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I. Introduction

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA)[1] in an effort to resolve the problem of discriminatory employment practices against older Americans and to promote the employment of members of that group.[2] As a result of the ADEA, discrimination based on age in the areas of hiring, firing, and compensating workers became unlawful.[3]

Within the broad scope of the ADEA, however, certain exceptions were created.[4] Among these exceptions is the so-called pension plan exception. This provision allows employers to observe the terms of bona fide pension plans provided that such plans are not used as subterfuges to avoid the purposes of the ADEA.[5] This exception was originally interpreted by the courts[6] and the Labor Department[7] as authorizing the involuntary early retirement of workers covered by such plans. By giving the pension plan exception a plain reading and ignoring the legislative history of the exception, the courts interpreted the exception as authorizing the forced retirement of workers before age sixty-five if such retirement was permitted under a pension plan.[8] Such mandatory retirement, therefore, did not violate the ADEA. Congress has recently reacted to this judicial interpretation of the ADEA in the 1978 amendments to the ADEA. Those amendments added language to the pension plan exception that prevents the use of a pension plan to force involuntary retirement before age seventy.[9]

Although the 1978 amendments effectively end the controversy over whether the pension plan exception authorizes mandatory early retirement, the amendments do not prevent an employer from discriminating against older workers[10] in awarding benefits under such pension plans. Specifically, the 1978 amendments shift the focus of interpretation to the subterfuge clause of the pension plan exception. Instead of deciding whether mandatory retirement is permitted by the pension plan exception, the courts will have to determine

1 29 U.S.C. § 621-34 (1970).

2 "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) (1970).

3 29 U.S.C. § 623 (1970).

4 29 U.S.C. § 623(f) (1970).

5 An employer may "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 plan shall excuse the failure to hire any individual." 29 U.S.C. § 623(f)(2)(1970).

6 *See, e.g.*, United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977).

7 29 C.F.R. 860.110 (1969).

8 *See* 434 U.S. 192.

9 Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189 (amending 29 U.S.C. § 623(f)(2) (1970)).

10 The term "older worker" refers to anyone between the ages of forty and seventy. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189 (amending 29 U.S.C. 623(f)(2) (1970)).

whether a particular action by an employer in granting differential benefits to older workers is a subterfuge of the ADEA.

This note will examine the history of the pension plan exception in the Congress and the courts in an effort to assess the probable future of that section. In addition, the note will propose some factors that should be considered in deciding whether a particular case of differential treatment under an employee benefit plan is a subterfuge of the ADEA. Since a significant portion of the American labor force may be covered by such employee benefit plans,[11] the interpretation of the pension plan exception and the subterfuge clause has a potentially far-reaching impact.

II. Congress and the Pension Plan Exception

The ADEA prohibits an employer from refusing to hire an older worker solely on the basis of that worker's age.[12] Likewise, the employer may not discriminate against an older worker in granting any employee benefits because of age.[13] The dilemma of an employer with any employee retirement or benefit plan is clear. He must hire the older worker who is close to the age at which that worker would be eligible to receive the plan's benefits. At the same time, the employer must accord to that older worker the same benefits given to a younger worker who will eventually make more contributions to the plan.

One reason Congress originally adopted the pension plan exception to the ADEA was to obviate this dilemma. Under the exception, the employer could hire an older person without being forced to grant that person the same benefits as a younger employee. The economic capacity of pension plans to provide for those persons already covered was thereby preserved.[14] Additionally, employers were given an economic incentive to hire older persons. Congress was, therefore, advancing the dual purpose of fostering the vitality of employee benefit plans while promoting the employment of older Americans.

This view of the pension plan exception was included in the House Committee Report on the original ADEA: "This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans."[15] The Committee felt that the exception provided a feasible method for employers to maintain such plans while complying with the ADEA's mandate to hire older workers.

