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NOTES

NO PLACE TO GO AFTER 60: THE PLIGHT OF PILOTS AND FLIGHT ENGINEERS IN THE AIRLINE INDUSTRY

I. INTRODUCTION

These are turbulent times for airline pilots and second officers due to the industry's deregulation in 1978.1 "Cut-throat" competition2 and brutal price wars have forced established airlines to cut costs by reducing their staffs and mandating the retirement of senior members at age sixty. As an alternative to retirement at this age, some pilots have tried to downbid3 to the position of flight engineers (also entitled second officers).4 When their employers have refused to fulfill their downbid requests, the pilots have brought actions under the Age Discrimination in Employment Act (ADEA) of 1967.5 The

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2. Id. Fourteen non-union jet airlines have emerged that pay their flight crew a fraction of union wages.
   (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;
      (2) 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; or
      (3) to reduce the wage rate of any employee in order to comply with this chapter.
See The legislative history of the ADEA as presented in the following materials: H.R. REP. No. 805, 90th Cong., 1st Sess. (1967); S. REP. No. 723, 90th Cong., 1st Sess. (1967); Age
Act forbids involuntary retirement based on the age of an employee who is within the protected age group of forty through seventy. The purpose of this Act is to “promote employment of older persons based on their ability rather than age” and “to prohibit arbitrary age discrimination in employment” with respect to compensation, terms, conditions or privileges of employment.

The plaintiff in an ADEA action must meet three requirements in order to establish a prima facie case. The plaintiff must show: first, that he was terminated at an age between forty and seventy; second, that there was a vacancy in the position he sought; and third, that he was qualified for that position. The alternative method of establishing a prima facie case is by proving a discriminatory motive from the fact that the employer is treating one group of employees differently from another. This may be accomplished in two ways. The first is by use of the disparate treatment theory, whereby the plaintiff must show that an employer intentionally treats one group of employees less favorably than another based on their race, age or sex. In that instance a discriminatory motive on the part of the employer must be proven. The second is by use of the disparate impact theory, whereby the plaintiff must show that a neutral rule imposed by the employer affects individuals in a protected class more harshly than others and that such rule is not justified by business necessity. Under this theory, discriminatory motive need not be


7. 29 U.S.C. § 621(b) (1982). See Note, Houghton v. McDonnell Douglas Corporation: Age Discrimination and Test Pilots, 23 St. Louis L.J. 187 (1979). The ADEA was passed in response to the need for national legislation to eliminate discriminatory employment practices which precluded applicants from job opportunities due to arbitrary age prerequisites. The ADEA was advocated by President Lyndon Johnson in his Older Americans Message of January 23, 1967. The legislation was to put an end to arbitrary age limits on hiring and to increase opportunities for Americans 45 years of age and older. The Labor Department's interpretive bulletin states that the purpose of the ADEA is to insure that age is not a determining factor in any decision regarding hiring, dismissal or promotion. “In recent years, however, litigation involving the Act has become increasingly more active.” Id. at 191.


9. Air Line Pilots Ass'n Int'l, 713 F.2d at 952.


11. Criswell, 709 F.2d at 554.

12. Id. at 552.
proven. Under both the disparate treatment and disparate impact theories, after the plaintiff establishes a prima facie case, the defendant must produce a legitimate, non-discriminatory reason for the challenged employment action. Finally, the plaintiff must prove the proffered reason is merely a pretext for discrimination.

As a defense to plaintiff's prima facie case, employers will often assert one of the three exceptions to the ADEA's general rule prohibiting the termination of an employee based on age. They are the "bona fide seniority system" defense, the "bona fide occupational qualification" defense (BFOQ) and the "reasonable factors other than age" defense (RFOTA).

The outcome of an ADEA action may depend on such arbitrary factors as the circuit in which the original suit is brought, and whether the plaintiff bringing the action works for a commercial or noncommercial airline. This note examines the standards of proof required of plaintiff pilots and second officers by different circuit courts and the varying results which have occurred due to inconsistent standards. The subsequent sections propose a uniform and equitable method of dealing with these cases which would avoid the inconsistent results that pilots and second officers presently face.

II. BACKGROUND

Since 1960, the Federal Aviation Administration (F.A.A.) has mandated that no captain or first officer older than age sixty pilot a commercial airliner. This rule was promulgated primarily to protect against the risk of a pilot's sudden incapacitation during a flight, due to a heart attack or stroke. The major justification for the rule was the apparent inability of medical diagnostic tests to indicate accurately the physiological and psychological degenerative changes in pilots over sixty.

However, the F.A.A. has not imposed any such age limitation
on flight engineers. They do not fly the planes but rather perform such tasks as interpreting approach charts, adjusting the engine throttles and monitoring the mechanical and electronic functioning of the airplane during a flight. Additionally, while captains are required by the F.A.A. to have first class medical certificates, the flight engineers need only second class medical certificates.

As an alternative to retiring at age sixty, some pilots have tried to downbid to the position of flight engineer. In accordance with the F.A.A. regulations, they could continue to work past age sixty in this position, although their salaries would be lower.

