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## The Bona Fide Occupational Qualification Exception--Clarifying the Meaning of "Occupational Qualification"

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# The Bona Fide Occupational Qualification Exception—Clarifying the Meaning of “Occupational Qualification”

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## I. INTRODUCTION

The Age Discrimination in Employment Act (ADEA)<sup>1</sup> prohibits employment decisions that discriminate against people aged forty to seventy<sup>2</sup> because of their age.<sup>3</sup> An exception to the ADEA permits otherwise unlawful age discrimination when age is a “bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business.”<sup>4</sup> To invoke this exception successfully, an employer must produce evidence from which a court can conclude that age is a valid BFOQ.<sup>5</sup> Currently, some confusion exists as to whether an employer’s evidence must establish that age is relevant to the performance of the employee’s

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1. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982)) [hereinafter cited as ADEA].

2. *Id.* § 631(a).

3. *Id.* § 623(a)-(e).

4. *Id.* § 623(f)(1).

5. EEOC Interpretive Guidelines for the ADEA, 29 C.F.R. §§ 1625.1-1625.20, 1625.6(b) (1984) [hereinafter cited as EEOC Guidelines].

specific duties or whether this evidence need relate only to the general business of which the employee is a part.<sup>6</sup> The resolution of this issue will determine the scope of the BFOQ exception.

In addressing this issue three circuit courts<sup>7</sup> have each proposed a different analysis. In *EEOC v. City of Janesville*<sup>8</sup> the United States Court of Appeals for the Seventh Circuit adopted an expansive view of the exception, requiring evidence of age as a BFOQ to relate to the generic class of law enforcement personnel rather than to the employee's specific duties as chief of police. Two years later, in *EEOC v. City of St. Paul*<sup>9</sup> the United States Court of Appeals for the Eighth Circuit reached a contrary result, requiring an employer to establish a BFOQ for the employee's specific occupation as district fire chief rather than a BFOQ relating to the generic class of firefighters as a whole. In 1984, in *Mahoney v. Trabucco*<sup>10</sup> the United States Court of Appeals for the First Circuit considered both the Seventh and Eighth Circuits' approaches and adopted an intermediate position. The First Circuit agreed with the Eighth Circuit that an "occupational qualification" can be separate from a "particular business" under narrow conditions, thus requiring evidence of a BFOQ to relate to the employee's specific occupation.<sup>11</sup> The First Circuit, however, narrowly defined those cases concerning separate occupations and finding no separate occupation in this particular case, accepted evidence of age as a BFOQ for the generic class of protective service employees.<sup>12</sup>

The purpose of this Recent Development is to determine which approach best effectuates the purpose of the BFOQ exception. Part II examines the history of the ADEA and the judicial application of the BFOQ exception. Part III discusses the three recent cases and their proposed tests for applying the BFOQ excep-

6. This issue does not arise frequently. Thus far, courts have addressed this problem only in cases concerning protective service employees—law enforcement personnel and firefighters. In these areas the duties and demands of the job differ greatly between the administrative personnel (police chief, fire chief) and those in more active duty. The question therefore arises whether evidence of a BFOQ should relate to the duties of the specific job or "occupation," or to the "particular business."

7. *Mahoney v. Trabucco*, 574 F. Supp. 955 (D. Mass. 1983), *rev'd*, 738 F.2d 35 (1st Cir.), *cert. denied*, 105 S. Ct. 513 (1984); *EEOC v. City of St. Paul*, 500 F. Supp. 1135 (D. Minn. 1980), *aff'd*, 671 F.2d 1162 (8th Cir. 1982); *EEOC v. City of Janesville*, 480 F. Supp. 1375 (W.D. Wis. 1979), *rev'd*, 630 F.2d 1254 (7th Cir. 1980).

8. 630 F.2d 1254 (7th Cir. 1980).

9. 671 F.2d 1162 (8th Cir. 1982).

10. 738 F.2d 35 (1st Cir. 1984).

11. *Id.* at 38-39.

12. *Id.* at 39.

tion. Part IV analyzes these tests in light of other judicial precedent, the wording of the BFOQ exception, and the ADEA's legislative history. Part V concludes that the proper BFOQ test should focus on the requirements of the employee's specific job rather than the generic class of employees of which the employee is a part.

## II. LEGAL BACKGROUND

### A. *The Age Discrimination in Employment Act*

Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967<sup>13</sup> in response to the Secretary of Labor's study of age discrimination in employment.<sup>14</sup> The purpose of the ADEA is to encourage employment of older workers by prohibiting discriminatory treatment based on stereotyped assumptions about the effects of aging on job performance.<sup>15</sup> As originally enacted, the ADEA applied to employers,<sup>16</sup> employment agencies,<sup>17</sup> and labor organizations,<sup>18</sup> and the ADEA protected individuals between the ages of forty and sixty-five.<sup>19</sup> Subsequent amendments broadened the scope of the ADEA. The 1974 amendments expanded the definition of "employer" to include state and local governments,<sup>20</sup> and the 1978 amendments extended the ADEA's protection to individuals up to seventy years of age.<sup>21</sup>

To accomplish its goals, the ADEA prohibits discrimination by

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13. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)).

14. Section 715 of the Civil Rights Act of 1964 directed the Secretary of Labor to examine the problem of age discrimination in employment. 42 U.S.C. § 2000e-14 (1970) (amended 1972). For a brief discussion of the Secretary's findings, see Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 383-84 (1976).

15. ADEA, 29 U.S.C. § 621(b) (1982). An additional goal of the ADEA is to facilitate interaction between employers and workers concerning joint resolution of the problems that accompany aging in the workplace. *Id.*

16. *Id.* § 623(a). "Employer" is defined as "a person engaged in an industry affecting commerce who has twenty or more employees . . ." *Id.* § 630(b).

17. *Id.* § 623(b). "Employment agency" is defined in § 630(c).

18. *Id.* § 623(c). "Labor organization" is defined in § 630(d)-(e).

19. ADEA, 29 U.S.C. § 631 (1976) (amended 1978).

20. The Age Discrimination in Employment Act Amendments of 1974, Pub. L. No. 93-259, § 23(a)(2), 88 Stat. 55, 74 (codified as amended at 29 U.S.C. § 630(b)(2) (1982)). Section 633a governs employment by the federal government. 29 U.S.C. § 633a (1982). In *EEOC v. Wyoming*, 460 U.S. 226 (1983), the United States Supreme Court held that the 1974 amendments, which required compliance with the ADEA by state and local governments as employers, were constitutional.

21. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (codified at 29 U.S.C. § 631 (Supp. III 1979)).

an employer against a person because of that person's age.<sup>22</sup> Specifically, an employer may not make either hiring or firing decisions based solely on age.<sup>23</sup> An employer also may not limit the employee's opportunities, wages, or status on the basis of age.<sup>24</sup> The ADEA, however, provides for several limited exceptions,<sup>25</sup> the most important of which is the bona fide occupational qualification (BFOQ) exception.<sup>26</sup> The BFOQ exception frees employers from otherwise valid charges of age discrimination when age is a demonstrably necessary occupational qualification of the employer's business.<sup>27</sup> Once an employee demonstrates discrimination based on age, the employer then must attempt to establish a valid BFOQ.<sup>28</sup> If the employer successfully demonstrates that age is a BFOQ for a job, he need not follow the general rule of individual analysis based on ability<sup>29</sup> and may impose a rigid age requirement for that job.<sup>30</sup>

Recognizing that frequent use of this exception would emasculate the ADEA and enable employers to make decisions solely on the basis of age, the ADEA's enforcement agencies<sup>31</sup> have indicated

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22. ADEA, 29 U.S.C. § 623(a)-(e) (1982).