The Senate floor manager of the original ADEA, Senator Yarborough, took the same view. In response to questioning on the Senate floor, he explained the exception to mean "that a man who would not have been hired except for this

11 *See, e.g.*, Bell, *Prevalence of Private Retirement Plans*, 98 MONTHLY LAB. REV. 17 (Oct. 1975), which indicates that the majority of office workers are covered by pension plans.
12 29 U.S.C. § 623 (1970).
13 *Id.*
14 H.R. REP. NO. 805, 90th Cong., 1st Sess. 4 (1967), *reprinted in* (1967) U.S. CODE & AD. NEWS 2213, 2217.
15 *Id. See also* 113 CONG. REC. 34752 (1967) (remarks of Rep. Dwyer); 113 CONG. REC. 34747 (1967) (remarks of Rep. Dent); 113 CONG. REC. 34743 (1967) (remarks of Rep. Smith).

law does not have to receive the benefits of the plan."[16] Considering the case of a fifty-five-year-old applicant, he said, "[The applicant] cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement."[17]

In spite of these expressions of Congressional intent concerning the meaning of the pension plan exception, the courts took a different view, one which Congress never seemed to consider. In deciding cases in which workers were involuntarily retired under pension plans, the courts found that the plain language of the pension plan exception allowed employers to force older workers into early retirement if the pension plans provided for such retirement.[18] Since employers were allowed to observe the terms of employee benefit plans which were not subterfuges to evade the ADEA, the courts reasoned that workers could be forced into early retirement under plans allowing for such mandatory retirement.

III. Judicial Attitudes Toward the ADEA and the Original Pension Plan Exception

In deciding the mandatory retirement cases, the only cases which have yet interpreted the pension plan exception, most courts have engaged in a two-step process. First, they have given the pension plan exception a plain reading,[19] refusing to examine legislative history as a guide to interpretation. Second, they attempted to identify various factors which would aid in determining whether a particular benefit plan was a subterfuge to evade the purposes of the ADEA.

Both of these characteristics are important in assessing the future of the pension plan exception after the 1978 amendments to the ADEA. The first indicates a judicial attitude of disfavor toward arguments interpreting the pension plan exception through reference to legislative history. The second issue, the subterfuge clause, survives the 1978 amendments.[20]

The retirement cases indicate that the courts are reluctant to go beyond the language contained in the pension plan exception in interpreting that section. Two early cases, which were decided on other grounds, *Grossfield v. Saunder*[21] and *Stringfellow v. Monsanto,*[22] merely assumed that the pension plan exception authorized mandatory retirement without discussing the issue.

Other courts have been more explicit in adopting the plain language doctrine when interpreting the pension plan exception. These courts have refused

16 113 CONG. REC. 31255 (1967) (remarks of Sen. Yarborough).
17 *Id.*
18 *E.g.,* 434 U.S. 192.
19 A detailed discussion of the plain reading doctrine is beyond the scope of this note. Further treatment of this doctrine may be found in several places including Schegman v. Calvert Distillers Corp., 341 U.S. 384 (1951) (Jackson, J., dissenting) and Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527 (1947).
20 The 1978 amendments only add the phrase, "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual" at the end of the original text of § 623(f)(2). Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189 (amending 29 U.S.C. § 623(f)(2) (1970)).
21 1 LAB. REL. REP. 624, 1 E.D.P. 9941 (S.D.N.Y. 1968).
22 320 F. Supp. 1175 (W.D. Ark. 1970).

to go beyond the words of the section even where faced with arguments based on the stated legislative purpose and legislative history of the ADEA. In *Brennan v. Taft Broadcasting*,[23] an employee elected to join defendant's retirement plan. He was notified later that he would have to retire at age sixty. Plaintiff argued that the legislative history indicated that the pension plan exception was only meant to protect the fiscal integrity of such plans and not to permit involuntary retirement. In rejecting this argument, the court found the pension plan exception to be unambiguous on its face.[24] Resort to legislative history was, therefore, unwarranted. The dissenting judge, however, found that the exception was poorly written. Applying a different canon of legislative interpretation, he felt that, as an exception to the ADEA, it should be narrowly construed.[25]

This restrictive attitude toward the pension plan exception was approved by the Supreme Court in *United Air Lines, Inc. v. McMann*.[26] In addressing arguments similar to those in *Taft*, the Court said that the traditional canons of interpretation precluded an examination of the legislative history of an unambiguous statute.[27]