III. COURT RULINGS

In Air Line Pilots Association International v. Trans World Airlines, Inc. (ALPA), three crew members were mandatorily retired at age sixty. In addition, their downbid requests were denied because TWA claimed there were no flight engineer vacancies between the time the pilots elected to downbid and the time of their sixtieth birthdays. The crew members brought an action under the

20. Air Line Pilots Ass'n Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 945 (2d Cir. 1983). On the television show “60 Minutes”, Harry Reasoner interviewed Raymond Fay, a Chicago lawyer involved in fighting for the rights of older pilots. Fay stated that the leading causes of in-flight incapacitations were stomach ailments, flus and viruses, and that the number of heart attacks in the air was infinitesimal and that they occurred at all ages. Reasoner then noted that pilots who are recovering alcoholics or who have had major surgery are permitted to fly, and that although the F.A.A. is able to monitor such health conditions it does not also monitor the conditions which accompany the aging process. Fay replied that pilots with serious eye problems, heart problems and psychiatric problems of all kinds are permitted to continue their employment, presumably because the F.A.A. has the means to closely monitor and evaluate these conditions, and that he believed they could monitor aging as well. Weinberg, “This Was Your Captain Speaking,” 60 Minutes, Volume XVI, Number 41 (June 24, 1984).


23. See supra note 4 and accompanying text.

24. See supra note 20 and accompanying text.


26. Id. at 1228.

27. Id. at 1229.

Under [the working agreement] procedures a captain or first officer approaching 60 years of age was required to complete his downbid with an effective date as a flight engineer before he reached 60 years or else face mandatory retirement and removal of his name from the seniority list upon his reaching 60 years. Since the downbidding captains or first officers first had to pass the FAA (sic) written examination for flight engineer and then wait until a flight engineer vacancy opened up before his bid would become effective, the procedure forced captains and first officers desiring to continue as flight engineers after 60 to downbid well before they
ADEX.28

As plaintiffs, the crew members had the burden of establishing the prima facie case29 in one of two ways. The district court in ALPA set forth the requirements of the older method, commonly referred to as the McDonnell-Douglas formula. Under this method the plaintiff must show that (1) he was a member of the protected age group; (2) he was terminated; (3) there was a vacancy in the position sought at the time he applied; and (4) he was qualified for that position.30 Once the plaintiff has met his burden, the possibility that he was fired for a legitimate reason, such as lack of proper qualifications, is eliminated.31

The ALPA district court found that the McDonnell-Douglas requirements had not been met, because the crew members were unable to prove there were any flight engineer vacancies when they applied for their transfers.32 Therefore, the district court held that they did not establish a prima facie case.33 The appellate court reversed, relying on McDonnell-Douglas Corp. v. Green,34 in which the Supreme Court specifically stated that the formula was not necessarily applicable in all respects to different factual situations.35 If the courts did strictly adhere to the formula, substantially fewer plaintiffs would be able to overcome their burden of establishing a prima facie case.36 Such a result would defeat the ADEA's purpose of prohibiting employers from arbitrarily terminating employees based on age.37 The appellate court found that the use of the McDonnell-Douglas formula was inappropriate because the plaintiffs had established direct proof of age discrimination in that captains disqualified

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reached 60 or lose out altogether.

Most of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60. However, several, including plaintiff-appellant Harold Thurston, turned 60 between April 6 and September 1, 1978, when there were no flight engineer vacancies. Hence, they could not secure a flight engineer bid before their 60th birthdays. Accordingly, they were mandatorily retired and their names were removed from the seniority list.

713 F.2d at 946.
29. Id.
30. Id.
31. ALPA, 713 F.2d at 952.
32. ALPA, 547 F. Supp. at 1229.
33. Id.
34. 411 U.S. 792 (1973).
35. ALPA, 713 F.2d at 952.
36. See Loeb v. Textron, 600 F.2d 1003, 1014 (1st Cir. 1979).
37. See supra note 7 and accompanying text.
for reasons other than age were allowed to displace lower officers. 38 Thus, the plaintiffs were able to use the disparate treatment theory 39 to prove circumstantially their employers’ discriminatory practices. 40

Once a prima facie case is established, the burden shifts to the defendant who must then show he had a legitimate nondiscriminatory reason for rejecting the employee’s request to downbid. 41 In ALPA, TWA rebutted the plaintiffs’ prima facie case by asserting that its employment practices were part of a bona fide seniority system and, therefore, legitimate under the ADEA. 42 The district court held that the denial of flight engineer status to pilots resulted not from discriminatory treatment based on age, but from the neutral application of the bona fide seniority system. 43 The district court stated that the plaintiffs were terminated solely because they reached age sixty while in the pilot status and under F.A.A. rules such a procedure was mandated. 44 However, the appellate court ruled that the pilots were not challenging the operation of the seniority system but their exclusion from it at age sixty. 45 It stated that the mandatory retirement from the company of those captains who were sixty years old was in “no way mandated by the negotiated seniority system.” 46 The system did not, and lawfully could not, specify that pilots who attain the age of sixty must be severed. 47 Such a result is not mandated by the F.A.A. 48 Such a severance would be mandatory retirement based on age which would violate the ADEA. Therefore, the appellate court concluded that the bona fide seniority system defense was not available to TWA as a matter of law. 49

