MANDATORY RETIREMENT AND IMPACT DISCRIMINATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: YOU’LL GET YOURS WHEN YOU’RE 70

by

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I. INTRODUCTION

"Since the turn of the century, the number of Americans over 65 years of age has grown two and one half times faster than the population as a whole . . . we, willfully and knowingly waste their resources, their skills and experiences. We do not grow old merely by living the number of years. People grow old by losing their enthusiasm, deserting their ideals, abandoning their joy for life and no longer looking forward to the challenges of adventure and change. Instead of yearning for retirement, the desire for a vigorous active life and the wish and ability to work hard and look forward with hope instead of fear often exists in men and women for 70 years or more . . . . Years may wrinkle the skin but to abandon enthusiasm wrinkles the soul and deadens the brain."

IN APRIL OF 1978, Congress amended the Age Discrimination in Employment Act (ADEA) to protect workers up to the age of seventy³ and to prohibit mandatory retirement prior thereto when based on age.⁴ The amendment responded directly to the Supreme Court’s decision in United Airlines, Inc. v. McMann⁵ wherein the Supreme Court concluded that a pre-sixty-five involuntary retirement plan was allowable if part of a bona fide seniority system or benefit plan and not used as a subterfuge of the Act.⁶ Chief Justice Burger writing on behalf of the majority stated that a seniority or benefit plan adopted prior to the effective date of the ADEA was, by definition, not a subterfuge of the Act even though that plan required involuntary retirement of employees prior to age sixty-five.⁷

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⁶Id. at 203.
⁷Id.
Congress, in Public Law 95-256, explicitly declared its intolerance of involuntary retirement of protected workers based upon age under the ADEA’s bona fide seniority system or benefit plan defense.  

While the McMann decision was the catalyst for the 1978 amendment, the determination that age was not an allowable basis for involuntary retirement was not a new concept. The Secretary of Labor in his 1975 annual report on the Age Discrimination in Employment Act of 1967 had specifically concluded that pre-sixty-five involuntary retirements were unlawful unless required by the terms of an otherwise bona fide seniority system or benefit plan. Several circuit courts had addressed issues similar to those raised in McMann and concluded that a pre-sixty-five involuntary retirement plan violated the Act regardless of whether the plan pre-dated the Act.

Congress and the courts, however, have been inconsistent in their treatment of age discrimination. They have not been able to reconcile differences in their tolerance of some types of age discrimination and intolerance of others. Congress has been quick to disallow negative age discrimination but slow to proscribe ameliorative age discrimination. Even within the ADEA, Congress has been inconsistent in its tolerance of age discrimination in employment. Mandatory pre-seventy retirement is now illegal under the ADEA, but different seniority and retirement benefits are not. The allowance of these differences for older workers is not only inconsistent, it also violates the spirit of the Act. Courts, following Congress’ uncertainty in the area, have analyzed age discrimination using either disparate treatment or disparate impact analysis or disparate impact.


*DEPT. OF LABOR ON ACTIVITIES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 17 (1975).


*For example, Americans over the age of 55 may exclude up to $125,000 of gain on the sale of their personal residence. Others may only defer gain if the personal residence is replaced with a more expensive residence within a specified period of time.


12 *(f) "It shall not be unlawful for an employer, employment agency, or labor organization . . .

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


*Disparate treatment refers to intentional discrimination. It requires proof of a subjective motive or intent. See generally, Player, "Proof of Disparate Treatment Under the Age Discrimination in Employment Act:
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This article will consider disparate impact analysis in the context of mandatory retirement of the pre-seventy employee under the ADEA. While disparate treatment analysis is clearly appropriate under the current legislative scheme, disparate impact analysis should also be available in age discrimination cases which consider mandatory retirement.

While it has been argued that Congress did not intend to confer disparate impact analysis on the ADEA, it must be remembered that the analysis is court-created. Congress did not “intend” to confer disparate impact analysis on Title VII either. But the effect of impact discrimination on those from forty to seventy is no different than the effect of impact discrimination on individuals because of their race or gender. There is no logical reason why the disparate impact analysis should not be used in age discrimination cases as well, except that Congress has created a separate statute for age discrimination. Once the protected class has been identified, however, nothing in the nature or extent of the discrimination supports the difference in analysis of age discrimination as opposed to sex and race discrimination. Congress, in its creation of a separate statute, has not created a barrier to the realization of freedom from discrimination for the protected class of workers aged forty to seventy. This article concludes that impact discrimination under the ADEA should be treated and analyzed as is impact discrimination under Title VII.

II. AGEISM

Ageism is the process of stereotyping based on the number of years an individual has lived. It includes both generalizations about capabilities or the lack thereof as well as the granting or denying of rights or benefits due to one’s age.

Age has traditionally been a major determinant of entitlement to benefits during both the first and last parts of one’s life. Most states, for example, have laws that determine when an individual may commence attendance in state public schools, or when an individual may receive special utility or tax rates. These requirements rely on age. Age is thus used as a measure of the likely characteristics of an individual. This use, however, ignores individual differences.


Disparate impact refers to neutral policies or acts which have the unintentional effect of discrimination. See footnote 27, infra and text and footnotes accompanying section V., B., infra. O’Connell v. Ford Motor Co., 11 Fair Empl. Proc. Cas. (BNA) 1471, 1472 (E.D. Michigan 1975) (Because prohibitions of A.D.E.A., with few minor exceptions, are identical to those of Title VII, standards developed under Title VII may be adapted to A.D.E.A. cases, with the substitution of “age” for “race”).


Birren and Loucks, Age Related Change and the Individual 57 CHI.-KENT L. REV. 833, (hereinafter cited as Birren and Loucks).