23. *Id.* § 623(a)(1).

24. *Id.* § 623(a)(1)-(2). In addition, an employer violates the ADEA if he acts against an employee or prospective employee in retaliation for questioning a discriminatory practice or for participating in an ADEA claim. *Id.* § 623(d). Nor can an employer use advertisements that encourage discrimination. *Id.* § 623(e).

25. Section 623(f) lists the exceptions to the ADEA. It is not unlawful:

(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business [the BFOQ exception], or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . ; or

(3) to discharge or otherwise discipline an individual for good cause.

*Id.* § 623(f). For a discussion of the ameliorating effect of the exceptions on the achievement of the ADEA's goals, see Rosenblum, *Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions*, 32 HASTINGS L.J. 1261 (1981).

26. ADEA, 29 U.S.C. § 623(f)(1) (1982).

27. *Id.*

28. See EEOC Guidelines, *supra* note 5, § 1625.6(b). For a discussion of the burden of proof in ADEA cases, see Schickman, *The Strengths and Weaknesses of the McDonnell Douglas Formula in Jury Actions Under the ADEA*, 32 HASTINGS L.J. 1239 (1981); Note, *supra* note 14, at 388-99.

29. See H.R. REP. No. 805, 90th Cong., 1st Sess. 7, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2213, 2219-20; see also *supra* note 28.

30. 29 U.S.C. § 623(f)(1) (1982).

31. Congress originally charged the Department of Labor with enforcing the ADEA and aiding in its interpretation. 29 U.S.C. § 628 (1967). See Note, *supra* note 14, at 381 (explaining the congressional choice to administer the ADEA through the Department of Labor). The Equal Employment Opportunity Commission (EEOC) is now responsible for carrying out these functions. 29 U.S.C. § 628 (1982).

that this section is one of "limited scope and application" and, therefore, to be construed narrowly.<sup>32</sup> The only other guidance initially given by Congress mandated a case by case approach<sup>33</sup> and described two examples of possible BFOQs: special, limited occupational circumstances requiring an employee of a certain age and a statutorily imposed mandatory retirement when necessary for public safety.<sup>34</sup>

### *B. Judicial Application of the Bona Fide Occupational Qualification Exception*

#### 1. Employer's Burden of Proof in Title VII Cases

Courts addressing BFOQ claims in ADEA cases have followed the BFOQ test set forth in cases arising under Title VII of the Civil Rights Act of 1964<sup>35</sup> for two reasons. First, the Civil Rights Act and the ADEA share the same purpose of prohibiting discrimination,<sup>36</sup> and second, Title VII contains a BFOQ exception similar to the one in the ADEA.<sup>37</sup> The BFOQ test that has emerged from Title VII cases combines the results of two decisions from the United States Court of Appeals for the Fifth Circuit—*Weeks v. Southern Bell Telephone & Telegraph Company*<sup>38</sup> and *Diaz v. Pan American World Airways*.<sup>39</sup>

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32. Department of Labor Interpretive Bulletin on the ADEA, 29 C.F.R. §§ 860.1-860.120, 860.102(b) (1984) [hereinafter cited as Department Bulletin]; EEOC Guidelines, *supra* note 5, § 1625.6(b).

33. H.R. REP. No. 805, 90th Cong., 1st Sess. 7, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2213, 2220.

34. Department Bulletin, *supra* note 32, § 860.102(b). For example, a play requiring a youthful characterization would be a special occupational circumstance requiring an employee of a certain age. *Id.* This bulletin, however, did not specify situations in which mandatory retirement would be necessary for public safety.

35. See, e.g., *Arritt v. Grisell*, 567 F.2d 1267, 1270 n.11 (4th Cir. 1977); *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 820 (5th Cir. 1972). *But see* Note, *supra* note 14 (suggesting that an "automatic application of Title VII precedents" is inappropriate in ADEA cases).

36. For a general discussion of employment discrimination and Title VII, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113-19 (1971).

37. The BFOQ exception in Title VII states:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . .

42 U.S.C. § 2000e-2(e) (1982).

38. 408 F.2d 228 (5th Cir. 1969).

39. 442 F.2d 385 (5th Cir. 1971).

In *Weeks* the plaintiff submitted a bid to her employer for the job of switchman.<sup>40</sup> Her employer refused to consider her application because the company had decided not to assign women employees to that job.<sup>41</sup> The plaintiff sued her employer for allegedly violating Title VII's prohibition against sex discrimination.<sup>42</sup> The employer admitted the violation, but asserted that being male was a BFOQ for the job of switchman.<sup>43</sup> The employer produced evidence that the job required routine lifting of heavy equipment, irregular working hours, and strenuous work during emergencies.<sup>44</sup>

According to the court, the employer did not meet its burden of proving a BFOQ defense merely by showing that the job was "strenuous."<sup>45</sup> The court relied on Equal Employment Opportunity Commission (EEOC) guidelines,<sup>46</sup> which require employers to consider individuals on the basis of their individual abilities rather than on "stereotyped characterizations."<sup>47</sup> The Fifth Circuit enunciated the following test for demonstrating a BFOQ: "[A]n employer has the burden of proving that he had reasonable cause to believe, that is, 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."<sup>48</sup> In a footnote that has become an essential part of the *Weeks* test, the court noted that in some situations it might be "impossible or highly impractical to deal with women on an individualized basis."<sup>49</sup> In such a case, the court postulated that the employer may be allowed to apply a "reasonable general rule."<sup>50</sup>

In *Diaz*<sup>51</sup> the Fifth Circuit added a threshold requirement to the application of the BFOQ exception. In the *Diaz* case the airline-employer refused to hire the plaintiff as a flight cabin attend-

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40. 408 F.2d at 230.

41. *Id.*

42. *Id.*

43. *Id.* at 231-32.

44. *Id.* at 234.

45. *Id.*

46. The EEOC is responsible for enforcing the Civil Rights Act. 29 U.S.C. § 628 (1982).

47. 408 F.2d at 235 (quoting 29 C.F.R. § 1601.1(a)(1)).

48. 408 F.2d at 235.

49. *Id.* at 235 n.5. The court indicated that this exception did not apply to the present case because testing each female applicant's lifting ability would be easy. *Id.*

50. *Id.*; see *infra* text accompanying notes 78-79 (discussing Fifth Circuit's further clarification of this part of the *Weeks* test). Subsequent Title VII and ADEA cases have adopted the dicta in this footnote as a second prong of the *Weeks* test. See *infra* notes 82-83 and accompanying text.