Although this plain language canon of interpretation has the advantage of consistency and predictability, it suffers from two major defects in this context. First, it forces the courts to misconstrue the intent of Congress in passing the ADEA. Although legislative intent is often difficult to ascertain, the legislative purpose of the ADEA is contained within the statute itself.[28] That purpose is to promote the employment of older workers. A reading of the pension plan exception which allows for involuntary retirement is obviously antithetical to this purpose. Second, the courts which have employed the plain reading canon have, in fact, read the pension plan exception out of the context of the ADEA. As the dissenting judge in *Taft* argued, this section must be read as a part of the entire ADEA.[29] An out-of-context reading gives rise to the possibility of illogical results, as Justice Marshall argued in his dissent in *McMann*. Marshall maintained that an integrated reading of the statute was necessary. He felt that the majority's interpretation of the pension plan exception would allow an employer to force a worker into early retirement, but the employer would have to rehire that same person upon reapplication under a different provision of the ADEA.[30]

Despite the value of such arguments and the enactment of the 1978 amendments which ended the mandatory retirement issue, the retirement cases indicate that the courts will continue to give a plain reading to the pension plan exception in interpreting the remaining issue, *i.e.*, the interpretation of the subterfuge clause.

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23 500 F.2d 212 (5th Cir. 1974).
24 *Id.* at 217.
25 *Id.* at 220 (Tuttle, J., dissenting).
26 434 U.S. 192.
27 *Id.* at 199. The Court, however, did go on to examine the legislative history to support its conclusion. *Id.* at 199-202.
28 29 U.S.C. § 621 (1970).
29 500 F.2d at 220 (Tuttle, J., dissenting).
30 434 U.S. at 208 (Marshall, J., dissenting).

IV. Congressional Response to *McMann*

After the judicial interpretations of the pension plan exception allowed the involuntary early retirement of older workers pursuant to employee pension plans, several members of Congress, believing that those interpretations were incorrect, introduced measures to restore what they felt was the original intent of the pension plan exception.[31] These efforts culminated in the 1978 amendments to the ADEA. That legislation added language to the pension plan exception prohibiting involuntary early retirement.[32] The Conference Report indicates that the language added to the pension plan exception is meant to correct the interpretation of that section by the *McMann* court.[33]

The 1978 amendments, however, leave an important question of interpretation of the pension plan exception unresolved. Although the issue of mandatory retirement of older workers was settled, the amendments did not affect the ability of employers to grant unequal benefits under pension plans that are not subterfuges to evade the purposes of the ADEA. Instead of deciding whether the pension plan exception allows for mandatory retirement, the courts will now have to concentrate on interpreting the subterfuge clause of the pension plan exception in future cases of discriminatory awards of benefits.

V. The Subterfuge Clause

Because the 1978 amendments only add language to the pension plan exception that prohibits mandatory retirement under pension plans, employers will still be able to observe the terms of benefit plans which discriminate against older workers, provided that such plans are not subterfuges to avoid the ADEA. The question whether a particular plan is a subterfuge of the ADEA has, to date, only arisen in the involuntary retirement cases. Although the mandatory retirement issue under the pension plan exception is now settled, these cases also indicate several factors which may be important in determining whether future cases of differential benefits violate the ADEA.

In interpreting the subterfuge clause in the retirement cases, three tests have been used by the courts: the sufficiency of benefits test, the chronological test, and the business purpose test.

The sufficiency of benefits test was applied in *Dunlop v. Hawaiian Telephone Co.*[34] In determining whether the forced early retirement of an employee, pursuant to the terms of a pension plan, was a subterfuge of the ADEA, the court looked to the amount of the benefits that the employee would receive under the plan. Since the payments to the employee would be substantial, the court concluded that the conduct of the employer was not a subterfuge of the ADEA.