See HOUSE SELECT COMM. ON AGING, FEDERAL RESPONSIBILITY TO THE ELDERLY, H.R. DOC. NO. 167, 95th Cong., 2d Sess. 2-3 (1978) which lists over 40 major federal programs which give special benefits to the elderly.
It can easily be appreciated that an individual has both a biological and psychological age. An individual's biological and psychological age may not coincide. Chronological age and competency, in particular here the ability to physically or mentally perform on the job, similarly may not coincide.

The question, then, is whether an age-based statutory classification is a lawful index of one's ability to perform a job. This inquiry must start with a consideration of Congress' intent in proscribing age discrimination in employment as set forth in the ADEA.

III. HISTORY AND SIGNIFICANCE OF THE ADEA

Congress considered incorporating a ban on age discrimination in Title VII of the Civil Rights Act of 1964. Many Congressmen, however, perceived a qualitative difference between age discrimination and sex and race discrimination. Some legislators felt age discrimination was a severe and obvious problem. Others were unsure. Still others felt it was necessary to document the need for legislation. The Secretary of Labor was directed to report to Congress on age discrimination in employment, which he did in 1965. The report showed that a substantial amount of age discrimination in employment did exist; therefore, in 1967 the ADEA was enacted.

The significance of the fact that age was placed in a separate act from the Civil Rights Act of 1964 has been debated by commentators. Many have considered this an indication of Congress' intent that age and race or sex discrimination be treated completely differently, that the nature of the discrimination was sufficiently different to warrant different analyses, treatments and statutes. Others have viewed the parallels between the two acts as an indication that Congress perceived that age based discrimination was similar to race and sex discrimination and should be similarly treated.

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14 "Biological age refers to the individual's present position with respect to his potential lifespan." Birren and Loucks, supra note 16, at 839.

15 "Psychological age refers to one's "state in comparison with the average capacities of persons of the same chronological age" Id. at 840.

16 Chronological age refers to the number of years one has lived.

17 Even during Congressional debate on the ADEA Congressmen raised such concerns. For example Representative Burke stated:

Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance. 113 CONG. REC. 34,743 (1967).

18 Id.

19 113 CONG. REC. 31,254 (1967).


22 Id. at 849-854.

23 Cf Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) where the court applied Title VII's disparate impact test to an ADEA case. See also, Player and Deming, Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection, and the Amendments 12 GA. L. REV. 4, 747 (1978).
The ADEA was enacted when Title VII was only two years old. None of the landmark decisions had yet been headed down which shaped the parameters of Title VII. Congress, then, was unsure of the actual effect of Title VII on the elimination of sex and race discrimination.²⁸

It is not surprising that the ADEA actually does parallel Title VII. It was enacted pursuant to the Secretary of Labor's documentation of age discrimination as similar to sex and race discrimination.²⁹ Further, no major problems had arisen in Title VII's attempt to eliminate sex and race discrimination. It was only natural, then, that this type of discrimination should be similarly treated, even if the treatment was in a separate statute.

While the Acts do parallel each other, there are differences. The defenses allowed under the ADEA, for example, are different from those recognized under Title VII. The ADEA permits the defenses of good cause,³⁰ differentiation based on reasonable factors other than age,³¹ use of age where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business,³² and observance of any bona fide seniority system or employee benefit plan which is not a subterfuge to evade the purposes of the Act.³³ It is this last defense which precipitates the inconsistent treatment of the pre-seventy employee.

IV. MANDATORY RETIREMENT UNDER THE ADEA

Prior to the 1978 amendments to the ADEA, the Act prohibited mandatory retirement of protected workers prior to age sixty-five unless pursuant to a "bona fide seniority system or benefit plan."³⁴ The Act, however, did not define this phrase and employers repeatedly raised the defense with varying results in the lower courts. In 1977 the Supreme Court squarely faced the ADEA's bona fide seniority system or benefit plan defense in McMann v. United Airlines.³⁵ This decision, which set the 1978 amendment process in motion, was preceded by the Secretary of Labor's indecision on the issue and by divergent lower court opinions which created the need for the amendment.

A. The Need for the Amendment — Secretary of Labor Interpretations

In 1969 the Secretary of Labor concluded that the ADEA authorized involuntary retirement irrespective of age as long as the retirement was pursuant

²⁸In fact Griggs, the disparate impact doctrine case (401 U.S. 424) was not decided until 1971.
²⁹113 CONG. REC. 31,254 (1967).
³⁴29 U.S.C. § 623(f)(2) (1978). "It shall not be unlawful for an employer, employment agency, or labor organization . . . (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this chapter."
to an otherwise bona fide section 623(f)(2) retirement or pension plan. Whether the retirement was mandated or optional was not determinative. The only requirement was that the employee be a participant in the plan.

By 1975, however, the Secretary had modified his position. While not changing the regulations, he intimated that only mandated or required retirements under a plan would be lawful. If the retirement was optional with the employer the plan could not withstand the ADEA age discrimination attack. In fact, the Secretary's new position coincided with several key lower court decisions including *McMann*. The Secretary ultimately supported the analysis *McMann* had urged in the Fourth Circuit under the bona fide plan defense, a complete reversal of the Secretary's original conclusion that the United plan did not appear to violate the Act.