51. *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir. 1971).

ant because he was male.<sup>52</sup> Demonstrating both that female cabin attendants generally were better at meeting the psychological needs of the passengers than males<sup>53</sup> and that passengers preferred female attendants, the employer claimed that being female was a BFOQ for the job of cabin attendant.<sup>54</sup> According to the court, the BFOQ exception set forth a "business *necessity* test, not a business *convenience* test."<sup>55</sup> The court, therefore, rejected the airline's BFOQ claim, stating that a BFOQ is valid only "when the *essence* of the business operation would be undermined" by not following the discriminatory hiring practice.<sup>56</sup>

## 2. Employer's Burden of Proof in ADEA Cases

The first ADEA case requiring a court to consider the BFOQ exception came before the Seventh Circuit in 1974. In *Hodgson v. Greyhound Lines, Inc.*<sup>57</sup> the Secretary of Labor alleged that the busline's maximum age hiring policy for intercity bus drivers violated the ADEA.<sup>58</sup> The busline claimed that age was a BFOQ because of public safety considerations.<sup>59</sup> To establish this claim the busline produced medical evidence of the effects of aging on driving,<sup>60</sup> descriptions of the rigors of the job performed by new drivers,<sup>61</sup> and safety statistics of drivers indicating the most safe com-

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52. *Id.* at 386.

53. *Id.* at 387. The court quoted the trial court's finding that females were better at performing the "non-mechanical aspects" of the job: "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations." *Id.* (quoting 311 F. Supp. 559, 563 (S.D. Fla. 1970)). The court characterized these benefits in addition to "the obvious cosmetic effect that female stewardesses provide," which was not noted explicitly by the lower court, as important but tangential. 442 F.2d at 388.

54. 442 F.2d at 386-87.

55. *Id.* at 388 (emphasis in original).

56. *Id.* (emphasis in original).

57. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

58. 499 F.2d at 860. The busline refused to consider any applications from persons aged thirty-five or older. *Id.* The Government claimed that this policy violated multiple sections of the ADEA: 29 U.S.C. § 623(a)(1)—for refusal to hire because of age; § 623(a)(2)—for detrimentally affecting an employee's opportunities or status because of his age; and § 623(e)—for discriminatory advertisements. 499 F.2d at 860.

59. 499 F.2d at 861.

60. *Id.* at 863-64. The busline's evidence described general degenerative changes that take place in the process of aging. *Id.* Typically, this type of *general* evidence of aging is unpersuasive to courts. *See, e.g., Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir. 1983); *EEOC v. County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976).

61. 499 F.2d at 864.



bination of age and driving experience.<sup>62</sup> The district judge, applying the *Weeks* test,<sup>63</sup> held that the busline had failed to establish a BFOQ.<sup>64</sup> The Seventh Circuit, however, reversed and refused to apply the *Weeks* test to this evidence, stating that *Weeks* did not address situations with strong public safety concerns.<sup>65</sup> The court found the *Diaz* test<sup>66</sup> to accommodate the safety factor better.<sup>67</sup> Because safe transportation of passengers was the essence of the busline's business, the court required that the employer have only a "rational basis in fact" to support his belief that the questioned hiring policy furthered the goal of public safety.<sup>68</sup> According to the court, the busline had met this lessened burden and, therefore, had established age as a valid BFOQ.<sup>69</sup>

Two years after *Greyhound*, the Fifth Circuit addressed an almost identical fact situation in *Usery v. Tamiami Trail Tours, Inc.*<sup>70</sup> The Secretary of Labor instituted this suit against the busline because of its maximum age hiring practice.<sup>71</sup> In evaluating the busline's claim of a BFOQ defense, the court confronted the question of what standard to apply.<sup>72</sup> According to the court, the Seventh Circuit had misunderstood *Diaz* and had wrongfully rejected the *Weeks* test.<sup>73</sup> The Fifth Circuit clarified the *Diaz* test, stating that the "essence of the business" requirement is a "condi-

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62. *Id.* at 864-65.

63. *See supra* text accompanying notes 48-50.

64. 499 F.2d at 861.

65. *Id.* at 861-62.

66. *See supra* text accompanying notes 55-56.

67. 499 F.2d at 862. The Fifth Circuit later questioned the Seventh Circuit's analysis of *Diaz*. *See infra* text accompanying notes 73-75. Because *Diaz* dealt with an aspect of the job that was clearly peripheral to the employer's business of safe air transportation of passengers, the Fifth Circuit in *Diaz* merely enunciated an important *threshold* requirement to claiming a BFOQ. Had this initial criterion been met in *Diaz*, the *Diaz* court would have required the further standard of proof set forth in *Weeks*. In *Greyhound* the Seventh Circuit only required the employer to meet this threshold criterion before rubber-stamping the employer's claim of age as a BFOQ. *See generally* Comment, *The Scope of the Bona Fide Occupational Qualification Exemption Under the Age Discrimination in Employment Act*, 57 CHI-KENT L. REV. 1145, 1150-54 (1981). Other circuits have not followed the *Greyhound* court's approach. *See infra* note 83 and accompanying text.

68. 499 F.2d at 863.

69. *Id.* at 861, 865. The court added that the busline's policy was based on a "good faith judgment" and was "not the result of an arbitrary belief lacking in objective reason or rationale." *Id.* at 865.

70. 531 F.2d 224 (5th Cir. 1976).

71. *Id.* at 226-27. The bus company considered applications for initial employment only from persons aged twenty-five to forty. *Id.* at 227.

72. *Id.* at 233-34.

73. *Id.* at 234-35.

tion precedent" to applying the *Weeks* test and not an exception to *Weeks*.<sup>74</sup> The Fifth Circuit also asserted that proper application of the *Weeks-Diaz* test should account adequately for safety considerations.<sup>75</sup>

Applying this test to the *Tamiami* case, the court found that the busline had established age as a BFOQ.<sup>76</sup> As the busline's concern was for public safety—clearly the essence of its business—the busline satisfied the *Diaz* requirement.<sup>77</sup> In applying *Weeks*, the court clarified the second prong of the *Weeks* test,<sup>78</sup> stating that an employer could demonstrate that it is impossible or highly impractical to use an individualized approach by showing that "some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class."<sup>79</sup> The court found that the district court could have concluded from the medical testimony that the busline had met this prong of the test.<sup>80</sup> The Fifth Circuit, therefore, affirmed the finding of a BFOQ exception.<sup>81</sup>

The *Weeks-Diaz* test set forth in *Tamiami* has become the standard approach in both Title VII<sup>82</sup> and ADEA cases.<sup>83</sup> The EEOC also has adopted the test,<sup>84</sup> requiring the employer first to meet the *Diaz* "essence of the business" test and then to satisfy either prong of the *Weeks* test by showing a factual basis for be-

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74. *Id.* at 235 n.27.

75. *Id.* at 235-36. According to the court, the *Diaz* element adjusts to encompass the safety factor—"the greater the safety factor, . . . the more stringent may be the job qualifications designed to insure safe driving." *Id.* at 236.

76. *Id.* at 237-38.

77. *Id.* at 236.

78. *See supra* notes 49-50 and accompanying text.

79. 531 F.2d at 235.

80. *Id.* at 236-38.

81. *Id.*

82. *See, e.g.,* *Harris v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980).

