Cir. 1969) (EEOC sex discrimination guidelines are "entitled to considerable weight." The court cited the *Udall v. Tallman*, 380 U.S. 1, 16 (1965), standard of "great deference to the interpretation given the statute by the . . . agency charged with its administration.").

65. H.R. REP. NO. 527, 95th Cong. 1st Sess., pt. 1, at 12 (1977). At the close of the introduction of the original bill, Senator Yarborough concluded: "To sum up, this is a bill to give every American the opportunity to be equally considered for employment and promotional opportunity." 113 CONG. REC. 31,253 (1967) (statement of Sen. Yarborough).

66. 472 U.S. at 422. The Court, however, did not discuss the issue of how to define "duties of the job" and did not mention *St. Paul*, *Janesville*, or *Mahoney*.

67. 472 U.S. at 409 (quoting U.S. DEPARTMENT OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT* 9 (1965)). It is interesting to note that some inconsistency in BFOQ cases has resulted from conflicting medical testimony as to whether physical examinations can reveal aging effects. The court in *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975), found that medical testing could not detect the relevant disabling effects. The *Tamiami* court agreed with this conclusion in a case also involving bus drivers. However, in *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977), the court ruled that medical testing can detect such effects in airplane pilots. See Comment, *supra* note 17, at 407-24; Recent Development, *Clarifying the Meaning*, *supra* note 17, at 1351 n.60.

68. 472 U.S. at 415 (emphasis added) (quoting S. REP. NO. 493, 95th Cong., 2d Sess. 10-11 (1977)), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 513-14). It is important to note that this statement differs from the test the Court ultimately adopted which uses the disjunctive

This wording suggests that the Senate intended that courts would analyze employees' particular job duties under the BFOQ defense.

C. Deference to States

Interpreting the ADEA to require an examination of each employee's individual job under the BFOQ defense is consistent with principles of federalism. Normally, public safety is the responsibility of state governments, which presumably best know how to serve the local population.⁶⁹ Also, courts generally defer to a state's "employment relationship with [its] citizens as a tool for pursuing social and economic policies."⁷⁰ The *Janesville* court emphasized judicial deference to the state's consideration of public safety as support for its broad definition of job duties for the BFOQ defense.⁷¹ The court reasoned that when a state legislature determines that public safety requires all police and fire department employees to retire at a certain age, a court should presume that determination to be valid.⁷²

Congress, however, enacted the 1974 amendments to the ADEA⁷³ precisely to limit states' freedom to establish age requirements for public safety personnel.⁷⁴ The deference to state legislatures relied on in

"or" to connect the safe performance of the duties of the job segment with the impracticality segment. See text at note 16, *supra*.

69. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § IB, at 269 (2d ed. 1983) (state action based on police power is upheld by the Supreme Court unless it interferes with interstate commerce).

70. EEOC v. Wyoming, 460 U.S. 226, 242 (1983) (Citing National League of Cities v. Usery, 426 U.S. 833 (1976) (overruled by *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985)) but upholding congressional exercise of power. *Garcia* cites *Wyoming* favorably; see note 74 *infra*). The Court, however, has been expanding judicial review of a state's employment practices. See generally Note, *Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment*, 1973 DUKE L.J. 1037, 1047-53. The 1986 Amendments to the ADEA temporarily suspend restrictions on states for the purposes of hiring and mandating retirement of firefighters and police officers. See note 10, *supra*.

71. *Janesville*, 630 F.2d at 1258-59. The court cited a Wisconsin statute which mandated retirement of protective service employees at age 55. 630 F.2d at 1259; see note 23 *supra*.

72. The burdens of proof described in the *Janesville* opinion are inconsistent. The *Janesville* court stated that the burden of establishing that the retirement programs falls within the BFOQ exception is on the city, yet the court also upheld the presumption that the age requirements set by statute for a class of occupations is a valid BFOQ. See EEOC v. City of St. Paul, 671 F.2d 1162, 1166 n.6 (8th Cir. 1982) (citing *Janesville*); see also *McIlvanie v. Pennsylvania State Police*, 6 Pa. Commw. 505, 296 A.2d 630 (1972) (holding, inter alia, that because of judicial deference to the legislature, a police captain challenging a state statute requiring retirement at age 60 for almost all members of the force has the burden to show that age is not a BFOQ).