**B. ADEA Cases**

1. **Lower Court Decisions**

*McMann* considered a pre-Act seniority system or benefit plan under the ADEA. Harris McMann was hired by United Airlines, Inc. in 1944 and served in various capacities before being mandatorily retired, over his objection, in 1973 just after his sixtieth birthday, pursuant to United's Employee Plan. The plan provided for a "normal retirement age" of sixty for employees in McMann's classification. Despite the Secretary of Labor's opinion stating that United's plan did not appear to be a subterfuge to avoid the purposes of the Act, McMann sought injunctive relief, reinstatement, and back pay in the district court under the ADEA. The issue which the district court considered was whether the ADEA proscribed mandatory retirement prior to age sixty-five if it was pursuant to a bona fide seniority system or benefit plan which

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39 United draws our attention to the Secretary of Labor's regulation, 29 C.F.R. § 860.110, which states that "the Act authorizes involuntary retirement irrespective of age." By its terms, this regulation is interpretive, not legislative. See 29 C.F.R. § 860.1 (views subject to change in light of court decisions or reexamination by Department of Labor). As evidenced by the Secretary's amicus curiae brief and argument, he has now concluded that the statement in the regulations is erroneous. As we understand the Secretary's present position, it is substantially in accord with the result we reach here. Thus, the regulation has no significance for our decision. We express no opinion as to whether it may provide the basis of a defense under 29 U.S.C. §§ 259, 626(e).
preceded the effective date of the Act.45

In defending its plan, United relied on Brennan v. Taft,46 a case in which the Fifth Circuit had concluded that pre-sixty-five retirement required by a plan predating the Act was valid, since such a plan could never be a subterfuge.47

In Brennan, an employee of Taft Broadcasting Company was mandatorily retired at the age of sixty pursuant to Taft's "Profit Sharing Retirement Plan."48 The Secretary of Labor brought suit alleging that Taft's plan violated the ADEA.49 While the Secretary's position turned on a narrow definition of bona fide seniority or benefit plan and Taft's failure to communicate the terms of the plan to the employee,50 the district court dismissed the action relying on section 623(f)(2).51 The Fifth Circuit affirmed,52 stating that "Taft's 'plan' was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion."53

Consistent with the conclusion in Brennan, the district court in McMann concluded that any action required by a plan which pre-dated the effective date of the Act could not be a subterfuge to violate the Act.54 The McMann court applied the Act's bona fide seniority system or benefit plan exception55 and Brennan to grant summary judgment to United.

On appeal, buttressed by the Secretary of Labor's new position in its amicus brief in support of McMann,56 the Fourth Circuit reversed.57 While conceding that the plan was "bona fide" in that it existed and paid benefits, the court rejected Brennan's subterfuge analysis,58 and required United to show that the mandatory retirement provision of the plan had some economic or business purpose other than arbitrary age discrimination.59 United had to show not only that the plan was not adopted as a subterfuge, but also that it was not maintained as a subterfuge.60 Congress clearly would not have created so vast a

45Id. at 218.
46500 F.2d 212 (1974).
47Id. at 215. Also see infra text accompanying note 53.
48Id. at 214.
49Id. at 215.
50Id. at 216-217.
51Id. at 214.
52Id.
53500 F.2d at 215.
54542 F.2d 218.
55Id.
56See supra text accompanying note 40.
57542 F.2d at 222 (1976).
58Id. at 220.
59Id. at 221. "... an early retirement provision must have some economic or business purpose other than arbitrary age discrimination." Id.
60Id. "... To avail himself of the exemption, an employer must demonstrate that a plan is not being maintained as a subterfuge to evade the Act . . . ." Id.
loophole, the Fourth Circuit concluded.61 Distinguishing between evading the purposes of the Act as opposed to evading the Act, the Fourth Circuit concluded that a seniority or employee benefit plan, effective long before the enactment of the statute could, nevertheless, be a subterfuge to the purposes of the Act.62

McMann was appealed to the Supreme Court, but before the Court could reach a decision the Third Circuit had occasion to pass upon the subterfuge issue in Zinger v. Blanchett63 Just prior to his sixty-fifth birthday, William F. Zinger, an attorney in Penn Central Transportation’s Legal department, was mandatorily retired over his objection.64 The retirement plan allowed the company to elect to retire any employee between the ages of sixty and sixty-five.65 Retirement payments for employees who retired at sixty-five were somewhat larger than were those for pre-sixty-five retirees.66 Zinger alleged that the involuntary retirement violated the ADEA. The company argued that since the retirement plan pre-dated the Act it could not be considered a subterfuge.67 Confronted by what it called “diametrically different interpretations” in McMann and Brennan, the Third Circuit independently examined the Act and its legislative history.68 It concluded that involuntary retirement pursuant to a bona fide plan would not be a subterfuge, but that pre-Act plans are not automatically exempted due to the fact that they were adopted prior to the ADEA.69 The Supreme Court then decided McMann.

2. The Supreme Court and McMann

The mandatory retirement of employees who participate in a bona fide seniority system or benefit plan that so requires was approved by the Supreme Court in McMann. The Court could find nothing to indicate that Congress had intended wholesale invalidation of retirement plans initiated in good faith prior to the effective date of the ADEA.70 It found the Fourth Circuit’s distinc-

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61 Id. at 222.
62 Id. at 220. “What is forbidden is not a subterfuge to evade the Act, but a subterfuge to evade the purposes of the Act . . . .” Id.
63 549 F.2d 901 (1977).
64 Id. at 901-3.
65 Id. at 902-3.
66 Id. at 902. “Only months before his sixty-fifth birthday and despite his protests, the Penn Central Transportation Company retired plaintiff Zinger, making him eligible for pension benefits from several sources including the Railroad Retirement Fund. However, these payments total $834.12 less per year than he would have received had he continued to work for Penn Central until age 65.” Id.
67 Id. at 904.
68 Id. at 905.
69 Id. at 907.
70 The dissent relies heavily upon the legislative history, which by traditional canons of interpretation is irrelevant to an unambiguous statute. However, in view of the recourse to the legislative history we turn to that aspect to demonstrate the absence of an indication of congressional intent to undermine the countless bona fide retirement plans existing in 1967 when the Act was passed. Such a pervasive impact on bona fide existing plans should not be read into the Act without a clear, unambiguous expression in the statute.