83. Of the circuits that have addressed this issue, the following circuits have adopted the *Weeks-Diaz/Tamiami* approach: First Circuit—*Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 105 S. Ct. 513 (1984); Fourth Circuit—*Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); Fifth Circuit—*EEOC v. University of Tex. Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); Sixth Circuit—*Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (applying a slight variation of *Tamiami*); Seventh Circuit—*Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 484 (1984); Eighth Circuit—*Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied* 434 U.S. 966 (1977); Ninth Circuit—*EEOC v. County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982); District of Columbia Circuit—*Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

84. EEOC Guidelines, *supra* note 5, § 1625.6(b).

lieving that substantially all members of a certain age group could not perform the job satisfactorily or that membership in a certain age group is the only practical means of determining whether an individual could perform the job satisfactorily.<sup>85</sup> While the *Weeks-Diaz/Tamiami* test is well established, courts recently have disagreed over a new issue concerning the proper application of the BFOQ defense. The recent cases that follow illustrate this new aspect of the continuing judicial development of the BFOQ test.

### III. RECENT DEVELOPMENT

#### A. EEOC v. City of Janesville

The 1980 case of *EEOC v. City of Janesville*<sup>86</sup> presented the Seventh Circuit with a new issue concerning judicial evaluation of an asserted BFOQ defense. The EEOC claimed that the City of Janesville, Wisconsin had violated the ADEA by discharging the chief of police when he reached the age of fifty-five.<sup>87</sup> The City had relied upon the Wisconsin Retirement Fund statute<sup>88</sup> that required mandatory retirement of all protective service employees<sup>89</sup> at age fifty-five. According to the City, the statute evidenced the legislature's judgment that age was a BFOQ for all protective service jobs.<sup>90</sup>

Having found the prima facie elements of age discrimination present, the district judge examined the likelihood of the City's

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85. Strong safety considerations are another factor that may affect the standard of proof. *See, e.g.,* *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981) (applying the *Diaz* test in a fashion similar to the Seventh Circuit's approach in *Greyhound*), *cert. denied*, 456 U.S. 915 (1982). At least one court has relied on federal age restrictions for certain classes of federal employees as conclusive evidence of a BFOQ. *See Johnson v. Mayor and City Council of Baltimore*, 731 F.2d 209 (4th Cir. 1984). The Supreme Court, however, has found this reliance to be improper. *See Johnson v. Mayor and City Council of Baltimore*, 105 S. Ct. 2717 (1985); *see also Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir. 1983) (federal age requirements not persuasive), *cert. denied*, 104 S. Ct. 484 (1984).

86. 630 F.2d 1254 (7th Cir. 1980).

87. *Id.* at 1256. Kenneth Jones, the discharged police chief, brought the original civil suit against the City (case number 79-C-477) claiming violations of the ADEA, the Civil Rights Act, and the 5th and 14th amendments to the Constitution. *EEOC v. City of Janesville*, 480 F. Supp. 1375, 1376 n.1 (W.D. Wis. 1979). The EEOC brought this separate action before the district court against the City and the State to enforce Jones' ADEA claim. *Id.* at 1376.

88. WIS. STAT. ANN. § 41.01-60 (West 1979). The Wisconsin Public Employees Retirement Act sets up a retirement fund for protective service employees. 480 F. Supp. at 1377.

89. The Seventh Circuit opinion noted that the statute's definition of protective service employees included the chief of police. *See* 630 F.2d at 1258.

90. 480 F. Supp. at 1377.

success in proving a BFOQ defense in order to rule on the EEOC's request for a preliminary injunction.<sup>91</sup> In applying the words of the BFOQ exception, the district judge focused on the police chief's specific duties. The district judge stated that a court can gauge the effects of aging only by "addressing precisely the particular activities of a particular employee or category of employees."<sup>92</sup> According to the district judge, the City's approach of focusing on protective service employees as a class was contrary to congressional intent as evidenced in the ADEA.<sup>93</sup> Because the City's only evidence of a BFOQ related to the generic class of protective service employees,<sup>94</sup> the district judge found that the City probably would not be able to demonstrate a BFOQ for police chiefs after a full trial on the merits.<sup>95</sup> The district judge, therefore, granted the EEOC's request for a preliminary injunction requiring reinstatement.<sup>96</sup>

On appeal the Seventh Circuit considered whether evidence of a BFOQ must relate to the specific duties of the police chief or to the generic duties of all protective service employees.<sup>97</sup> According to the court, the district judge's interpretation of the BFOQ exception, which required the court to look at the employee's specific duties, was excessively restrictive.<sup>98</sup> The court stated that an examination of the legislative history of the ADEA was unnecessary,<sup>99</sup> relying instead on the "plain meaning of the term 'particular business.'"<sup>100</sup> According to the Seventh Circuit, the City need only

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91. *Id.* at 1377-78.

92. *Id.* at 1378. The district judge went on to say: "The effect of the ages of all of the members of the department upon the normalcy of the department's operation cannot be gauged by addressing only the particular activities of the patrol officers." *Id.*

93. *Id.* at 1379.

94. The district court noted that the City had no evidence of its own to support any claim of a BFOQ. Rather, the City relied exclusively upon reports of Wisconsin's Retirement Research Committee to support the City's general BFOQ claim. *Id.* at 1377, 1379-80. The court found this general evidence irrelevant to establishing a BFOQ for the job of chief of police. *Id.* at 1380.

95. *Id.* at 1380-81.

96. *Id.* at 1381.

97. 630 F.2d at 1254. On appeal the City claimed that the trial judge had abused his discretion by issuing the injunction and that the ADEA's applicability to state and local governments violated the 10th amendment. *Id.* at 1256. The Seventh Circuit found that issue to be properly addressed at trial by the district court. *Id.* at 1259. The United States Supreme Court later found that the 1974 amendments making the ADEA apply to state and local governments were constitutional. *EEOC v. Wyoming*, 460 U.S. 226 (1983).

98. 630 F.2d at 1258.

99. *Id.*

100. *Id.* The court stated, "Congress was certainly at liberty to limit the applicability of a BFOQ to a particular 'occupation' rather than to a 'business' if it so intended." *Id.*

demonstrate at trial that age was a BFOQ for "the *generic class* of employees subject to its retirement program."<sup>101</sup> Based on this interpretation of the BFOQ defense, the Seventh Circuit reversed the district judge's grant of the injunction.<sup>102</sup>

### B. EEOC v. City of St. Paul

In *EEOC v. City of St. Paul*<sup>103</sup> the Eighth Circuit addressed the same issue as the Seventh Circuit in *Janesville*. The City of St. Paul retired a district fire chief pursuant to both a Minnesota statute and a St. Paul ordinance that provided for the mandatory retirement of all fire department personnel at age sixty-five.<sup>104</sup> The EEOC filed suit on the fire chief's behalf to enforce his rights under the ADEA.<sup>105</sup>

To determine whether age was a BFOQ defense to this action<sup>106</sup> the district court examined the duties of firefighters, fire captains,<sup>107</sup> and district chiefs.<sup>108</sup> The district court found that the district chief's primary duties included supervising, handling disciplinary problems, and training.<sup>109</sup> Moreover, only occasionally did district chiefs take an active role in fire suppression.<sup>110</sup> The court also looked at both the effects of aging on the performance of the duties of each job<sup>111</sup> and the efficacy of testing to discover individuals' actual abilities to perform the duties of their jobs.<sup>112</sup> Based on this extensive analysis, the court concluded that being sixty-four or younger was a BFOQ for the jobs of firefighters and fire captains.<sup>113</sup> Applying the two-part *Weeks* test<sup>114</sup> to the position of dis-

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101. *Id.* (emphasis in original).

102. *Id.* at 1257.

103. 671 F.2d 1162 (8th Cir. 1982).