In reaching this conclusion, the court relied on Labor Department regulations that permitted the mandatory retirement of an individual covered by a plan, but forbade the retirement of a nonmember.[35] The sole reason the court

31 *E.g.*, 123 CONG. REC. S17274 (daily ed. Oct. 19, 1977) (remarks of Sen. Williams); 123 CONG. REC. H9354 (daily ed. Sept. 13, 1977) (remarks of Rep. Weiss).
32 *See* note 20 *supra*.
33 H. R. CONF. REP. No. 95-950, 95th Cong., 2d Sess. 8 (1978).
34 415 F. Supp. 330, 332-33 (D. Hawaii 1976).
35 29 C.F.R. 860.110 (1969).

could see for such differential treatment was that the plan member would receive payments under the plan.[36] It concluded, therefore, that the ADEA meant to focus on the sufficiency of benefits received.[37]

This approach is laudable in its attempt to insure the economic survival of the worker.[38] The sufficiency of benefits, however, is probably better cast as a factor to determine whether the pension plan is a bona fide one, as required by the ADEA, and not whether the plan is a subterfuge.[39] A plan may provide the retiree with adequate benefits, but still be used in a discriminatory fashion.

In adopting the benefits test, the *Dunlop* court refused to follow the chronological approach of *Taft*. The *Taft* case, as previously discussed, involved the mandatory retirement of an individual under a pension plan which pre-dated the ADEA. The *Taft* court held it was impossible for any plan that preceded the enactment of the ADEA to be an evasion of the statute. Any notion that the plan was a subterfuge of the ADEA was therefore eliminated.[40]

This chronological approach was rejected by the Fourth Circuit in *McMann v. United Air Lines, Inc.*[41] In *McMann,* the *Taft* reasoning was rejected because the text of the pension plan exception refers to a plan that is a subterfuge of the purposes of the ADEA. Although a plan pre-dating the ADEA could not be a subterfuge of the ADEA, *per se,* the Fourth Circuit held that such a plan could be used to evade the purposes of the ADEA.[42] Therefore, the court employed an economic purpose test. It required the defendant to show some economic or business purpose for its action. In this way, the court attempted to conform to the legislative intent discussed earlier.[43]

On review, the Supreme Court reversed the Fourth Circuit and held that the chronological test of *Taft* applied. In defining the subterfuge clause, the Court stated that the clause referred to "a scheme, plan, strategem, or artifice of evasion"[44] in the plain meaning of the term. Further, the Court merely assumed that Congress must have intended to use that term in its ordinary meaning.[45] Therefore, a plan established before the passage of the ADEA could not be a subterfuge of a statute not in existence at the time of the plan's establishment.

In passing the 1978 amendments, Congress clearly intended to overrule that part of the *McMann* opinion interpreting the pension plan exception as authorizing involuntary retirement. Congress also repudiated the chronological test adopted by the *McMann* court: "Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they

36 415 F. Supp. at 332-33.
37 *Id.*
38 Note, *The Problem of Involuntary Retirement Before Age 65,* 60 MARQ. L. REV. 1053 (1977) [hereinafter cited as *Involuntary Retirement*].
39 The *Dunlop* approach was probably overruled by the Supreme Court in *McMann. See* text accompanying notes 42-45 *infra.*
40 500 F.2d at 215.
41 542 F.2d 217 (4th Cir. 1976).
42 *See also Involuntary Retirement, supra* note 38; Note, *Age Discrimination in Employment,* 50 N.Y.U. L. REV. 924 (1975) (similar interpretations of the exception are made).
43 *Cf.,* 434 U.S. at 204 (White, J., concurring) (similar discussion of business purpose test).
44 434 U.S. at 203.
45 *Id.*

antedate the act or these amendments."[46] *McMann*'s emphasis on the intent of the employer in determining whether a particular plan is a subterfuge of the ADEA, however, was left untouched. The subterfuge language was retained by Congress in the ADEA. Given the "plain reading" history of the pension plan exception, the courts will probably continue to focus on that portion of the *McMann* opinion defining the subterfuge clause in terms of employer intent. Several factors can therefore be identified as guides in deciding whether an employer has intentionally discriminated against older workers in granting differential benefits under pension plans.

One initial factor to be considered is whether the employee benefit plan in question was the product of collective bargaining. This consideration was given weight in two ADEA retirement cases, *Thompson v. Chrysler Corp.*[47] and *Steiner v. National League of Professional Baseball,*[48] although both decisions rested upon other grounds.[49] This factor should be extremely probative of an employer's intent to evade the ADEA. If a plan has been the subject of genuine collective bargaining between a union and an employer, the inference that any discriminatory terms resulted from the employer's intent to evade the ADEA is obviously weak. Discrimination under a plan that evolved from collective bargaining should not be found to be a subterfuge of the ADEA absent a strong showing to the contrary. This view of collectively bargained plans is supported by the special exemption from the higher retirement age created in the 1978 amendments.[50] Congress, therefore, believed that such plans deserved special treatment.