434 U.S. at 199.
tion between the Act and the purposes of the Act untenable.\footnote{Id. at 198.} The Court stated "... it is difficult to conceive of a subterfuge to evade the one which does not also evade the other."\footnote{Id. at 203.} Subterfuge, the Court concluded, meant a scheme or plan or artifice of evasion.\footnote{"In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem or artifice of evasion. In the context of this statute 'subterfuge' must be given its ordinary meaning ... ." Id. at 203.} So read, a plan adopted prior to the effective date of the Act could not be a subterfuge. Employers, then, need not show a business necessity for the mandatory retirement as the Fourth Circuit had required in\textit{McMann}.\footnote{Id. at 217.}

In reaching its conclusion the Court looked to the legislative history of the Act only to show the dissent's error.\footnote{"Id. at 208-9.} The Court stated that section 623(f)(2) was only included to allow reduced benefits for older workers as an inducement to employers to hire older workers.\footnote{See Senator Yarborough's comments on the proposed act wherein he explained that § 623(f)(2) would prohibit discharge or refusal to hire based upon age but allow differential pension or retirement plans
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Justice Marshall, in his dissent, maintained that an integrated reading of the statute was necessary. He felt that the majority's interpretation of the exception would allow an employer to require an employee to retire before age sixty-five while under another ADEA provision the employer would have to rehire the same employee if the employee reapplied.\footnote{Id. at 208-9.} Clearly, he concluded, Congress had not intended that result. Marshall also pointed out that section 703 of Title VII tracks the language of the ADEA's section 623(f)(2), and in the absence of contrary Congressional intent should be construed similarly.\footnote{Id. at 208-9.} Marshall, in essence, suggests Title VII as the starting point for ADEA analysis.

C. Title VII, A Starting Point for ADEA Analysis

The ADEA, while paralleling Title VII in condemning most stereotypes, tries to find some middle ground that prohibits some stereotypes and allows others.\footnote{Id. at 198.} Unlike Title VII, the ADEA attempts to straddle the stereotype pro-
blem. Its ultimate result is that one cannot use stereotypes for one purpose but may use them for another. Not surprisingly, the Court is no more able than Congress to eliminate the confusion. While the Court may be criticized for its *McMann* analysis, Congress is ultimately to be blamed for both giving and taking away in the same move.

Congress’ dilemma, however, is not unique. Social scientists themselves offer us numerous definitions of ageism. They talk in terms of biological age as opposed to psychological age, and note that an individual may be a composite of various ages at any one time, i.e., age of one’s nervous system, age measured by physical abilities or mental abilities etc. Not surprisingly, Congress was not able to define the point at which it would want to prohibit all of the stereotypes.

This confusion, however, may be inherent in the nature of age discrimination and the problems which ensue when any remedy is attempted. Most commentators have concluded that employment discrimination laws will never completely eliminate employment discrimination. In theory, of course, even marginally effective laws are better than none at all. But in actuality, discrimination laws often engender hostility against the protected minority when the burdened majority feels adversely affected by the attempted remedy. Minority group members in turn are all too aware of the laws’ failures. The end result, then, of the legislation is just the opposite of its stated objective.

While it certainly may be argued that no such result will occur in age discrimination, that there is not and never will be such hostility between older Americans as a class and younger Americans, and that the nature of the relationship is significantly different than, for example, the race problem, there are nonetheless, too many similarities in the two situations to avoid comparison.

based upon age.

\[\ldots\] [It] is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he 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. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan.

113 CONG. REC. 31,255 (1967).

"See Justice Marshall’s dissent in *McMann*, describing the confusion created by the majority’s decision, *supra* note 78.


"See *supra* note 18.

"See *supra* note 19.

It is difficult to imagine that age discrimination will be totally eliminated. The thirteenth amendment reinforces our nation's adamant policy against race discrimination. The repeated introduction of the ERA at least suggests that sex discrimination will not be tolerated. Age discrimination has no such vehicles.

In fact it might be argued that an age-based classification is far different from one based on either race or sex. Aging happens to all individuals who are lucky or unlucky to live long enough. This may explain our schizophrenia on age stereotypes. Do we in fact find "benign" age-based stereotypes more plausible because each of us stands eventually to benefit? Do we find discriminatory stereotypes less repulsive because we are, or have been, beneficiaries?

It may be argued that the Court has realized Congress' indecision and is to be applauded for refusing to apply Title VII disparate impact analysis in age discrimination cases. But the Court actually applied Title VII analysis in McMann. It applied Title VII disparate treatment analysis because it found the seniority defense an insurmountable stumbling block. Title VII, then, is an appropriate starting point for a resolution of the appropriate standard for ADEA analysis.

V. TITLE VII, THE ADEA AND DISPARATE TREATMENT VS. DISPARATE IMPACT

Two distinct theories of employment discrimination have developed under Title VII of the Civil Rights Act of 1964. Disparate treatment challenges intentional discrimination whereas disparate impact challenges neutral employer policies or actions which have an adverse effect on protected class members.

A. Disparate Treatment

An employee who charges disparate treatment in violation of Title VII has the initial burden of establishing a prima facie case. This burden requires

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46 U.S. CONST. amend XIII.
47 At least that is one of the arguments in support of ratification of The Equal Rights Amendment to the United States Constitution. See Kanowitz, The ERA: The Task Ahead, 6 Hastings Const. L. O. 637 (1979); Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871 (1971).
48 It is also difficult to imagine that race and sex discrimination will be totally eliminated, but it may be argued that the national policy against race and sex discrimination is stronger. However, the ERA has not been ratified and its effect as a statement of national policy is therefore very weak. Age discrimination, similarly, has no constitutionally enunciated national policy. It should therefore be treated in the same manner as sex discrimination. The courts have applied disparate impact analysis to Title VII gender discrimination cases. See Dothard v. Rawlinson, 433 U.S. 321 (1977).
49 See American Tobacco Co. v. Patterson, __ U.S. ___, 102 S. Ct. 1534 (1982), wherein the Court required an intention to discriminate before it would strike a bona fide seniority system even under Title VII.
50 The Court, therefore, did not go any further and never concluded whether this would also withstand disparate impact analysis.
51 "Protected class members" refers to those persons for whom the statute provides protection. Here it refers to employees between the ages of 40 and 70.
proof of the employer’s discriminatory motive or intent. In *McDonnell Douglas Corp. v. Green* the Supreme Court articulated the required proof for a prima facie case of Title VII disparate treatment race discrimination. The plaintiff must show:

(i) that he [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of Complainant’s qualifications.