104. *EEOC v. City of St. Paul*, 500 F. Supp. 1135, 1137-38 (D. Minn. 1980).

105. *Id.* at 1138. Initially, both the City of St. Paul and the State of Minnesota were defendants in this action. The court dismissed the State as a defendant, however, because the court found that the State had no plan to enforce the statute against the fire chief. *Id.* at 1143-44.

106. *Id.* at 1137.

107. *Id.* at 1138-40. According to the court, the duties of firefighters and fire captains include rescuing the persons endangered by the fire, moving heavy equipment to the scene of the fire, suppressing the fire, and clearing the scene after extinguishing the fire. *Id.*

108. *Id.* at 1139-40.

109. *Id.* at 1139.

110. *Id.* at 1140.

111. *Id.* at 1140-41.

112. *Id.* at 1141-43.

113. *Id.* at 1143-45.

114. The court did not identify this test by name, but applied the same standards found in the *Weeks* test. *See id.* at 1145.

trict chief, however, the court found that the City did not have a "factual basis for believing that substantially all District Chiefs are unable to perform their duties safely and effectively after the age of 64."<sup>115</sup> Nor did the City establish the impossibility of ascertaining, without knowing the employees' ages, whether some district chiefs possessed traits making safe, effective performance impossible.<sup>116</sup> The district court, therefore, concluded that being sixty-four or younger was not a BFOQ for the job of district fire chief.<sup>117</sup>

On appeal<sup>118</sup> the City argued that the district judge erred in looking at the district chief's specific duties to determine whether age was a BFOQ.<sup>119</sup> Instead, the City argued that the court should follow the Seventh Circuit's approach in *Janesville* and require evidence of a BFOQ to relate to all firefighting personnel as a class.<sup>120</sup> The Eighth Circuit refused to adopt the Seventh Circuit's approach, finding it "inconsistent with the goal of ability-based decisions to allow a city to retire a fire chief or a police chief who was completely able to fulfill his duties because he was unable to fulfill the duties of another position within the department."<sup>121</sup> While the Seventh Circuit emphasized the words "particular business" to support its conclusion that the ADEA did not contemplate evidence of a particular occupation within a business, the Eighth Circuit interpreted the language of the BFOQ exception differently. The Eighth Circuit examined the rest of the words in the BFOQ exception, including "bona fide occupational qualification," and concluded that age must be relevant to an occupation within a business.<sup>122</sup>

The Eighth Circuit noted other problems with the Seventh Circuit's approach, including its inconsistency with the congressional intent behind the ADEA, the potential of frustrating the entire purpose of the ADEA by broadening the scope of the BFOQ defense, and the difficulty of defining the "generic class" in order to apply the test.<sup>123</sup> The Eighth Circuit affirmed the district court's

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115. *Id.*

116. *Id.*

117. *Id.* at 1146.

118. EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982).

119. *Id.* at 1164.

120. *Id.* at 1165.

121. *Id.*

122. *Id.* (emphasis in original).

123. *Id.* at 1165-66. For an in-depth discussion of *Janesville*, see Comment, *supra* note 67; Casenote, EEOC v. City of Janesville: *Promoting Age Discrimination—The Exception Becomes the Rule*, 14 J. MAR. L. REV. 895 (1981).

approach, requiring evidence of a BFOQ to relate to the specific duties of the district chief.<sup>124</sup> Examining the evidence in light of this approach, the court found that the facts supported the district court's holding that the City had failed to establish age as a BFOQ for district chiefs and, thus, the Eighth Circuit affirmed the district court's result.<sup>125</sup>

### C. Mahoney v. Trabucco

In *Mahoney v. Trabucco*<sup>126</sup> the First Circuit also addressed the issue of the relevant class of employees for the purpose of establishing a BFOQ defense and proposed yet a third approach. In *Trabucco* Massachusetts sought to retire<sup>127</sup> a state police sergeant in accordance with a Massachusetts statute requiring the retirement at age fifty of all uniformed members of the state police.<sup>128</sup> The Sergeant sued the Commissioner of the Department of Public Safety, claiming that applying the mandatory retirement statute in his case violated the ADEA.<sup>129</sup> The Commonwealth asserted that age was a BFOQ for all uniformed members of the state police.<sup>130</sup> The district court identified the *Weeks-Diaz/Tamiami* approach as the proper test for establishing a BFOQ defense.<sup>131</sup> Finding that the retirement statute was related to the essence of the job of the Massachusetts State Police,<sup>132</sup> the district court went on to examine whether the Commonwealth had met the second part of the test.<sup>133</sup> In order to determine whether substantially all persons older than fifty would be unable to perform the duties of the job or that individual testing would not indicate whether persons older than fifty could effectively perform the duties of the job,<sup>134</sup> the district judge recognized the important threshold question of how to define the duties of the Sergeant's job.<sup>135</sup>

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124. 671 F.2d at 1166.

125. *Id.* at 1168.

126. 738 F.2d 35 (1st Cir. 1984).

127. With the consent of the parties the district court enjoined Mahoney's retirement until trial on the merits. *Mahoney v. Trabucco*, 574 F. Supp. 955, 956 (D. Mass. 1983).

128. *Id.* at 956.

129. *Id.*

130. *Id.* at 957.

131. *Id.* at 958.

132. *Id.* This finding satisfied the *Diaz* part of the *Weeks-Diaz/Tamiami* test. See *supra* text accompanying note 56.

133. 574 F. Supp. at 958.

134. This is the second prong of the *Weeks-Diaz/Tamiami* test. See *supra* text accompanying notes 48-50, 78-79.

135. 574 F. Supp. at 958.

The Commonwealth contended that the Sergeant's duties should be defined as the duties of all uniformed state policemen,<sup>136</sup> namely, patrolling state highways, assisting the public and police, imposing order during state prison disturbances, and helping during natural disasters and emergencies.<sup>137</sup> Based on the Commonwealth's evidence concerning these duties and medical evidence about the effects of age on performing the duties,<sup>138</sup> the district judge concluded that age was a BFOQ for those duties.<sup>139</sup> The Sergeant, however, argued that the court should examine the asserted BFOQ defense in light of the duties of his particular job, which differed greatly from the duties of most uniformed state policemen.<sup>140</sup> The Sergeant introduced evidence that he had worked at the State Police General Headquarters as a telecommunications specialist for fourteen years.<sup>141</sup> The evidence indicated that, although subject to some of the same responsibilities as all uniformed state policemen,<sup>142</sup> the Sergeant's daily job routine differed greatly, essentially amounting to a desk job.<sup>143</sup> Even his duties during emergencies had been confined largely to communications duty.<sup>144</sup> Furthermore, the Commissioner testified that, although the Sergeant was subject to transfer to a job involving road duty, such a transfer would be unlikely in his case.<sup>145</sup> Finally, medical evidence indicated that age would not be a BFOQ for the duties of the Sergeant's job.<sup>146</sup>

Faced with all this evidence, the district judge reviewed the Seventh and Eighth Circuits' approaches to the same issue of stat-

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136. *Id.*

137. *Id.* at 959. The evidence indicated that two-thirds of the uniformed branch of state policemen performed these duties. *Id.*

138. *Id.* at 959-60.

139. *Id.* at 960.

140. *Id.* at 958.