38. ALPA, 713 F.2d at 952.
39. See supra note 10 and accompanying text.
40. ALPA, 713 F.2d at 952.
41. ALPA, 547 F. Supp. at 1229.
It shall not be unlawful for an employer . . . 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.
Id.
43. ALPA, 547 F. Supp. at 1231.
44. Id. at 1231. Since there were no vacancies in the flight engineer position when the plaintiffs retired, the court stated that TWA was not obliged to offer the plaintiffs positions that did not exist; “nor was it obligated to keep them on as dormant employees until openings in the Flight Engineer Status arise.” Id. at 1230.
45. ALPA, 713 F.2d at 953.
46. Id.
47. Id.
48. Id.
49. Id.
In *ALPA*, TWA asserted a second defense commonly used by the airline industry. The company claimed that the ADEA's prohibition against age discrimination does not apply where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business. TWA argued that because an age of less than sixty is a lawful BFOQ for captains who continue as pilots, the airline could preclude captains who are age sixty or older from downbidding to positions where age is not a BFOQ.

The appellate court stated that the BFOQ is an extremely narrow exception to the prohibition against age discrimination, and, as such, must relate to the ability of the employee to perform his assigned job. Therefore, the court concluded that the BFOQ could not be established "without proof relating to the inability of medical science to predict on an individual basis, the likelihood that a pilot who has reached age sixty will become incapacitated during a flight."

The House report on the ADEA states that employers are not

50. 29 U.S.C. § 623(f)(1) (1976). It shall not be unlawful for an employer, employment agency, or labor organization 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.

_id_.


52. ALPA, 713 F.2d at 954. The lower court stated that "because the F.A.A. has seen fit not to place Flight Engineers within the scope of the Age Sixty Rule, ALPA cannot effectively argue that mandatory retirement at age sixty is a bona fide occupational qualification for Flight Engineers." 547 F. Supp. at 1227.

53. ALPA, 713 F.2d at 954. The court emphatically added that because the BFOQ provision creates an exception to the statute's general prohibition against discrimination based on age, it may only be invoked if an employer proves "plainly and unmistakably" that its employment practice meets the "terms and spirit" of the remedial legislation. *Id.*

54. ALPA, 713 F.2d at 951 (quoting Tuohy v. Ford Motor Co., 675 F.2d 842, 846 (6th Cir. 1982). The appellate court in ALPA stated that "the evidence is overwhelming that an Age 60 Rule for flight engineers is not reasonably necessary to insure safety standards and that ALPA's claim to the contrary must be rejected." 713 F.2d at 949.

As of February 1982, TWA employed approximately 130 flight engineers over the age of 60. ALPA has pointed to no evidence indicating that an airline accident has ever been caused by the incapacitation of any flight engineer, including one over the age of 60. The first officer, and sometimes an additional International Relief Officer, is always present to take over the flight controls in case the captain becomes incapacitated.

713 F.2d at 949-50.
required to provide special jobs, part-time employment, retraining and transfers to less physically demanding jobs so that older workers could remain employed.\textsuperscript{55} However, the appellate court in \textit{ALPA} stated that TWA must treat older captains the same as younger ones who become unable to fly for non-age related reasons.\textsuperscript{56} The court noted that TWA retained and relocated all employees who were over sixty except captains and first officers.\textsuperscript{57} That action was deemed a violation of the ADEA.\textsuperscript{58} Nevertheless, the court did make clear that an “employer can lawfully retire an employee because he is beyond the age established as a BFOQ for his position provided that, unlike the situation here, the employer’s refusal to consider the employee’s request for alternative assignments is not discriminatory.”\textsuperscript{59}

Forcing employers to retain every individual who is beyond the age established as a BFOQ would be senseless and an unfair burden. Employers may not be able to afford such a program or may have to retain more employees than are needed to fill existing vacancies. However, the court was correct in stating that, if the employer does decide to retrain and transfer any individuals, he is mandated by the ADEA to include in such a program those over the BFOQ age. If he does not, younger employees would receive preferential treatment.

In a similar situation, DC-10 pilots in \textit{Criswell v. Western Air Lines, Inc.},\textsuperscript{60} sued Western because the airline refused to allow their sixty-year-old captains to downbid to the position of flight engineer.\textsuperscript{61} In addition, Western imposed a mandatory retirement age of sixty upon the flight engineers.\textsuperscript{62} The plaintiffs in \textit{Criswell} used the \textit{disparate impact} theory\textsuperscript{63} to establish a prima facie case.\textsuperscript{64}

The pilots argued that although Western’s rule prohibiting all downbidding seemed on its face to affect both younger and older pilots equally, it operated to deprive the older pilots of the opportunity for continued employment because they had to retire. The rule had no such effect on the younger pilots,\textsuperscript{65} who were able to continue to work as pilots even though they could not downbid.\textsuperscript{66} Western at-