Once the employee establishes a prima facie case the burden of production then shifts to the employer to show a legitimate non-discriminatory reason for its actions. If the employer does present a legitimate non-discriminatory reason, the burden then shifts back to the plaintiff to show that the employer’s stated reason was pretextual.

Disparate treatment analysis has been applied in ADEA cases when employers paid workers different benefits based on age, or differentially disciplined workers based on age, or terminations because of economic factors related to age. While several courts applied Title VII’s disparate treatment analysis to ADEA cases, the Second Circuit was the first to use Title VII’s disparate impact analysis in the ADEA case.

**B. Disparate Impact**

In disparate impact cases under Title VII the employee usually presents statistics showing a disparity in hiring or other policies which suggest that a facially neutral employer policy has a discriminatory effect on protected class members. This showing satisfies the employee’s initial burden and the burden then shifts to the employer who must show a business need for the policy or

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92 See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-806 (1972), and SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1154 (1976) and SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1979 SUPPLEMENT 300-301 (1979), hereinafter SCHLEI & GROSSMAN.

93 411 U.S. 792 (1972).

94 Id. at p. 802.

95 "The burden then must shift to the employer to articulate some legitimate nondiscriminatory reason for respondent’s rejection." *Id.* at 802.

96 The Court in *McDonnell Douglas* found the corporation’s reason for rejection to be sufficient but stated "On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner’s stated reason for respondent’s rejection was in fact pretextual." *Id.* at 804.


100 See generally Player, *supra* note 13.

101 But the Supreme Court has not yet spoken on this issue and denied certiorari in *Geller* noting it had never held disparate impact alone could violate the ADEA. 452 U.S. 945 (1981).

102 See SCHLEI & GROSSMAN, *supra* note 92 at 1154.
actions.\textsuperscript{103} The Supreme Court adopted this approach in \textit{Griggs v. Duke Power},\textsuperscript{104} stressing Congress’ intent to remove “artificial, arbitrary, and unnecessary barriers to employment” for protected class members.\textsuperscript{105}

In \textit{Geller v. Markham},\textsuperscript{106} the Second Circuit struck down a school board policy which allowed preferential hiring of teachers with less than five years of experience because of the policy’s disparate impact on protected class workers.\textsuperscript{107} The Eleventh Circuit similarly applied disparate impact analysis to a reduction in force where the employer allowed managers to use whatever criteria they chose to reduce the work force. The manager felt he could do without several employees, but his choice had a disproportionate impact on protected class members.\textsuperscript{108} In 1983 the Eighth Circuit also adopted disparate impact in ADEA cases.\textsuperscript{109}

The Supreme Court decided \textit{McMann} under traditional Title VII discriminatory treatment analysis. The imposition of age-based retirement, however, has a disparate impact on older workers. Disparate impact, not disparate treatment analysis would therefore have produced the correct result.

The Supreme Court, however, never reached the question of whether disparate impact analysis was appropriate in \textit{McMann} because the Court felt circumscribed by the bona fide seniority system or benefit plan defense. The Court concluded that be definition section 623(f)(2) allowed all pre-Act plans even though they provided for involuntary retirement.\textsuperscript{110} The Court could not find a subjective motive in conduct which preceded the enactment of the statute.\textsuperscript{111} All pre-Act plans, therefore, survived disparate treatment analysis as there was no discriminatory intent or motive. The Court did not consider whether, lacking a discriminatory intent, a pre-Act plan might still violate the ADEA.

C. The Better McMann Analysis

The Supreme Court adopted Title VII disparate impact analysis to remove artificial, arbitrary impediments to employment of protected class members.\textsuperscript{112}

\begin{flushleft}
\textsuperscript{104}\textit{Id.}
\textsuperscript{105}\textit{Id. at} 429-31.
\textsuperscript{106}635 F.2d 1027 (2d Cir. 1980, cert. denied 451 U.S. 945 (1981).
\textsuperscript{107}\textit{Id.}
\textsuperscript{108}Allison v. Western Union, 680 F.2d 1318 (11th Cir. 1981).
\textsuperscript{109}Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983).
\textsuperscript{110}[A] plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later. To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer. We reject any such \textit{per se} rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act.” United Airlines, Inc. v. McMann, 434 U.S. 192, 203 (1977).
\textsuperscript{111}\textit{Id.}
\textsuperscript{112}401 U.S. at 430-31.
\end{flushleft}
In Griggs the impediment was a high school diploma or required test score.\textsuperscript{113} McMann's impediment was an involuntary retirement plan. The pre-Act plan is an artificial, arbitrary impediment to employment of protected class members. It should have been stricken under disparate impact analysis. Griggs focused on whether the neutral policy or act operated to freeze prior employment practices which are now unlawful.\textsuperscript{114} The McMann court, if it had used Title VII disparate impact analysis, would have similarly focused its attention.

Viewed in this light the plan must fail. It operated to freeze the prior lawful employment practice of involuntarily retiring employees before age sixty-five. Insulated by the plan defense,\textsuperscript{115} the employer would have been allowed to continue to violate the law by involuntarily retiring pre-sixty-five employees in violation of the current law.