73. Pub. L. No. 93-259, sec. 28(a)(2), 88 Stat. 74 (1974) (codified as amended at 29 U.S.C. § 630(b) (1985)).

74. Congress has this authority under the commerce clause. EEOC v. Wyoming, 460 U.S. 226, 243 (1983). In 1985, *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), overruled *National League of Cities* by lowering any constitutional barrier to Congress' exercise of its commerce clause power to extend the requirements of the Fair Labor Standards Act to the states. The *Garcia* court stated that "[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" *Garcia*, 469 U.S. at 554 (quoting

Janesville thus is inconsistent not only with the purpose of the 1974 amendments,⁷⁵ but also with federal case law upholding Congress' power to regulate states' employment practices. The Supreme Court considered the question of federalism and the ADEA in *EEOC v. Wyoming*.⁷⁶ In *Wyoming*, the Court upheld the 1974 amendments and limited the deference federal courts must show to state and local determinations with respect to public employee retirement policies. Because the state employees in *Wyoming* were game wardens, the Court did not address directly the state deference issue with regard to public safety. Lower courts have interpreted *Wyoming* as a broad endorsement of the application of the ADEA to state and local protective service employees, and have not deferred to state determinations unless those determinations are supported by sufficient evidence.⁷⁷ The court in *Mahoney* observed that *Wyoming* stressed "the nature of the burden on or interference with state policy constituted by the ADEA."⁷⁸

In the area of police and fire protection, a court should defer to the state's safety goals but must not uphold discriminatory means of achieving those goals.⁷⁹ Although a retirement and pension system that does not consider particular job duties may be more convenient

Wyoming, 460 U.S. at 236). The 1974 amendment provisions governing these cases have been temporarily suspended by the 1986 amendments. See note 10, *supra*.

75. Casenote, *EEOC v. City of Janesville: Promoting Age Discrimination — The Exception Becomes the Rule*, 14 J. MARSHALL L. REV. 904-15 (1981) (arguing that deference to state legislature defeats the purpose of the ADEA by permitting a broad BFOQ exception to swallow the rule); Note, *Scope of the BFOQ*, *supra* note 17 (based on deference to the state legislature, a broad BFOQ exception undermines the purposes of the ADEA).

76. 460 U.S. 226 (1983).

77. No ADEA cases after *Wyoming* defer to state and local governments. Courts have not distinguished the extent of involvement in public safety of game wardens from police officers or fire fighters. The courts in the following cases gave no deference to state and local determinations of age qualifications. *EEOC v. City of Altoona*, 723 F.2d 4 (3d Cir. 1983) (city decision pursuant to state court decree setting a mandatory retirement age for five department members), *cert. denied*, 467 U.S. 1204 (1984); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983) (state policy setting maximum hiring age); *EEOC v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983) (city policy setting maximum hiring age for pilots in sheriff's and fire departments), *cert. denied*, 464 U.S. 1073 (1984); *EEOC v. County of Allegheny*, 705 F.2d 679 (3d Cir. 1983) (state statute setting maximum hiring age for police officers); *Hahn v. City of Buffalo*, 596 F. Supp. 939 (W.D.N.Y. 1984) (state statute setting maximum hiring age for police officers), *affd.*, 770 F.2d 12 (2d Cir. 1985); *Mahoney v. Trabucco*, 574 F. Supp. 955 (D. Mass. 1983) (state statute setting mandatory retirement age for state police), *revd.*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984).

78. 738 F.2d at 41. "Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC v. Wyoming*, 460 U.S. at 239.