\textsuperscript{55} H.R. REP. No. 527, 95th Cong. 1st Sess. 12 (1978).
\textsuperscript{56} ALPA, 713 F.2d at 954.
\textsuperscript{57} Id. at 955.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} 709 F.2d 544 (9th Cir. 1983).
\textsuperscript{61} Id. at 546.
\textsuperscript{62} Id.
\textsuperscript{63} See supra note 12 and accompanying text.
\textsuperscript{64} Criswell, 709 F.2d at 552.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
Pilots and Flight Engineers

tempted to justify its rule by asserting that due to business necessity (i.e. safety) the second officer position had to be filled by someone less than sixty years old.\textsuperscript{67} However, the jury was not persuaded by this affirmative defense.\textsuperscript{68} As noted earlier, flight engineers do not fly the planes, but rather monitor the equipment.\textsuperscript{69}

On appeal, Western contended that the district court did not correctly understand the law of the circuit, with regard to the BFOQ defense raised by the airlines.\textsuperscript{70} The appellate court disagreed and ruled that the jury instructions\textsuperscript{71} encompassed both the language and

\textsuperscript{67} Id. Western contended that the same reasons which support the Age Sixty Rule for pilots support its application to second officers. The testimony given in the district court was conflicting.

Western relied primarily on the expert opinion of a former FAA [sic] Deputy Federal Air Surgeon. His testimony was that the onset of at least certain diseases is age-related, that with advancing age the likelihood of onset of disease increases and that in persons over age 60 it could not be predicted whether and when such diseases would occur. In particular, he was concerned with the occurrence of a cardiovascular event, such as a myocardial infarction, in flight.

Criswell, 514 F. Supp. at 389.

On the other hand, plaintiffs' experts, a medical doctor of aerospace medicine and aging and a professor of psychiatry, specializing in the psychology of aging, cognition and gerontology, testified to the contrary. In their opinion, physiological deterioration is not caused by nor does it necessarily accompany aging between the ages of 60 and 70. There are a number of healthly individuals older than age 60 and it is not unusual for an individual over age 60 to be healthier than a much younger person. Deterioration is caused by disease and not by aging . . . . Plaintiffs' expert on aerospace medicine also testified that it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over age 60, were physically qualified to continue to fly.

\textsuperscript{68} Criswell, 709 F.2d at 552.

\textsuperscript{69} See supra note 21 and accompanying text.

\textsuperscript{70} Criswell, 709 F.2d at 549.

\textsuperscript{71} The challenged instruction reads:

If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defendant's defense that age is a "bona fide occupational qualification" for its Second Officers (flight engineers). This defense is usually abbreviated "BFOQ." The BFOQ defense is available only if it is reasonably necessary to the normal operation-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence-of Western's business is the safe transportation of air passengers.

The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.

One method by which defendant Western may establish a BFOQ in this case is to prove

(1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job.
the spirit of the Ninth Circuit law. The circuit had adopted the two pronged test initially used in the Fourth and Fifth Circuits. First, the job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of his business. The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure [safety].

Second, the employer must show that

[t]here is a factual basis for believing that all or substantially all persons over a certain age would be unable to perform the duties of the job safely and efficiently or that it is impossible or impractical to ascertain the difference between older employees who can and cannot perform the job safely.

Although there was evidence of accidents arising out of pilot incapacitations, there had never been an accident caused by the disability of a second officer. In addition, the plaintiffs presented two

safely, and

(2) that some Second Officers (flight engineers) over age 60 possess traits of physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.

In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978.


72. Criswell, 709 F.2d at 550.
73. Id.
74. Id. (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976) (emphasis in original). The Criswell appellate court noted that in formulating the “reasonably necessary” standard, the court in Harris v. Pan American World Airways, Inc., 649 F.2d 670, 677 (9th Cir. 1980) specifically rejected a test similar to the one advanced by Western. The Harris trial court found that Pan American had formulated “a reasonable general rule” which excluded all female flight attendants from working during pregnancy on the grounds of their possible disability during an emergency. The Harris court of appeals said that the flaw in the district court's standard is that it requires only that a BFOQ age policy be “reasonable” in light of the safety factor rather than “reasonably necessary.” The Harris appellate court concluded that adoption of such a standard in that case would unnecessarily broaden the BFOQ defense, which the Supreme Court characterized in Dothard v. Rawlinson, 433 U.S. 321, 344 (1977) as an extremely narrow exception to the prohibition of discrimination based on sex. Criswell, 709 F.2d at 550.

75. Criswell, 709 F.2d at 551.
76. Id. at 552. The evidence also showed that half of the pilots in the U.S. are flying for major airlines which do not require second officers to retire at the age of 60 and that there are over 200 such second officers currently flying in wide-bodied aircrafts. Id.
well-qualified experts, who testified that Western's *Age Sixty* policy was not necessary to assure that the second officers' tasks would be performed safely.\(^77\) The appellate court held that the district court properly refused to grant a judgment notwithstanding the verdict in favor of Western Air Lines because the above evidence amply supported the jury verdict.\(^78\) Therefore, Western could not demand that the second officer position be held by someone younger than sixty years of age.

The appellate court in *ALPA* ruled that the BFOQ defense could not be established without medical proof relating to the likelihood that a pilot over sixty will remain healthy and functional during a flight.\(^79\) Similarly, the *Criswell* appellate court ruled that an employer must prove that there is a factual basis for believing that substantially all persons over a certain age would be unable to do the job safely or that it is impossible to ascertain the difference between older and younger employees who can perform the job safely.\(^80\) Whether a plaintiff can or cannot defeat a BFOQ defense seems to depend upon which experts win the "battle of the experts" at trial. Such a result fosters unnecessary inconsistency in this area.