141. *Id.* at 959. The Sergeant's duties included training others in the uses of police telecommunications, keeping and supplying certain criminal records, and serving as a state police liaison to a civilian communications unit. *Id.*

142. As a uniformed member of the state police, the Sergeant was responsible to help citizens in emergency situations on state highways, to take appropriate action if he saw a crime taking place, and to be prepared to respond to an emergency. *Id.*

143. According to the court, the Sergeant's job was the same in essence as "an office worker holding a desk job." The Sergeant worked regular office hours while most state police officers worked four days and then had two days off. *Id.*

144. *Id.*

145. The Commissioner stated that, because the Sergeant's job required technical knowledge, he probably would not be reassigned unless his job performance was poor. *Id.* at 962.

146. *Id.* at 960.



utory interpretation.<sup>147</sup> The district court chose to adopt the Eighth Circuit's approach from *St. Paul*<sup>148</sup> despite the potential problems with this approach,<sup>149</sup> finding that it reflected sound statutory interpretation and best effectuated the ADEA's policies.<sup>150</sup> The court concluded that evidence of a BFOQ defense should be tested against "the requirements of the job that Sergeant Mahoney has actually performed in the past and is likely to perform in the future."<sup>151</sup> The district court applied this test to the evidence and, not finding that age was a BFOQ for the Sergeant's job, enjoined the Commonwealth from enforcing the statute against the Sergeant as long as he worked at his current assignment.<sup>152</sup>

On appeal<sup>153</sup> the First Circuit reversed, noting problems of "morale, administration, litigation and adjudication" resulting from the district court's approach.<sup>154</sup> The court found that the ADEA and congressional intent supported a different, less problematic approach. Agreeing with both the Eighth Circuit and the district court in *Trabucco* that courts must ascribe meaning to "occupational qualification" as well as to "particular business,"<sup>155</sup> the First Circuit defined occupation as a "recognized and discrete vocation."<sup>156</sup> Disagreeing with the district court, the First Circuit stated that assignments within a paramilitary uniformed force, even if of long duration, would not constitute occupations.<sup>157</sup> The

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147. *Id.* at 960-61.

148. *See supra* text accompanying note 124.

149. 574 F. Supp. at 962-63. For example, the court recognized that this approach could favor those members of the uniformed branch of the state police whose duties did not require top physical condition, thereby subjecting some, but not all, members of the uniformed branch to mandatory retirement at age fifty. *Id.*

150. *Id.* at 961.

151. *Id.*

152. *Id.* at 963.

153. *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984).

154. *Id.* at 38-39. The court noted that the district court's approach could create the following problems: (1) administrative personnel within a strenuous occupation not being subject to a BFOQ applicable to other personnel; (2) some personnel being unavailable for general duty; (3) inconsistent treatment of officers of the same rank; (4) more difficult assignment decisions; (5) more incentive for employees to seek "safe harbor" positions; (6) fewer promotions; (7) responsible employees being penalized; (8) increased litigation; and (9) more intrusive quality judgments by the courts. *Id.*

155. *Id.*

156. *Id.* at 39. The court cited Webster's definition of "occupation" as: "The principal business of one's life: a craft, trade, profession or other means of earning a living. . . ." *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1560 (1966)).

157. 738 F.2d at 39. The court seemed to think it significant that all members of such a force were subject to the same military training, unrestricted reassignment, and strenuous emergency duties, and all received special disability and pension benefits. *Id.* Agreeing with

First Circuit concluded that the language of the ADEA,<sup>158</sup> congressional intent,<sup>159</sup> and relevant case law<sup>160</sup> supported the court's approach of giving meaning, but limited application, to the term "occupation."

#### IV. ANALYSIS

The three circuit courts that have addressed the issue of whether an "occupational qualification" need relate only to the general business of which the employee is a part or to the employee's specific duties within that business have taken three different positions. The Seventh Circuit maintains that the BFOQ need pertain only to the duties of the generic class of personnel. The Eighth Circuit holds the opposite view and requires that the BFOQ relate to the duties of the particular position in question. The First Circuit takes an intermediate stance, asserting that the BFOQ need be relevant to the specific job only in those narrowly defined situations in which genuinely distinct occupations exist within a general group of employees. Proper resolution of this conflict is extremely important because the approach adopted will determine the scope of the BFOQ exception and, thus, the efficacy of the ADEA in protecting the rights of many elderly employees. In order to determine the appropriate conclusion, these three approaches must be evaluated in light of three considerations: (1) prior judicial application of the BFOQ test in similar circumstances, (2) the words of the BFOQ exception, and (3) legislative history as a manifestation of congressional intent.

Although previous ADEA cases did not explicitly address this

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the Eighth Circuit to a limited extent, the court stated that the job of fire chief, such as the one in *St. Paul*, was "arguably" an occupation. The First Circuit, however, went on to disagree with the Eighth Circuit's willingness to consider other assignments as occupations. *Id.*

158. According to the court, its approach was consistent with the language of the BFOQ exception because the court gave meaning to both occupation and particular business. *Id.* at 39.

159. *Id.* at 39-41. The court relied both on statements from the 1977 congressional debate between Senators Williams and Javits and on a specific example, offered by Senator Javits, of a possible BFOQ defense. *Id.* For a discussion of these statements, see *infra* text accompanying notes 183-86.

160. 738 F.2d at 39-41. The court identified four cases that focused on the class of employees and not on the exceptions. These cases, which arose prior to the 1977 debates, are: *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976); and *McIlvanie v. Pennsylvania State Police*, 6 Pa. Commw. 505, 296 A.2d 630 (1972). The court also relied on language from *EEOC v. Wyoming*, 460 U.S. 226 (1983). 738 F.2d at 41. The persuasiveness of these cases is discussed *infra* text accompanying notes 162-64, 180-82.

issue, earlier cases can give some indication of how other courts might address the issue. This particular BFOQ issue does not arise in the typical job situation in which an employee is hired to perform a specific job and may be promoted to a different job as he progresses. In these cases, courts have always required evidence of a BFOQ defense to relate to the employee's specific duties.<sup>161</sup> The issue of whether a BFOQ should relate to a specific job or to a generic class only arises in situations in which the duties of different positions within a general group of employees may vary greatly. In *Aaron v. Davis*,<sup>162</sup> the only case arising prior to *Janesville* in which this issue is relevant, the district court examined the BFOQ evidence in light of the employees' specific duties as assistant fire chief and district fire chief. By focusing on the exact duties each plaintiff performed, the court implied that evidence of a BFOQ for the general class of firefighters was inadequate.<sup>163</sup> Although not determinative, this past judicial precedent does yield slight support for focusing on the individual employee's duties.<sup>164</sup>

The most important requirement for any statutory interpretation is that it conform with the language of the statute. A proposed test for applying the BFOQ exception, therefore, must be consistent with the words of the BFOQ exception. The BFOQ exception explicitly contemplates that the qualifications required by the employee's *occupation* also must be necessary within the larger sphere of the *particular business*. A proper interpretation of the BFOQ exception, therefore, must give meaning to both "occupational qualification" and "particular business." To say, as the Seventh Circuit did in *Janesville*, that Congress' use of "particular business" resolves the inquiry, placing the whole focus on the "business" of law enforcement or firefighting,<sup>165</sup> is inconsistent

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161. In retirement cases, the employee's current duties provide the standard. *See, e.g., Houghton v. McDonnell Douglas Corp.*, 413 F. Supp. 1230 (E.D. Mo. 1976), *rev'd*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977). In refusal to hire cases, the applicant's potential duties are determinative. *See, e.g., Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976).