79. "[T]he 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." *Wyoming*, 460 U.S. at 240 (emphasis in original). Unlike *Wyoming*, *Janesville* permits a means to protect the public, even if that means is discriminatory. *Janesville* cited no authority to justify its broad deference to the state legislature. 630 F.2d 1254, 1258-59.

for a state to administer, requiring individualized consideration would hardly force a state to abandon its public policy objectives.⁸⁰ Congress may prohibit discrimination against older persons, even if it means that the state will find its public safety standards costlier to meet.⁸¹

One practical reason not to give deference is that legislatures may adopt a retirement age as a political compromise rather than as a scientifically established necessity.⁸² A political compromise cannot be considered a reasonable necessity⁸³ for the protection of the public if it is not based on a demonstrable medical rationale. Courts should not defer to such choices but must be willing to examine the legislative record to determine whether a legislature had a rational basis for its retirement determination. In applying a rational basis test (the first prong of *Criswell-Tamiami*), the court would have to decide whether the retirement age was rational with respect to the individual's position, his rank, or his occupation.⁸⁴

Furthermore, deference to the state's choices is inconsistent with the employer's burden of proof under the BFOQ defense.⁸⁵ When a public service employee sues his state employer, any deference the court gives the state translates into a reduced burden of proof for the state. This would increase the difficulty a public employee would have in maintaining a case against his employer. It is not in keeping with

80. *Criswell* settled the issue of deference to the employer's decision where public safety is a concern of a private business. The Court found erroneous jury instructions that prescribed deference to the employer's "selection of job qualifications for the position of [flight engineer] that are reasonable in light of the safety risks." 472 U.S. at 419; see text at notes 93-94 *infra*.

81. See, e.g., *Garcia*, 469 U.S. at 550-55 (the minimum-wage requirements imposed by Congress and upheld by the Court resulted in greater cost for the San Antonio Metropolitan Transit Authority). The political logrolling process may make additional expenses for states more palatable to legislators and also may provide states with revenues from federal grants. See *Wyoming*, 460 U.S. at 241 ("[I]ncreased costs, even if they were not largely speculative . . . might very well be outweighed by a number of other factors . . .").

82. For instance, in *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976), the mandatory retirement age "arose out of collective bargaining and political agreements . . . [and was not based on] actual studies or empirical data indicating the relevance of the age 62 to the occupational requirements as compared with, say, age 65." 414 F. Supp. at 460.

83. The ADEA requires that a BFOQ be "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (1982 & Supp. II 1984).

84. If a good-faith judgment, based on a loose fit between the needs of the job and the effects of age, were enough to bring a mandatory retirement policy within the shelter of section 623(f)(1), the Act would have little bite. Older people in our society are not a despised and powerless minority; and mandatory retirement laws, rather than being manifestations of vicious, exploitative, or unreasoning prejudice, are for the most part efforts — crude and arbitrary perhaps but not malicious — to balance the costs of a fixed retirement age in sometimes forcing out perfectly fit employees with the benefits in avoiding individualized evaluations of fitness, evaluations both costly for the employer to make and potentially humiliating for the individual employee to receive.

Heiar v. Crawford County, Wis., 746 F.2d 1190, 1197-98 (7th Cir. 1984) (Judge Posner struck down a mandatory retirement age for police officers.), *cert. denied*, 472 U.S. 1027 (1985).

85. See note 11 *supra* and accompanying text. A defendant state agency has the best evidence of the basis of a retirement (or maximum hiring age) requirement that it imposes. A plaintiff, on the other hand, has the best evidence of the duties of his job.

the spirit of the ADEA to require a plaintiff to produce medical and statistical evidence to show that a mandatory retirement age is invalid.⁸⁶

D. Public Safety Concerns

The strongest argument against analyzing the particular duties of an employee is that it endangers public safety. Under the particularistic analysis, a court judges an individual by standards that reflect the likelihood that he will be exposed to elements of physical stress.⁸⁷ The difficulty arises in formulating standards that take into account the small likelihood of exposure to strenuous activity that occurs in cases such as *Janesville*, *St. Paul*, and *Mahoney*. *Criswell* suggests that courts should use job descriptions to measure the likelihood that an employee will perform strenuous activity.⁸⁸ That would encourage employers to focus on the safety obligations included in each individual employee's duties. Unfortunately, it might encourage an employer to write misleading, over-inclusive job descriptions.