The position taken by the *ALPA* and *Criswell* courts regarding BFOQ proof standards is not without opposition. For example, the plaintiffs in *Monroe v. United Airlines* (UAL),\(^81\) three second officers, were involuntarily retired by UAL at age sixty.\(^82\) UAL contended that its age sixty policy was defensible as a BFOQ, whether or not the F.A.A. regulation and its *Age Sixty Rule* applied *ex proprio vigore* to UAL's second officers, because their policy was a self-imposed safety regulation.\(^83\) The plaintiffs alleged that United had not presented any facts to show that safety would be threatened by the elimination of its age sixty policy.\(^84\) The district court stated that in order to establish that branch of the BFOQ defense, UAL was required to demonstrate at trial that the age sixty policy had a "rational basis in fact."\(^85\) The court noted that businesses must be operated with the highest possible degree of safety\(^86\) due to the

\(^{77}\) *Id.* at 551.

\(^{78}\) *Id.* at 552.

\(^{79}\) *See supra* note 54 and accompanying text.

\(^{80}\) *See supra* note 75 and accompanying text.

\(^{81}\) 32 Fair Empl. Prac. Cas. (BNA) 1117 (N.D. Ill. 1979).

\(^{82}\) *Id.*

\(^{83}\) *Id.* at 1120.

\(^{84}\) *Id.* at 1123.

\(^{85}\) *Id.* at 1124.

\(^{86}\) *Id.*
hazards involved in the running of an airline business. Therefore, the
district court felt it must afford the employer substantial discretion
in selecting specific safety standards.\textsuperscript{87}

The same court went on to state that the F.A.A. \textit{Age Sixty
Rule} is premised on the notion that human physiological and psycho-
logical functions deteriorate with age, and the exact timing of the
process is not predictable.\textsuperscript{88} The court noted that this same process
applies to pilots, busdrivers and all other human beings including
\textit{second officers}.\textsuperscript{89} The court decided that UAL did not have to
"reinvent the wheel" in order to convince them that plaintiffs lacked
a reasonable probability of ultimately prevailing on the merits of the
case.\textsuperscript{90} Finally, the court concluded that UAL did not have to experi-
ment with the safety of its customers in order to present evidence
concerning the relationship between UAL's age sixty policy and its
accident rate.\textsuperscript{91}

The Monroe court's decision that the employer must show that the
\textit{Age Sixty Rule} has a "rational basis in fact" is even more ob-
scure than the standards used by the appellate courts in \textit{Criswell}
and \textit{ALPA}.\textsuperscript{92} Almost any rule made by an employer can have a rational
basis. In the airline industry, the employer will almost always assert
that the rational basis for its \textit{Age Sixty Rule} is "safety". The
Monroe court stated that the employer should have substantial dis-
cretion in selecting safety standards. However, such a standard gives
the employer too great an opportunity to discriminate against older
employees. For instance, an employer can create a "safety" standard
whereby each pilot must complete a physical fitness test which is so
difficult that only pilots between the ages of twenty-five and forty
could actually pass it.\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id. at} 1123. The court stated:
\begin{quote}
The FAA regulations are only minimal safety standards, which companies like UAL
are free to exceed in their internal rules and policies. The same medical considera-
tions which make it reasonable to suppose that it is safer for persons to cease serving
as pilots on UAL's commercial flights subject to the regulation under Part 121 of
the FAA regulations, 14 C.F.R. § 121.1 et. seq., when they reach their sixtieth
birthday make it reasonable to conclude that it would be safer to demand that per-
sons cease serving as UAL Second Officers on Boeing 747s when they reach that
same age.
\end{quote}
\textit{Id. at} 1121.
  \item \textsuperscript{89} 32 Fair Empl. Prac. Cas. at 1123 (emphasis added).
  \item \textsuperscript{90} \textit{Id.}
  \item \textsuperscript{91} \textit{Id. at n. 17}.
  \item \textsuperscript{92} \textit{See supra} notes 79, 80 and accompanying text.
  \item \textsuperscript{93} The appellate court recently held that the district court's jury instructions were erro-
neous. However, it did not specifically criticize those instructions on the same basis as the
\end{itemize}
In Johnson v. American Airlines, a majority of the plaintiffs were terminated as captains and co-pilots due to the Age Sixty Rule and they challenged their exclusion from the position of flight officers. American's defense was based on § 623(4)(f)(1) of the ADEA which provides that "[i]t shall not be unlawful for an employer to take any action otherwise prohibited [by the Act] . . . where the differentiation is based on reasonable factors other than age."

American contended that its refusal to allow "age-disqualified" pilots to serve as flight officers was based on "reasonable factors other than age" (RFOTA). Such factors include safety, the need to train pilots and the maintenance of the crew command concept. The court rejected American's RFOTA defense based on the evidence that younger pilots were permitted to downbid while older pilots approaching age sixty were not. The court accused American of disparate treatment. Additionally, the court stated that American's "reasonable factors" were too general and that the RFOTA defense ought to be used in only limited situations. For example, it would be an acceptable defense if an employer contended that an employee was not terminated or denied a downbid due to his age, but rather because of excessive absences, lack of physical fitness, general inabilities or other concerns.