It is important to note that even though the pre-Act plan violated current law, the section 623(f)(2) defense operated to make the plan neutral by definition.\textsuperscript{116} Any bona fide plan was devoid of an intent to discriminate by virtue of the defense. The question was whether the plan could be called bona fide. Although the Court correctly concluded a pre-Act plan was void of discriminatory intent, the inquiry then should have focused on impact discrimination. Did the plan have the unintended impact of discriminating against protected class members?

The Supreme Court's McMann analysis simply did not go far enough. It did not look to Title VII's other test (disparate impact). The McMann benefit plan clearly operated to freeze the prior employment practice (involuntary pre-sixty-five retirement), now unlawful.

The use of a separate statute to eliminate age discrimination has encouraged distinctions in analysis based on the differences in the nature of age discrimination and race discrimination. Commentators suggest that Griggs' impact analysis is inappropriate because there is nothing inherent in race or sex which sup-

113 Id. at 427-428.
114 Id. at 427-428.
115 The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. 401 U.S. at 429-30.
116 The plan defense was that the seniority or benefit plan pre-dated the Act and was, by definition, not a subterfuge to evade the Act.
117 There could be no intent to discriminate because implementation of the plan pre-dated the Act. Once could not intend to violate an act that was not even contemplated.
ports a correlation between these characteristics and the ability to perform particular skills.\(^7\) It has also been suggested that there is no history of lifelong discrimination against individuals based on age as there is against individuals based on sex and race.\(^8\) These two differences, the theory continues, support a conclusion that discriminatory impact analysis should be available under Title VII but not under the ADEA.\(^9\)

Other commentators suggest that there actually is a correlation between age and the ability to perform certain jobs and that in order to find discrimination on the basis of age there must in fact be an intent on the part of the employer to discriminate on the basis of age.\(^120\) These commentators find support in the notion that, with age, unlike race, there are no invidious stereotypes or hatreds against those who are the subjects of the discrimination.\(^121\) But should the difference in analysis turn on the length of time of the discrimination or the depth of enmity against the protected class? It should not. An employer who practices discrimination against employees for twenty years rather than for the entire forty or fifty years of their employment should not be protected simply because s/he has been selective in terms of when s/he discriminated. Likewise, an employer under Title VII is not protected simply because there was a time when s/he did not discriminate against the protected employee. All unlawful discrimination treats the individual unfairly based on a pre-conceived notion of that individual's ability due to a characteristic which does not accurately measure ability. Age, like race and sex, should be subject to disparate impact analysis. There is no special reason to remove arbitrary discrimination from race that is not there for age.\(^122\) Once we have identified the protected class,

\(^{117}\)In fact it has been argued that there may indeed be such a correlation in regard to age, particularly where manual labor is concerned. See Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380 (1976); Kovarsky & Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 Vand. L. Rev. (1974).

\(^{118}\)In fact the Supreme Court notes in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 208 (1976) (per curiam) that age is really a stage in life rather than a class of people against whom invidious discrimination is practiced.

\(^{119}\)See supra note 25.

\(^{120}\)See supra note 117. If the A.D.E.A. recognizes a correlation between age and performance, it recognizes a lack of correlation up to the point for the protected ages. Between the ages of 40 and 70 the A.D.E.A. does not recognize a correlation between age and performance.

The class defined by the statute is older workers, and once defined it is entitled to be free of discriminatory treatment. It is similarly no answer to discrimination against women to say that they benefitted from protective legislation in the past.

Further, while Murgia, 427 U.S. at 208, is authority for the proposition that there is more invidious discrimination against parties based upon race and religion, the argument is weakened by the fact that sex discrimination also uses impact analysis and sex discrimination was added to kill Title VII. Clearly Congress had no specific intent to afford this special protection to women, but the Court nonetheless extended it to women just because sex happened to be tacked on as a protected class under Title VII; but for the wheels of Congress, so too would the aged. Clearly this cannot be seen as an overriding reason to exclude impact discrimination from the ADEA.

Persons between 40 and 70, in fact, are protected by the Act and as protected class members the Act recognizes no correlation between age and their performance.

\(^{121}\)See Note, supra note 25 at 852.

\(^{122}\)It has been argued that if there is a policy of preferring younger workers it is somehow validated by the fact that the older worker was at one time younger and might well have benefitted from the preference.
discrimination is discrimination. In an attempt to define some discrimination as worse than other discrimination, we show the sheer fallacy of the distinction.

If X applies to an employer for a job and is black, if s/he is refused the job because s/he does not have a high school diploma, s/he may sue on the basis of the discriminatory impact of the requirement on blacks generally. If X had been a sixty year old white man, and the employer’s policy had been to not promote anyone with thirty or more years of experience, the court would require X to find a discriminatory intent in order to sue the employer. Discriminatory impact alone would not suffice. X at sixty would suffer just as obviously from the “neutral” thirty year policy as X, a black person, would suffer from the “neutral” policy of requiring a high school diploma.

Perhaps it could be argued that there is something different about race discrimination, but sex discrimination cases also use disparate impact analysis and the argument regarding the long history is much weaker there. Disparate impact should be available to eliminate arbitrary barriers which have no bearing upon job performance and which result in excluding protected class members. Once we define the protected class we should protect the class. Disparate impact analysis protects the class from facially neutral policies that unfairly set up barriers for protected class members. Disparate impact analysis should be available for age discrimination.

The disparate impact test articulated by the Court in Griggs proscribes not only overt discrimination but also prohibits practices that are fair in form but discriminatory in operation. Seniority systems and benefit plans constitute proscribed age discrimination when they impose a burden on older workers

This ignores the fact that sex uses disparate impact analysis and women have clearly benefitted from ameliorative discrimination and suffered from invidious discrimination, yet the courts attempt to remove arbitrary barriers. Griggs’ logic and holding were applied 6 years later in Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), a gender discrimination case.