The narrow analysis must come to terms with the problem of a job that involves a very small likelihood of exposure to strenuous activity. When an employee's job exposes her to strenuous activity only one percent of the time, it is during precisely that one percent of the time that we are most concerned for public safety.⁸⁹ If the courts were to decide that the one percent chance of "active" duty gives rise to the same unascertainable physical qualification as a ninety-nine percent chance, then in most instances the narrow *St. Paul* analysis would col-

86. See note 11 *supra*.

87. Courts have done this by examining the history of a particular employee's involvement in strenuous activities and rejecting speculative probabilities of future involvement. *EEOC v. City of Minneapolis*, 537 F. Supp. 750, 754 (D. Minn. 1982) (court refused to consider, as too speculative, the impact of prospective changes in police department structure that would have caused plaintiff captains to assume more strenuous duty); see note 49 *supra*; *Mahoney v. Trabucco*, 574 F. Supp. 955, 962 (D. Mass. 1983), *rev'd*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984):

Commissioner Trabucco testified that he could not of course 'guarantee' that the plaintiff would not be reassigned. But the evidence indicates that the possibility of reassignment is quite speculative and, in my judgment, the chance that Sergeant Mahoney may be reassigned to a job for which age is a BFOQ is, on the evidence presented, of only limited importance in determining whether the state has sustained its burden of proof on the BFOQ defense.

88. "When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is [a BFOQ]." *Criswell*, 472 U.S. at 419 (rejecting employer's argument that age qualifications are reasonable based on the employer's subjective assertion).

89. In *Criswell*, the Court ruled that pilots too old to continue in that capacity could become flight engineers who do have "critical functions in an emergency situation and, of course, might cause considerable disruption in the event of [their] own medical emergency." 105 S. Ct. at 2747-48. The Court accepted the view, however, that individualized physical examinations were sufficient to detect this weakness in older flight attendants. See also *St. Paul*, 500 F. Supp. at 1141-42 (finding that age is a BFOQ for captains and firefighters but not for district chiefs who occasionally perform the same tasks as captains and firefighters); text at notes 29-33 *supra*.

lapse into a broad *Janesville* analysis. The resolution of this problem, then, may ultimately determine the scope of the BFOQ test and the outcome of the case.⁹⁰

A modified *St. Paul* standard that focuses on an individual's duties but grants employers flexibility in asserting a BFOQ defense where they can show, based on prior practice, that there is a small but more than speculative chance that the particular employee will be called on to perform strenuous duties, would mitigate this shortcoming.⁹¹ Such flexibility would not broaden the judicial definition of the job characteristics; the "duties of the job" would still be measured by the individual's own job. Rather, it would allow employers who could justify age discriminatory policies to retain a safe personnel structure.

Another common expression of the public safety concern focuses on the size of reserve forces to deal with unanticipated emergency situations: In order to have an adequate reserve, it is asserted, all public welfare employees should be fit enough to respond to an unexpected event.⁹² However, although a public safety organization must be

90. The *St. Paul* court failed to confront this difficult public safety question. The court answered concerns about the older district chiefs' physical ability to handle demanding aspects of their positions by stating that (1) a district chief engages in physically strenuous activities for only short periods of time, and (2) a court is able to measure a chief's ability to engage in strenuous activity. *St. Paul*, 671 F.2d at 1168. The brevity of the chief's responsibility does not sufficiently quell safety concerns because during these short, infrequent periods of strenuous activity the chief's inability to perform may cost lives. The *St. Paul* SWAT team analogy, 671 F.2d at 1166, quoted in text at note 36 *supra* (dispatchers need not be fit to serve on a SWAT team), misses the point because a dispatcher is not required to engage in physically strenuous activity at any time. A district chief could be called upon to engage in a task similar to what a SWAT team member would do. Even if a district chief's duties include only infrequent strenuous physical activity, then the chief cannot fully meet the demands of his position if he is too old to withstand those episodes.

The court's second answer is even more problematic. The district court found that the city failed to show either that the district chief was unable to perform the duties of his job, or that it was impractical to determine whether he was unable to perform the duties of his job. The court did find that the city made that showing for captains and firefighters. *St. Paul*, 500 F. Supp. at 1141-42 (finding of fact number 42). The court implicitly states that characteristics other than age that preclude safe performance of physically strenuous tasks cannot be ascertained in firefighters and captains, but can be ascertained in district chiefs. The court must have believed that the occasional strenuous physical activity performed by district chiefs is of a different quality than that performed by the firefighters and captains. 500 F. Supp. at 1139 ("District Chiefs are expected to, and do, perform less demanding work than Captains and Firefighters.").