Since the disparate treatment by American Airlines was triggered by age, the Johnson court properly interpreted the ADEA RFOTA exception when it ruled that it could not be used as a defense by American. American should have asserted the defense that their Age Sixty Rule was a BFOQ. This would have allowed them to deal with an entire class of people on an age related basis. American would then have had to justify its generalized treatment of older pilots.

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95. Id. at 1237.
96. Id.
97. Id. The definition of "crew concept" is the safe and effective operation of a three-man crew in a coordinated manner. See Smallwood v. United Air Lines, 661 F.2d 303, 306 (4th Cir. 1981).
98. 32 Fair Empl. Prac. Cas. at 1237.
99. Id.
100. Id. at 1238.
101. Id.
102. Id.
IV. NON-COMMERCIAL AIRLINES

The F.A.A. rule which requires a pilot to retire at age sixty applies only to pilots in commercial airlines. The burdens of proof regarding age discrimination for non-commercial airlines are just as inconsistent and vague as they are for commercial airlines.

In Tuohy v. Ford Motor Co., the plaintiff was employed as a pilot, pilot-in-command, and pilot trainer for Ford, a non-commercial airline. Although the F.A.A. rules did not apply to Ford, the company nevertheless adopted most of the F.A.A. regulations. Ford claimed it had adopted these regulations because it did not have the medical expertise to determine whether individual pilots would be subject to disabling medical problems in flight after the age of sixty. Tuohy produced an affidavit from an expert stating that reliable and accurate medical procedures did exist for testing a pilot's physiological and psychological health, independent of age. The lower court recognized the conflict in the evidence concerning the ability of medical science to make judgments concerning a particular pilot's state of health, apart from his age. The court concluded that where, as in the airline industry, safety is a major concern of a business, the ADEA requires no more of an employer than that the company's Age Sixty Rule be "reasonable." The district court found it immaterial that the F.A.A. chose not to apply the Age Sixty Rule to corporate as well as to commercial pilots, and that the F.A.A. did not apply the rule to its own employees. However, the appellate court stated that Title VII standards should not be applied automatically in ADEA cases. Instead, it

103. See supra note 18.
104. See supra notes 79-80, 92 and accompanying text.
105. 675 F.2d 842 (6th Cir. 1982).
106. Id. at 843.
107. Id.
108. Id.
109. Id.
111. Id. See Starr v. Federal Aviation Admin., 589 F.2d 307, 313 (7th Cir. 1978); Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975).
112. Id. at 264.
noted that when an employer seeks to justify denial of employment on the basis of a BFOQ, a particular inquiry into the effect of aging on the ability of a pilot to perform is necessary. The appellate court then reversed the district court and held that the proper standard on which to judge the legitimacy of a BFOQ defense was whether an Age Sixty Rule based on age considerations was "reasonably necessary," as opposed to merely "reasonable." The court added the caveat that the presence of an overriding safety factor might lead a court to conclude that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low. The court then remanded the case for further proceedings to determine whether the Age Sixty Rule was, in fact, reasonably necessary, and whether medical science can predict on an individual basis the likelihood that a pilot over the age of sixty will become incapacitated during flight.

In Gathercole v. Global Associates a plaintiff was discharged by an air transportation service when he reached age sixty. Global contended that the Age Sixty Rule, incorporated into Global's contract with the Army, was a BFOQ. Global claimed that it could not successfully bid for government contracts unless it accepted this term in its contracts for flight operation. However, the district court ruled that the BFOQ must relate to the "actual ability of the employee to perform his or her assigned job." Otherwise, discrimination of any type could be legitimated where it is economically profitable to discriminate.

Following the return of a jury verdict in favor of the plaintiff, the defendants moved for a judgment notwithstanding the verdict, or

After the defendant rebuts the presumption, the plaintiff must have an opportunity to persuade the trier of fact that the defendant's reason is actually a pretext for discrimination. Id. at 256. The Burdine court provided guidelines for the allocation of burdens in only Title VII cases. The majority of courts, however, have adopted the Burdine formula in ALPA jury trials. See e.g., Garner v. Boorstin, 690 F.2d 1034, 1036 (D.C. Cir. 1982); Halsell v. Kimberly Clarke Corp., 683 F.2d 285, 289 (8th Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981).