162. 414 F. Supp. 453 (E.D. Ark. 1976).

163. *See* Casenote, *supra* note 123, at 911-12.

164. After *Janesville* and *St. Paul*, the following courts outside of the Seventh and Eighth Circuits addressed this issue and found as follows: *EEOC v. University of Tex. Health Science Center*, 710 F.2d 1091 (5th Cir. 1983) (finding *St. Paul* the proper approach); *Beck v. Borough of Manheim*, 505 F. Supp. 923 (E.D. Pa. 1981) (cites *Janesville*'s district court opinion, which is the same as *St. Paul*, as the proper approach).

165. *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980). Courts and commentators have criticized *Janesville* for its statutory interpretation and other problems. *See, e.g., EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-68 (8th Cir. 1982); Comment, *supra*

with the very words of the statute the court purports to apply. The Seventh Circuit's approach, therefore, is not a viable interpretation of the BFOQ exception. The Eighth and First Circuits' approaches both address the dual focus of the BFOQ exception, acknowledging its recognition of separate occupations within the larger business. These circuits, however, differ in the meaning they ascribe to "occupation," a difference that determines the scope of the BFOQ exception. In order to resolve this important conflict, both approaches must be examined in light of the third guide to proper interpretation, legislative intent.

Although the legislative history of the ADEA is sparse and not entirely lucid, examining the following sources provides guidance in developing an appropriate clarification of the BFOQ test: interpretive statements by the ADEA's enforcement agency, an example of a possible BFOQ defense, and the general purpose of the ADEA and its BFOQ exception. In 1968 the Department of Labor—the agency then charged with enforcing the ADEA and aiding in its interpretation—issued an interpretive bulletin relating to the BFOQ exception.<sup>166</sup> In 1981 the Equal Employment Opportunity Commission, which had taken over the Department of Labor's responsibilities of enforcing and interpreting the ADEA, issued a similar interpretive bulletin with several very significant changes.<sup>167</sup> The 1981 report incorporated the *Weeks-Diaz/Tamiami* test to describe the employer's burden in establishing a BFOQ defense.<sup>168</sup> In addition, the 1981 report repeated a statement from the earlier report verbatim except for the important addition of four words: "Whether occupational qualifications will be deemed to be 'bona fide' to a specific job and 'reasonably necessary to the normal operation of the particular business,' will be determined on the basis of all the pertinent facts surrounding each particular situation."<sup>169</sup> Thus, rather than requiring that an occupational qualification be bona fide and necessary only to the particular business, the added language means that the occupational qualification must be necessary to the employee's job as well.

The example of a possible BFOQ defense given in the legislative history of the 1978 ADEA amendments also supports the idea

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note 67, at 1147-48, 1165-78; Casenote, *supra* note 123, at 906-15.

166. Department Bulletin, *supra* note 32, § 860.102.

167. EEOC Guidelines, *supra* note 5, § 1625.6. The present version of § 1625.6 is similar to the cited version.

168. *Id.* § 1625.6(b).

169. *Id.* § 1625.6(a) (emphasis added).

that a BFOQ should relate to the employee's specific job. The example states that the *Weeks-Diaz/Tamiami* test might be satisfied "in certain types of particularly arduous law enforcement activity."<sup>170</sup> Clearly, this statement does not imply that all employees engaged in the business of law enforcement would be subject to such a BFOQ. Rather, the words "certain types of particularly arduous" limit those parts of law enforcement activity that would be likely candidates for a valid BFOQ defense, necessitating an examination of the type of law enforcement activity in which the employee is engaged.

Finally, numerous statements by Congress, the Department of Labor, and the EEOC clearly demonstrate four general interpretive guidelines. First, courts should construe the BFOQ exception narrowly.<sup>171</sup> Second, courts should evaluate BFOQ claims on a case by case basis.<sup>172</sup> Third, courts should focus on the ability of the elderly employee to perform his job effectively.<sup>173</sup> Last, courts must accomplish the ADEA's purpose of ridding our nation of useless age discrimination.<sup>174</sup> All of these guidelines from the legislative history indicate that the duties of the employee's specific job or occupation are very relevant in determining a BFOQ. The Eighth Circuit's approach in *St. Paul*, requiring evidence of a BFOQ to relate to the individual employee's ability to do his individual job, therefore, is most consistent with effectuating the ADEA's intended goals.

The First Circuit's approach in *Trabucco* also attempts to comply with the guidelines set out in the legislative history. The First Circuit's thoughtful opinion suggests a middle ground approach that attempts to balance the conflicting policy concerns of the elderly employee, the employer, and the courts. The *Trabucco* opinion offers persuasive arguments to support its restrictive interpretation of occupation. Although willing to acknowledge "recognized and discrete vocation[s]" as occupations,<sup>175</sup> the First Circuit points out numerous problematic implications of considering an employee's assignment within a uniformed, protective service force

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170. S. REP. No. 493, 95th Cong., 2d Sess. 10-11, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 504, 513-14.

171. Department Bulletin, *supra* note 32, § 860.102(b).

172. 1967 U.S. CODE CONG. & AD. NEWS 2213, 2220.

173. S. REP. No. 493, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 504, 506.

174. *Id.*; EEOC Guidelines, *supra* note 5, § 1625.6.

175. *Mahoney v. Trabucco*, 738 F.2d 35, 38-39 (1st Cir. 1984).

to be an occupation.<sup>176</sup> The many problems that could impose burdens on employers and courts include restricting the assignability of employees; treating employees of the same rank inconsistently; interfering with existing pension programs, which are calculated on the basis of retirement at a certain age; increasing litigation; and forcing courts to make intrusive quality judgments.<sup>177</sup> According to the First Circuit, because those problems are particularly prevalent in employment situations within the protective service field, such assignments should not be considered occupations for the purpose of applying the BFOQ exception.<sup>178</sup>

Admittedly, considering an assignment within a protective service force to be an occupation could create problems. The existence of these problems, however, does not justify an analytical approach that is inconsistent with the ADEA. The First Circuit asserts that its narrow view of what constitutes an occupation is supported by the ADEA.<sup>179</sup> To support this assertion the opinion lists four cases decided prior to *Janesville*, stating that these cases demonstrate a focus on the class of employees and not on exceptions within the class.<sup>180</sup> The First Circuit's reliance on these cases, however, is misplaced. For example, the issue is not relevant in two of the cases, *Tamiami* and *Greyhound*, because they concern a failure to hire employees to perform a discrete occupation.<sup>181</sup> Another case, *Aaron v. Davis*, supports an individualized examination of the duties of the assistant fire chief and district fire chief for purposes of demonstrating a BFOQ exception.<sup>182</sup>

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176. See *supra* note 154.

177. 738 F.2d at 38. An additional, unrecognized problem concerns the possibility of manipulating an employee's retirement either by assigning him to a strenuous job for which age is a BFOQ or by assigning him to an administrative job for which the same age is not a BFOQ. Although this problem could occur, courts should be able to circumvent this problem partially by using the approach suggested by the district court in *Trabucco*, which necessitates looking at the duties of the job the employee has performed in the past and is likely to perform in the future. *Mahoney v. Trabucco*, 574 F. Supp. 955, 961 (D. Mass. 1983); see *infra* notes 191-92 and accompanying text.