91. Employers can show that employees' duties involve a small chance of strenuous activity by refining job descriptions and duties. *Cf. Criswell*, 472 U.S. at 419. See note 88 *supra* and accompanying text.

92. *Cf. Mahoney v. Trabucco*, 738 F.2d 35, 39 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984); *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980).

In *EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986), the court upheld a mandatory retirement age of 60 because the City had made a sufficient showing to support a BFOQ defense despite the City's practice of permitting retired officers to

work part time for the police force on an on-call basis. . . . Although there was expert testimony at trial that a retired special officer could be called upon to perform the same duties as a regular police officer, the two officers who testified that they had accepted such employment stated that their only assignments as retired special officers had consisted of directing traffic. . . .

798 F.2d at 531.

somewhat flexible, it need not have interchangeable personnel. Literature on police administration does not stress the interchangeability of paramilitary organizations that *Mahoney* indicated was so important.⁹³ The realities of modern police and fire protection require, instead, increased specialization in highly technical areas.⁹⁴

A requirement that all specialists be fit for physically strenuous duties is not reasonably necessary to fulfill the safety goal and is discriminatory. For the unpredictable disasters that may require a great amount of physical resources, a reserve system of able-bodied men and women may meet the need. To force each specialist and supervisor within police and fire units to meet age requirements that are only BFOQ's for front-line emergency work does not buttress a bulwark for the public welfare. In fact, public safety is enhanced by allowing experienced and committed employees to serve in their positions longer. Any management problems inherent in a personnel structure in which older, more experienced specialists and supervisors cannot be substituted for other personnel are small compared to the benefits of the increased talents of the overall team.⁹⁵ For instance, in times of disaster, a telecommunication hub is crucial to save lives and property. Massachusetts may well be better off with the experienced Sgt. Mahoney running the hub than with a younger officer who would be able to perform more strenuous physical tasks.⁹⁶ Public safety does not require employees to possess abilities that they will not be called on to use.

93. *Mahoney*, 738 F.2d at 38-39; see also M. BROWN, *WORKING THE STREETS* (1981); O. WILSON & R. McLAREN, *POLICE ADMINISTRATION* (1972). Political scientist Michael K. Brown notes that:

[M]any observers of the police are fond of citing the quasi-military characteristics of police bureaucracies as the most notable feature of contemporary departments, and police administrators frequently attest to the superiority of this form of organization. Yet the analogy between police departments and the military, despite its appeal, is quite misleading. A quasi-military structure is not really suited to the requirements of the police task nor is it completely descriptive of the actual structure of a police department.

M. BROWN, *WORKING THE STREETS* 87 (1981). The American Bar Association's Standing Committee on Association Standards for Criminal Justice has written the following standard for police department organization:

More flexible organizational arrangements should be substituted for the semimilitary, monolithic form of organization of the police agency. Police administrators should experiment with a variety of organizational schemes, including those calling for substantial decentralization of police operations, the development of varying degrees of expertise in police officers so that specialized skills can be brought to bear on selected problems, and the substantial use of various forms of civilian professional assistance at the staff level.

STANDARDS FOR CRIMINAL JUSTICE Standard 1-7.7 (1986).

94. See O. WILSON & R. McLAREN, *supra* note 93, at 81-86 for a discussion of specialization in police administration.

95. Special operational problems such as riots are often handled by specially trained task forces. O. WILSON & R. McLAREN, *supra* note 93, at 436-37.

96. See note 42 *supra* and accompanying text.

E. Other Policy Considerations

Simplicity is a virtue, and the narrow and simple analysis in which courts examine the duties of each individual employee is easiest for courts to apply. The *Janesville* and *Mahoney* standards rely on categorizations that force courts to define such elusive concepts as the “generic class” of employees or the “vocations” within a business.⁹⁷ The opinions in these cases are rife with discussion of the definitions of these categories.⁹⁸ By concentrating on rules for categories, instead of analyses of basic principles, courts lose sight of the fulcrum where Congress intended the public interest in safety to balance the employee’s statutory right to be free from stereotyping and discrimination. An analysis of each individual’s job description avoids intermediate categorizations.