115. Id. at 845-46.
116. Id. at 845.
117. Id. at 846.
119. Id. at 1281.
120. Id. at 1282.
121. Id.
122. Id.
123. Id.
in the alternative, for a new trial.\textsuperscript{124} Their motion was denied.\textsuperscript{125} The district court used the same "reasonable necessity" standard as did the appellate court in \textit{Tuohy v. Ford Motor Co.}\textsuperscript{126} Although Global claimed that the medical evidence at the jury trial conclusively established that the \textit{Age Sixty Rule} was necessary, the district court held that the jury could reasonably have concluded that the rule was "not reasonably necessary to the essence of its business."\textsuperscript{127} The district court went on to state that Global "did not have a sufficient factual basis for believing that pilots past age 60 would be unable to perform their duties safely and efficiently."\textsuperscript{128} The court concluded that it would not be "highly impractical [for Global] to deal with pilots past age 60 on an individual basis."\textsuperscript{129}

The appellate court\textsuperscript{130} reversed the district court, not on the basis of the legitimacy of the "reasonable necessity" standard per se, but of the application of the standard to the particular facts of that case.\textsuperscript{131} The appellate court found that the \textit{Age Sixty Rule} was reasonably necessary to the normal operation of Global's business.\textsuperscript{132} The BFOQ was not determined solely by Global; it was a consequence of Global's contract with the Army\textsuperscript{133} which relied on the judgment and expertise of the F.A.A. in promulgating the \textit{Age Sixty Rule}\.\textsuperscript{134} The court stated that if Global had not followed the Army's official regulations, it could have been justly charged with breach of the contract.\textsuperscript{135}

V. \textbf{ANALYSIS OF \textit{Tuohy, Gathercole AND Monroe}}

The appellate court in \textit{Tuohy v. Ford} was technically accurate when it stated that the correct BFOQ standard to be used regarding safety considerations was "reasonably necessary" as opposed to merely "reasonable."\textsuperscript{136} The BFOQ exception to the ADEA specifically states that "it shall not be unlawful for an employer . . . to

\begin{itemize}
  \item \textsuperscript{124} Gathercole v. Global Assoc., 560 F. Supp. 642, 644 (N.D. Cal. 1983).
  \item \textsuperscript{125} \textit{Id}. at 648.
  \item \textsuperscript{126} 490 F. Supp. 258, 264 (E.D. Mich. 1980), rev'd on other grounds, 675 F.2d 842 (6th Cir. 1982) \textit{(quoted in Gathercole v. Global Assoc., 560 F. Supp. at 645).}
  \item \textsuperscript{127} Gathercole, 560 F. Supp. at 645.
  \item \textsuperscript{128} \textit{Id}.
  \item \textsuperscript{129} \textit{Id}.
  \item \textsuperscript{130} Gathercole v. Global Assoc., 727 F.2d 1485 (9th Cir. 1984).
  \item \textsuperscript{131} \textit{Id}. at 1488. \textit{See supra} note 102 and accompanying text.
  \item \textsuperscript{132} \textit{Id}. at 1488.
  \item \textsuperscript{133} \textit{Id}. \textit{See supra} note 96 and accompanying text.
  \item \textsuperscript{134} \textit{Id}. at 1488.
  \item \textsuperscript{135} \textit{Id}.
  \item \textsuperscript{136} 675 F.2d at 845.
\end{itemize}
take any action otherwise prohibited . . . where age is a bona fide occupational qualification *reasonably necessary* to the normal operation of the particular business." The *Gathercole* district court agreed that this standard was proper. The "reasonably necessary" standard is superior to the *Monroe* district courts "rational basis in fact" standard. A court may be better able to judge whether a standard is "reasonably necessary" to safety as opposed to merely "rational." However, the parameters of what is "reasonably necessary" are still somewhat vague. An employer's ability to prove he meets the standard will depend upon the quality of his expert medical testimony. An airline is far more capable of funding such testimony than are pilots and second officers. Similar to the *ALPA* and *Criswell* appellate courts, the *Gathercole* district court ruled that a determination ought to be made as to whether in general, medical science can predict on an individual basis the likelihood that a pilot over age sixty will remain healthy during a flight. This ruling creates an arbitrary situation in which one adversary will be able to persuade the trier of fact that his experts' opinion is more sound. The *Gathercole* appellate court suggested that it was not highly impractical to deal with pilots past age sixty on an individualized basis. This seems to be the best solution to the problem.

The district court in *Hoefelman v. Conservation Commission* reached a conclusion opposite from that of the appellate courts in *Tuohy* and *Gathercole*, regarding the ability of medical science to predict the probability of a pilot's capacity to remain healthy during a flight. In *Hoefelman*, the plaintiff asserted that his transfer by the commission at age sixty from his position as Chief Aircraft Pilot to Equipment Supervisor constituted unlawful discrimination. At the trial, Dr. Carter, a state physician working at the Mayo Clinic, testified for the defendants. He claimed that he examines approximately five hundred pilots a year and found through testing that the performance I.Q. of the pilots begins to decline perceptibly around age sixty. Dr. Mohler testified for the plaintiff. In his opinion, the

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138. See supra note 126 and accompanying text.
139. See supra note 85 and accompanying text.
140. See supra note 126 and accompanying text.
141. Id.
142. 541 F. Supp. 272 (W.D. Miss. 1982).
143. Id. at 273.
144. 718 F.2d 281, 282 (8th Cir. 1983).
145. Id. at 283.
146. Id. at 285.