178. 738 F.2d at 39.

179. *Id.* at 39-42.

180. See cases cited *supra* note 160.

181. See *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974). For a discussion of these cases, see *supra* notes 57-81 and accompanying text.

182. *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976); see *supra* text accompanying notes 162-63. The fourth pre-*Janesville* case noted was *McIlvanie v. Pennsylvania State Police*, 6 Pa. Commw. 505, 296 A.2d 630 (1972). In this state case the court refused to focus on the employee's specific duties as a troop commander within the state police and upheld the employee's mandatory retirement. *Id.* This case provides some support for the First

The First Circuit also relies on statements made in the congressional debate of the 1978 ADEA amendments for support. The First Circuit, however, admitted that the speaker contradicted himself and made statements "inconsistent with any concept of a BFOQ."<sup>183</sup> Understanding how the First Circuit could draw any support from this source is difficult. The First Circuit also cites the example of a BFOQ concerning "certain types of particularly arduous law enforcement activity."<sup>184</sup> By restricting the BFOQ exception to only those specific aspects of law enforcement activity in which increasing age truly will make job performance more difficult, however, this example provides more support for the Eighth Circuit's view of "occupation."<sup>185</sup> The example did not suggest that there need be a "well-recognized occupation" as the First Circuit maintains.<sup>186</sup> Because the First Circuit relied on unpersuasive grounds and the legislative history supports the Eighth Circuit's approach, the First Circuit opinion lacks any credible support.

Not only is the First Circuit's approach unsupported by the ADEA's legislative history and relevant judicial precedent, but the First Circuit's concerns about applying a broader interpretation of occupation, although legitimate, are not persuasive in light of the ADEA's policy objectives. The First Circuit's narrow view of occupation resulted in the mandatory retirement at age fifty of a state police officer who had performed successfully as a telecommunications specialist for fourteen years,<sup>187</sup> who was likely to remain in that position until a later retirement date,<sup>188</sup> and who would most

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Circuit's approach. *But see supra* notes 161-64 and accompanying text (discussing cases that suggest the Eighth Circuit's approach is more appropriate).

The First Circuit also relied on *EEOC v. Wyoming*, 460 U.S. 226 (1983), a case in which the United States Supreme Court considered the constitutionality of the ADEA's applicability to the states. The First Circuit drew support from dicta in the Court's opinion asserting that the state could continue to enforce its retirement policy if it could demonstrate age as a BFOQ for game wardens. Because the plaintiff was a game warden *supervisor* in the case, the First Circuit thought the Court's reference to game wardens indicated the Supreme Court's inclination to look at the generic class and not at the employee's specific duties. *Mahoney v. Trabucco*, 738 F.2d 35, 41 (1st Cir. 1984). This issue, however, was not before the Supreme Court in the *Wyoming* case, and the entire context of the opinion indicates that the Court probably did not consider this peripheral issue. The First Circuit's reference to *EEOC v. Wyoming*, therefore, is not persuasive.

183. 738 F.2d at 40-41 (referring to the debate between Senators Williams and Javits).

184. *Id.* at 40, (citing S. REP. NO. 493, 95th Cong., 2d Sess. 10-11, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 513-14).

185. *See supra* text accompanying and following note 170.

186. *See* 738 F.2d at 42.

187. *Id.* at 37.

188. 574 F. Supp. at 962.

likely have been able to perform his duties in that position effectively for many years after age fifty.<sup>189</sup> This result clearly frustrates the intent of the ADEA and misuses the BFOQ exception to the harm of both the employee and the employer by forcing the State to find and train another person to perform the Sergeant's duties when he could still perform them effectively.

In a different, less factually sympathetic case, the First Circuit's concerns for the employer and the courts may seem more persuasive. However, this policy decision to balance inconvenience to the employer and the courts against the needs of the older worker is not a task for the courts. Congress, as the appropriate body for weighing conflicting policy choices, has made its intent clear through the ADEA. Congress has chosen to remedy the problem of past age discrimination by imposing some of the burden previously borne by the older worker on the employer and the courts. When interpreting this statute, courts must comply with Congress' expressed intent. The broader interpretation of occupation enunciated by the Eighth Circuit in *St. Paul*, while problematic in some instances,<sup>190</sup> does achieve Congress' intended result by focusing on an individual's ability to perform his specific duties effectively. Adopting the *St. Paul* approach, therefore, is the best method of resolving the conflict over the proper focus of the BFOQ test.

Finally, this new aspect of the BFOQ test must be integrated into the judicial application of the BFOQ exception as a whole. The district court in *Trabucco* adopted the *St. Paul* analysis and demonstrated the proper place of this criterion in the application of the BFOQ test.<sup>191</sup> First, the court must apply the *Diaz* test to assure that the mandatory retirement age is related to the essential function of the employer's business. Second, prior to applying the *Weeks* test as clarified by *Tamiami*, the court must examine the duties of the employee's job. If the job is a specific assignment, the court should look at "the requirements of the job that [the employee] has actually performed in the past and is likely to perform in the future."<sup>192</sup> Finally, the court should apply the *Weeks*/

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189. *Id.* at 960, 962.

190. *See supra* notes 154, 177.

191. 574 F. Supp. 955.

192. *Id.* at 961. The results of this inquiry may necessitate examining age as a BFOQ for the generic class of employees rather than for the employee's specific duties if the employee has been or may be subject to diverse short-term assignments, some of which have required or will require performance of strenuous activity. In these situations, therefore,



*Tamiami* two-part test to those duties, requiring the employer to demonstrate either that substantially all persons over the given age cannot perform the duties of the job as defined above or that individual determinations of ability to perform the job are impossible or impracticable.

This BFOQ test, incorporating *St. Paul* into the *Weeks-Diaz/Tamiami* test, truly effectuates the drafters' intent for the application of the ADEA's BFOQ exception. An employer will be able to demonstrate a BFOQ defense when the employee's age actually interferes with his ability to do his job. When age is not a relevant factor in the employee's ability to perform his duties, however, the employer, the employee, and society will benefit by the employee's continued work performance. Courts, therefore, should embrace this approach as the most viable and effective expression of congressional intent.

#### V. CONCLUSION

The issue recently addressed by the First, Seventh, and Eighth Circuits represents a new aspect of the continuing judicial development of a BFOQ test. This issue, concerning whether evidence of a BFOQ defense should relate specifically to the actual duties of the individual employee's job or to the duties of the generic class of employees of which the employee is a part, is resolved by careful examination of the ADEA and its legislative history. This inquiry reveals a preference for a restrictive construction of the BFOQ exception, which requires the BFOQ evidence to relate to the employee's ability to perform the actual duties of his job. Courts should adopt the approach first set forth by the Eighth Circuit in *St. Paul*. This resolution of the current conflict among the circuits will enable the BFOQ test as a whole to achieve its proper function of allowing employers to make employment decisions based on empirical evidence of the effects of age on specific job performance, but will prevent employers from misusing the BFOQ exception as a means of circumventing the ADEA's purposes.

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applying the *Trabucco* district court approach will require evidence to relate to the employee's specific duties only when his assignment actually approximates an occupation that has some duration and particular duties.