123The Griggs court expressed its concern about artificial barriers to employment. Clearly the use of age as a limiting factor in employment is just that kind of arbitrary barrier. In fact it has been argued that the sole purpose of the ADEA is to eliminate arbitrary barriers. See, e.g., Age Discrimination in Employment: Hearings on §§ 830 and 788 Before the Sub-Comm. of Labor of the Senate Comm. on Labor and Public Welfare (hereinafter cited as Hearings) 90th Cong., 1st Sess. 36 (1967) (statement of Secretary of Labor Wirtz).

Once Griggs formulated the disparate impact doctrine, subsequent plaintiffs did not need to prove that the underlying rationale applied in their individual case. Similarly, once the disparate impact doctrine is applied to ADEA cases, a court need not determine whether the rationale applies to each case.

124See 401 U.S. 424.


126Invidious discrimination against older workers as indicated by past discrimination can be found once we define the protected class as those between 40 and 70. The use of the Griggs test requirement really served as the arbitrary barrier, not the inferior education. Neither the education nor the test was necessary to the job, as the Griggs court states. The barrier, then, was arbitrary. These arbitrary barriers are exactly what the ADEA was intended to eliminate. It is a reincarnation of past discrimination against the protected class when we discriminate against older workers due to our history of being allowed to so do. See also Rutherglen, Sexual Equality in Fringe-Benefit Plans, 65 VA. L. REV. 199 (1979).
in their status as employees by involuntary loss of their jobs. An employer should be foreclosed from so burdening protected class members because of their age.

In 1978 Congress removed impact analysis as an issue for mandatory retirement in its ADEA Amendments. But the amendment leaves questions unanswered for the forty to seventy year old employee.

VI. AFTERMATH OF McMANN

A. The Amendment

1. Purpose

The Conference Report indicates that the amendment to the benefit plan exception was necessary to correct McMann's interpretation.\textsuperscript{127} The legislative history accompanying the amendment finally clarifies the purpose of section 623(f)(2)'s exception. The amendment "served to express congressional approval of the result reached by the Fourth Circuit in McMann," states the Senate Report.\textsuperscript{128} The intent, then, was to proscribe involuntary retirement of protected class members even if pursuant to a seniority system or benefit plan. While Congress' intent is now clear, the effect of such an amendment was strongly debated before enactment.

a. Proponents of the Bill

Armed with compilations of employers who mandatorily retire workers, Harriet Miller, the Executive Director of the American Association of Retired Persons, testified before the House Select Committee on Aging in favor of the bill.\textsuperscript{129} She suggested that mandatory retirement ages are arbitrary and are a substitute for good personnel policies. Further, employers often retire older workers to cut their costs by hiring younger workers at lower wages.

Other proponents suggested that a mandatory retirement age was merely an administrative convenience and that much of the concern about displacing younger workers would be inapposite in view of declines in American birthrates.\textsuperscript{130}

Medical authorities suggested that declines in physical and psychological health often accompany the kind of enforced idleness that mandatory retirement causes.\textsuperscript{131}

b. Arguments Against the Amendment

Opponents of the bill suggested that the problems facing older workers

\textsuperscript{128}Id.
\textsuperscript{129}Id. at 1-5.
\textsuperscript{130}Id. at 56-60.
\textsuperscript{131}See Hearings at 4 (testimony of Dr. Robert Gunn).
were much broader than mandatory retirement.\textsuperscript{132} Congress, they suggested, should look at the demographic effects of the proscription. Possible reduced benefits to all workers was seen as a potential result. Correction of the shortfalls of Medicare and Social Security in meeting financial needs of older Americans, they argued, would more effectively address the problem.\textsuperscript{133}

Many older persons, opponents argued, really want to retire. Modifying the statute would only cause additional confusion for them. Further the amendment would disrupt many very effective retirement systems. If employers were forced to discharge persons based on ability alone it would clearly discriminate against the manual labor wage earner because physical abilities may decline faster with age and managers who rely on cerebral skills would not be required to retire as early as manual laborers.\textsuperscript{134}

Concerns about the lack of jobs for youths, women and minorities were also raised as a potential result of removing involuntary retirement.\textsuperscript{135} In short, opponents argued that the solution is income for older workers, not a longer work life.

On balance Congress was persuaded that the amendment was necessary and enacted the 1978 amendments to the ADEA.

2. Provisions of the Amendment

Section 623(f)(2) now provides that no bona fide seniority system or benefit plan "... shall require or permit the involuntary retirement of any individual ... because of the age of such individual."

The 1978 amendment clarified the ADEA's seniority system or benefit plan defense. The statutory defense does not protect involuntary retirement of protected class members. It requires that protected class members be treated as any other employee in any mandatory retirement action by employers. The defense does allow reductions in benefits for older workers but this is in keeping with the Act's purpose of promoting employment of older workers.\textsuperscript{137} The defense thereby encourages employers who hire older employees.

Employers with collective bargaining agreements presently in effect were given time to come into compliance with the amendment as Congress felt that many had in good faith entered into plans which were now clearly unlawful.

\textsuperscript{132}Id. at 98-110.

\textsuperscript{133}Id.

\textsuperscript{134}See Hearings at 64-71 (testimony of H. J. Lartigue of the Exxon Co., U.S.A.).

\textsuperscript{135}Hearings at 5.