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primary reason for the F.A.A. adoption of the *Age Sixty Rule* was its concern with the incidence of heart disease in men over sixty.\textsuperscript{147} Dr. Mohler further testified that advances in medical science made it possible to predict with a 99% degree of certainty that Hoeftelman would not have a heart attack while in flight.\textsuperscript{148} The Department felt that a restriction against flying after age sixty ought to apply to its pilots, even though the restriction was not imposed by the F.A.A., because the Department's pilots did not fly with co-pilots. In addition, the pilots are routinely engaged in hazardous low level flying.\textsuperscript{149} Despite the conflicting expert testimony, the appellate court upheld the lower court's determination that age was a BFOQ because there was no way to determine whether individual pilots were able to fly safely and efficiently except by reference to their age.\textsuperscript{150}

**VI. Conclusion**

The current state of affairs regarding the rights of pilots and second officers after age sixty is in an extremely confused state. Although courts have no trouble deciding when the "bona fide seniority system" defense and the "reasonable factors other than age" defense should prevail, there is less certainty with respect to the "bona fide occupational qualification" defense. What is likely to occur in today's political climate? The Supreme Court recently ruled on Air Line Pilots International v. Trans World Airlines, Inc.\textsuperscript{151} The Court generally affirmed the decisions of the appellate court, reversing only its holding regarding damages.\textsuperscript{152}

The district court had held that the plaintiffs failed to establish a prima facie case of discrimination because they had not met the requirements set forth in the *McDonnell-Douglas* formula.\textsuperscript{153} However, the Supreme Court found the application of the formula to be

\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Hoeftelman 541 F. Supp. at 274.
\textsuperscript{150} Hoeftelman 718 F.2d at 284. The lower court stated that:

> The aging process affects the psychomotor functioning of pilots over the age of 60 in a manner which impairs their ability to operate an aircraft safely under particular circumstances. Medical science cannot predict, on an individual basis, the likelihood that a pilot who has reached the age of 60 will become incapacitated during flight. Neither the state of knowledge nor feasible evaluation systems presently exist that would enable businesses to convert to an "open-ended" system which evaluates aging pilots on an individual basis.

Hoeftelman 541 F. Supp. at 273.

\textsuperscript{151} 105 S. Ct. 613 (1985).
\textsuperscript{152} Id. at 614.
\textsuperscript{153} ALPA, 547 F. Supp. at 1229.
improper, as the plaintiffs in ALPA had presented direct evidence of discrimination. The Court held that the pilots had proven the transfer system to be directly discriminatory because it allowed captains younger than sixty to displace second officers, while not providing the same privilege in every case, to those age 60 and over.

In addition, the Supreme Court affirmed the appellate court's decision that the "bona fide seniority system" defense could not prevail. As the appellate court stated, a system that includes such a discriminatory transfer policy permits the forced retirement of pilots on the basis of age. This is unlawful under the ADEA. The Supreme Court concluded that such a system was not "bona fide" by definition.

According to TWA policy, it was a BFOQ for pilots but not flight engineers to be less than sixty. The Supreme Court found the "bona fide occupational qualification" defense meritless with regard to pilots over sixty who wish to downbid to the position of flight engineer.

Unfortunately, the Supreme Court did not rectify the conflict among the circuits regarding the standard to be used when a BFOQ defense is asserted. The creation of a generalized test would have been helpful. The trend of the majority of the circuit courts is to determine whether the BFOQ is reasonably necessary to the normal operation of a particular business. However, even if the Supreme Court had chosen this standard, the basic problem with the BFOQ defense still exists. The ability of a plaintiff to defeat a BFOQ defense seems to depend on which doctors or scientists win the "battle between the experts" at trial.

The best solution is for the F.A.A. to reevaluate the Age Sixty Rule for pilots and demand that commercial and non-commercial airlines set up a complete battery of individualized tests. These tests would detect and evaluate those symptoms normally accompanying aging and disease, which would affect the performance of a pilot. Recent advances in medical science and technology make this possible. Data could be collected in a systematic way when a pilot reaches the age of forty. It is possible that a pilot of age forty-five could have

154. ALPA, 105 S. Ct. at 622.
155. Id.
156. Id. at 623.
157. ALPA, 713 F.2d at 953.
158. ALPA, 105 S. Ct. at 623.
159. Id. at 622.
160. Id. at 622-23.
a serious heart condition, which would make him more of a safety threat than a healthy pilot who is sixty years of age. Since pilots must undergo an extensive physical annually, these extra requirements would not greatly increase the financial burden on the airlines. There is persuasive evidence to support the proposition that the lower accident rate among older pilots is due to their higher level of experience. Although reflexes and thought processes do eventually slow down with age, there is much evidence to support the argument that the age when this can be expected to occur, may be safely set beyond the current limit of sixty.

If the airlines want to defeat such a solution, they should be required to prove to the F.A.A., using empirical data, that the health of pilots cannot be monitored individually and that employment of pilots over the age of sixty is truly dangerous.

A uniform rule promulgated by the F.A.A., which would apply to both commercial and non-commercial airlines would benefit all parties involved. For example, when an Age Sixty Rule was defended by an airline as a BFOQ, the court could cite to the F.A.A. rule which would state that age does not affect a pilot’s abilities. The airline’s BFOQ defense would then be defeated.

As a result of the Supreme Court’s decision in ALPA, pilots now have “some place to go after sixty”; however, the direction is only down, not up.

Amy Gibbons