A second factor, present in some of the retirement cases, is whether the differential treatment is within the discretion of the employer. The vesting of discretion with the employer to extend his affiliation with his employee beyond the plan's retirement age was specifically approved in *Steiner.*[51] In that case, plaintiff had been permitted by defendant to continue working one year after the retirement age. He was later retired when his job rating fell. Although the court approved this action as nondiscriminatory, in comparison to other employees who continued working for several years after the retirement age, a conscious decision on the employer's part to withhold benefits from an older worker may indicate that the plan is merely a device to attempt to legitimize otherwise discriminatory treatment. This would be especially true if the employer routinely uses such discretion to withhold benefits from older workers.

Although this factor may give some inference of employer intent to unlawfully discriminate, it should only be a threshold inquiry. Such discrimination may be for valid reasons, such as job performance or other business reasons. When the decision is within the employer's discretion, the next inquiry should be whether there exists any independent justifications for the discriminatory treat-

46 *See* note 33 *supra.*
47 406 F. Supp. 1216 (E.D. Mich. 1976).
48 377 F. Supp. 945 (C.D. Cal. 1974).
49 406 F. Supp. at 1217. *See also* Kovarsky & Kovarsky, *Economic, Medical, and Legal Aspects of the Age Discrimination Laws in Employment,* 27 Vand. L. Rev. 839 (1975); *Involuntary Retirement, supra* note 38.
50 Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189 (amending 29 U.S.C. § 623(f)(2) (1970)).
51 406 F. Supp. at 1217.

ment. If there are none, the inference that the employer is using the plan to avoid giving equal benefits to older workers may remain.

The *McMann* court refused to place the initial burden of justifying the discriminatory treatment on the employer.[52] If a plaintiff can show that the decision to accord differential treatment rested with the employer, however, an intent to unlawfully discriminate may be implied. If no other reasons justifying the discrimination exist, then an intent to discriminate may be inferred. The discretion factor alone should not be determinative. It is the discretion plus the absence of other justifications that is probative of employer intent.

A third factor to be considered is whether the employer gains any economic benefits from the discriminatory treatment. In *Taft,* the court found that the employer's costs remained the same regardless of any differential treatment of older workers.[53] The employer had no real incentive to discriminate. When an employer's costs would be lessened by granting lower benefits to older workers, the employer has an obvious incentive to violate the ADEA. When such an economic incentive is present, therefore, a strong inference that the employer is merely using the plan to evade the ADEA's purpose of providing equal treatment to older workers is present.

A related factor is whether the discriminatory treatment is necessary to the economic health of the benefit plan. As previously discussed, this factor was part of the original motivation behind the pension plan exception in Congress.[54] If the differential treatment is for this reason, the employer's action should be automatically valid, given such Congressional intent, unless it can be shown that the plan was intentionally designed to give the employer this escape valve for differential treatment.

Of course, any other type of evidence tending to establish that an employer intended to evade the ADEA through the use of an employee benefit plan must be considered. Each fact tending to show such intent must be balanced against possible business reasons for the differential treatment and the Congressional purpose to promote equal treatment for all workers regardless of age.

VI. Conclusion

The ADEA has the laudable purpose of promoting the employment and equal treatment of older workers. In the past, the pension plan exception threatened to be the exception that swallowed the rule. The 1978 amendments have returned the pension plan exception to its original role as a part of the overall legislative scheme. The courts will now be faced with the problem of applying the subterfuge clause of the exception to particular cases of discriminatory treatment. *McMann*'s focus on employer intent, absent the chronological considerations, is the best way to effectuate the Congressional purpose. A forthright judicial examination of employer intent in future cases is needed to define the scope of the pension plan exception.

—*Thomas W. Millet*

52 434 U.S. at 203.
53 500 F.2d at 214.
54 *See* text accompanying notes 11-17 *supra.*

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