\textsuperscript{137}When the ADEA was enacted in 1967 Senator Javits stated "... [A]n employer will not be compelled under this section to afford to older workers exactly the same pension retirement, or insurance benefits as he affords younger workers." 113 CONG. REC. 31,255 (1967) \textit{reprinted in} 2 U.S. CODE CONG. & AD. NEWS 2213. \textit{But see} the 1982 amendments to the ADEA. Pub. L. 97-248, § 116(a).
These agreements had to comply by the earlier of the termination of the agreement or January of 1980.\textsuperscript{138} The effect of the new amendment was immediate if an employer was initiating a plan. Remedies for violations of the amendment are those set forth for other violations of the ADEA.\textsuperscript{139}

B. The Effect of the Amendment

Clearly, the amendment responded to \textit{McMann}. Congress overruled \textit{McMann}'s conclusion that pre-Act benefit plans requiring involuntary retirement under the age of sixty-five were bona fide by definition. The amendment construes any plan which involuntarily retires protected class members as unlawful. Use of a seniority system or benefit plan, even an otherwise bona fide seniority system or benefit plan to involuntarily retire protected class members with intent to discriminate on the basis of age violates not only the purposes of the Act, but the Act itself. Use of a bona fide seniority system or benefit plan to involuntarily retire protected class members without the intent but with the impact of discrimination on the basis of age also violates the Act. Disparate treatment and disparate impact analysis now both apply to such retirements. Congress has declared its intolerance of any kind of age-based involuntary retirement of protected class members.

While Congress rejected \textit{McMann}'s date of enactment as the determinant of whether a plan was a subterfuge, it did not proscribe any non-subterfuge discrimination other than involuntary retirement of protected class members.\textsuperscript{140} Disparate treatment or disparate impact analysis are not relevant to any other action against workers pursuant to a bona fide seniority system or benefit plan.

In amending the ADEA to require a review of pre-Act seniority plans, Congress has not eliminated the Supreme Court's dilemma with regard to \textit{Griggs'} impact analysis under the ADEA. The \textit{McMann} court applied discriminatory treatment analysis because it equated subterfuge with intent. The 1978 amendments remove the need to show intent to discriminate in involuntary retirement of protected workers pursuant to seniority systems or benefit plans. The 1978 amendments, however, do not resolve whether discriminatory impact is available in other than involuntary retirement situations.

In 1982 Congress once again amended the ADEA. Under this amendment employers cannot provide different group health plans to employees between


It shall not be unlawful . . . (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by Section 631(a) of the Title because of the age of such individual . . .
the ages of 65 and 69.\textsuperscript{141} This amendment again requires equal treatment for protected class members and, as Title VII, prohibits discriminatory health benefits for protected class members.\textsuperscript{142}

While the 1977 Reorganization Plan No. 1\textsuperscript{143} transferred the Secretary of Labor’s functions under the ADEA to the Equal Employment Opportunity Commission, (EEOC), the Secretary’s regulations are still in effect.\textsuperscript{142} Clearly, the amendment overturned the Secretary’s 1969 conclusion that pre-sixty-five involuntary retirements are lawful. It also mooted the Secretary’s distinction between optional and mandatory involuntary retirements. The Secretary’s position in his Fifth Circuit amicus brief in \textit{McMann} is consistent with the amendment.

\section*{VI. Implications for Future Litigation}

While impact analysis is an important addition to the ADEA arsenal, it is not a cure-all. Even if the court allows disparate treatment analysis in ADEA cases, the court has severely limited this analysis even in Title VII cases where a seniority system is challenged.\textsuperscript{144} The court has broadly construed the definition of seniority system under Title VII, and if the two acts are treated similarly, we can expect the same construction under the ADEA.

The 1978 amendment addresses only the question of involuntary retirement. Other actions pursuant to bona fide seniority or benefit plans are still reviewed under disparate treatment analysis. A reorganization of a work force which results in a disparate impact on older workers due to the terms of a seniority or benefit plan could be defended against an ADEA attack.

New decisions as to what terms to include in a seniority plan must reflect the current law. An employer may not now develop a plan which discriminates on the basis of age and use that plan as a defense in a lay-off or reorganization.\textsuperscript{145} The defense merely protects such actions where there is clearly no intent to discriminate. Plans which require anything short of involuntary retirement are lawful. An employer is precluded under the 1982 amendments from offering different health benefits to older workers.

Impact analysis would make the plaintiff’s burden easier under the ADEA even in light of the Court’s broadened definition of seniority system, by allowing statistical evidence of a disparity between a neutral policy’s effect on older workers to carry plaintiff’s initial burden.

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\item \textsuperscript{141}Pub. L. 97-248, § (116(a).
\item \textsuperscript{142}Id.
\item \textsuperscript{143}Id.
\item \textsuperscript{144}5 U.S.C. § 354 (Supp. III 1979).
\item \textsuperscript{145}See Patterson, ___ U.S. ___, 102 S.Ct. 1524.
\item \textsuperscript{146}Clearly any such decision would post-date the Act and would evidence an intent to evade the Act.
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VII. CONCLUSION

Congress amended the ADEA in April of 1978 to prohibit pre-seventy involuntary retirement of workers covered under the Act. The amendment affirmed the Fourth Circuit's opinion in *McMann* and resolved a conflict in rulings among the circuits. The amendment also effectively overruled the Supreme Court's *McMann* holding.

The Supreme Court should apply disparate impact analysis in *McMann* type cases. Clearly involuntary retirement of protected class members, even pursuant to a bona fide plan, has a disparate impact on those members.

The similarities in language and construction of the ADEA and Title VII suggest that Title VII analysis is relevant to construction of identical ADEA language. Title VII's impact discrimination is therefore relevant in construing unintentional discrimination caused by neutral policies.

Since the 1978 amendment proscribes all involuntary pre-seventy retirements, and the 1982 amendment prohibits all differentiations in health benefits for the age sixty-five to sixty-nine employee, any seniority system group health or benefit plan which so requires by definition intentionally discriminates. Despite the historical difference between age and race discrimination all employer actions should be subject to both discriminatory treatment and discriminatory impact tests. The purposes of Title VII and the ADEA are too similar to be ignored.