The narrower definition of “duties of the job” is clearly defined — a court must determine what it is that the plaintiff does in *his* job.⁹⁹ When the inquiry is expanded to include various categories of jobs, it enters a gray area. The *Janesville* court, for example, defined the business as the police department without discussing why it made this choice. The absence of any logical limits to the definition may lead to absurd results. Another court may just as well define the business as that of a municipality, thus drastically altering the definition of the “duties of the job.”

Another concern is that an individualized analysis will allow fewer employees to fall within the BFOQ exception, making it increasingly difficult for states and municipalities to manage their public safety agencies.¹⁰⁰ As certain specialties are freed from mandatory retirement rules, they may become more popular. For instance, if Sgt. Mahoney had won his suit, the telecommunication assignment might have become more attractive to his fellow sergeants seeking to avoid the mandatory retirement age. Any management problems this might cause¹⁰¹ could be mitigated by increasing job incentives for strenuous assignments to compensate officers who will be forced to retire.¹⁰²

97. *Janesville*, 630 F.2d at 1258; *Mahoney*, 738 F.2d at 39.

98. *Mahoney*, 738 F.2d at 38-39 (defining “occupation” and “vocation”); *Janesville*, 630 F.2d at 1258 (defining “business” and “position”).

99. See notes 87-91 *supra* and accompanying text for a discussion of the problem of incorporating a small likelihood of physically strenuous duties into a job description.

100. *Mahoney*, 738 F.2d at 38.

101. *Mahoney*, 738 F.2d at 38.

102. A concern with any standard is that it will let loose a flood of litigation as employees sue to keep their jobs. See *Mahoney*, 738 F.2d at 38. The proposed narrow analysis may seem at first to encourage litigation because it considers each plaintiff’s individual situation, while with a broad *Janesville* standard, a single ruling on the BFOQ issue might settle many plaintiffs’ claims. Also, the narrow analysis would allow fewer BFOQ exceptions. In a regime with many BFOQ exceptions, plaintiffs would sue less frequently because they would have less chance of winning. However, once the initial wave of cases is decided, the particularized analysis is not likely to

CONCLUSION

The ADEA stands for the principle that employment decisions must be based on ability rather than on age stereotypes. In situations in which public safety is at stake and an employer cannot determine an employee's fitness through individual testing, the law has carved out a narrow exception to this principle. Although the Supreme Court has adopted a test to determine when the narrow BFOQ exception is satisfied, there are conflicting theories about what group of employees' job duties a court must examine when applying the test.

An analysis of an employee's particular activities is the proper scope of examination to determine what constitutes the "duties of the job" in the context of the *Tamiami* test adopted in *Criswell*. To expand the scope of examination is to ignore Congress' underlying goal in passing the ADEA to protect the employees from categorizations that do not reflect either their individual abilities or the demands on those abilities.

The statutory history of the ADEA suggests a narrow scope for the BFOQ defense. Serious problems arise in applying the narrow scope to job responsibilities that entail a small probability that strenuous work will be done. In order to maintain organizational flexibility for emergency responses, the scope must be wide enough to permit employers to show, through job descriptions and prior practice, that such small likelihoods actually occur. Public safety is served by setting high standards for the individual to meet, and not by stereotyping employees by age or classifying them by their occupational allegiance. The 1986 ADEA amendments require the EEOC and the Department of Labor to study tests which may determine the ability and competency of individuals to carry out certain strenuous public safety activities.¹⁰³

Our judicial process is designed to resolve disputes between two parties. As a result, when courts are asked to adjudicate the rights of a discrete class, such as the elderly, the court focuses on a single, named plaintiff. By concentrating on justice for the individual rather than broad policymaking for the class, courts may remedy discrimination and avoid creating new stereotypes to be applied across a large group of people. The right of older Americans to work is ensured by the consistent application of the ADEA antidiscrimination principles to each employee who complains of age stereotyping. To enhance the fairness of its decisions, the judicial system must tailor a scope of analysis that complements its ability to apply antidiscrimination standards. The examination of the particular duties of the job of the individual

generate more suits than the other analyses. The faster the law stabilizes and becomes predictable, the less litigation will arise.

103. See note 10 *supra*.

employee, rather than of a class of employees, creates such a complementary system.

— *Robert L. Fischman*