Early Retirement Incentives
Under the ADEA*

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Early retirement incentive programs provide employers with a flexible, cost-effective tool for reducing their workforces. In recent years, however, programs designed to hasten senior employees into retirement have come under attack: characterized either as thinly disguised discharges of unwanted employees, or, conversely, as providing benefits to a select group of employees favored on the basis of age. The author examines the merits of these arguments and related challenges mounted against early retirement incentive programs under the federal Age Discrimination in Employment Act. The author concludes that a properly designed early retirement incentive program can survive legal scrutiny, and offers employers guidance on planning for, designing and implementing such a program.

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Two years ago, the Company, a large manufacturing firm located in the Midwest, adopted the Company Early Retirement Incentive Plan ("CERIP"). The CERIP provides that Company employees with twenty years of service may retire on a full Company pension when they turn fifty-five, instead of waiting until the normal retirement age of sixty-five. In addition, the CERIP provides that an employee shall receive a $10,000 cash "early retirement incentive" if he or she retires before the age of fifty-nine.

Joshua, a Company manager, is now fifty-nine years old. This is the last year that he can retire and still receive the $10,000 bonus. Joshua, however, is not anxious to retire. Certainly, he has thought about retiring and the life of leisure he could lead — especially with an extra $10,000 in his pocket. But for thirty years Joshua’s life has centered around his work. All of his friends are at the plant. Also, at the age of fifty-nine, Joshua finally has attained a position of respect in the Company. His opinion is valued by his superiors, peers and subordinates. Joshua knows he would miss the camaraderie and respect if he chose to retire early. After weighing the pros and cons of retiring early, Joshua decides to wait until he turns sixty-five to retire, even if that means passing up $10,000 in cash.

Then came Black Thursday.
On that day, Company headquarters issued a press release explaining the need for cutbacks. It seemed that the Company was no longer competitive. In the words of the Chairman: “The Company needs to be trimmed down. We have no room for hangers-on.” Rumors circulated that many management positions—like Joshua’s—would be cut. Joshua asks his supervisor if his job will be cut. The supervisor says, “There are no guarantees.”

Joshua’s view of the CERIP changes. He is no longer balancing early retirement against a full worklife, but rather, early retirement against a possible forced layoff—a layoff without a full pension and without the $10,000 bonus. The CERIP now is a much more attractive alternative. In fact, given the possibility of a layoff, the CERIP now is too good to pass up. Joshua signs the necessary papers, is given his $10,000 check and is told that he will receive his first pension disbursement check in three weeks.

Before the first pension check arrives, however, Joshua decides that retirement is not at all what he thought it would be like. He has too much time, too little to do and no one to listen to him. Retirement is so bad that Joshua now is willing to risk layoff if he could just continue working for a little while longer. Joshua files suit to get his job back.

While Joshua is trying to rescind his retirement decision, Shirley and Leba face a different legal problem. Shirley is fifty-three and Leba is sixty-one. Both, like Joshua, are Company managers. They too live in fear of an impending layoff. Unlike Joshua, however, Shirley and Leba would jump at the chance to retire with the $10,000 CERIP bonus. Unfortunately, Shirley is too young for the CERIP; Leba is too old. Shirley and Leba institute a legal action to allow their participation in the CERIP—the same early retirement incentive offer that Joshua is attempting to invalidate.

This hypothetical scenario may seem far-fetched, but it is not. In the context of early retirement incentives, one worker’s boon is another’s bane. The issues raised by this situation lead us to look closely at what is meant by “age discrimination.” In 1978 Congress amended the Age Discrimination in Employment Act1 to prohibit employers from requiring the early retirement of certain employees.2 In the wake of this amendment, employers began using economic incentives to encourage early re-

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tirement. The use of these incentives is widespread and growing dramatically. In fact, early retirement incentives are so prevalent that the 1986 Senate Special Committee on Aging concluded that early retirement may be a "permanent fixture" in the United States. The reasons for this growth are not difficult to discern. For employers, early retirement incentives are a painless, often tax-subsidized, way to implement a reduction-in-force, promote young employees, or facilitate compli-


4. Bureau of Nat'l Affairs, Older Americans in the Workforce: Challenges and Solutions (BNA), at 60 (1987) [a BNA special report] [hereinafter BNA Report].

5. The types of incentives employed to encourage early retirement vary with respect to the employee groups eligible to participate in the plan and the plan's design characteristics. Hewitt Associates estimates that the majority of plans (72 percent) take the form of an early retirement window, where only employees of a specified age bracket (often age 50 to 55) are offered the incentive for a limited period of time (the "window"). See Hewitt Assocs. Survey, supra note 3, at 1. The Wyatt Company survey confirms the prevalence of window plans. Wyatt Co. Survey, supra note 3, at 9. According to Hewitt Associates, the financial incentive offered usually is a combination of improved or liberalized retirement benefits, plus a substantial cash payment, typically around $10,000. See Hewitt Assocs. Survey, supra note 3, at 9. This conclusion is supported by the Wyatt Company survey which found that of 28 companies providing detailed information about the incentives offered, 18 offered a cash incentive plus a liberalized retirement benefit. Wyatt Co. Survey, supra note 3, at 9.

Like the type of the incentive offered, the length of the offer window varies. A 1985 survey by the consulting firm of Towers, Perin, Forster & Crosby found that more than 60 percent of the offer windows were in the range of one to three months; 33 percent had a four to seven week window; 27 percent had an eight to eleven week window; 13 percent had a 12 to 15 week window; 8 percent had a 16 to 19 week window; 6 percent had a 20 to 27 week window; 6 percent had 28 or more weeks; 3 percent had window periods that varied. (Cited in BNA Report, supra note 4, at 65); see also Wyatt Co. Survey, supra note 3, at 9 (two-thirds of those companies responding have offered incentives with window periods between one and three months).

For the purposes of analytical clarity, the term "early retirement incentive" as used in this paper refers to the window/liberalized pension benefit-cash payment model described herein. See infra Part IV.


7. See Kass, Early Retirement Incentives and the Age Discrimination in Employment Act, 4 Hofstra Lab. L.J. 63 (1986) [hereinafter Kass]; Hewitt Assocs. Survey, supra note 3, at 5 (57 percent of the companies surveyed said their early retirement incentive plans were implemented to avoid mandatory layoffs). The Towers, Perin, Forster & Crosby study confirms the Hewitt Associ-
rance with affirmative action obligations.\textsuperscript{9}

Early retirement incentives are also a particularly cost-effective method of reducing labor costs. This is because older employees typically are on the high end of the corporate wage or salary scale.\textsuperscript{10} Thus, even when the cost of an early retirement incentive is figured into the calculation, an early retirement incentive program is usually more cost-effective than a mandatory reduction-in-force.\textsuperscript{11} For unions, early retirement incentives, if effective, are an opportunity for membership growth and new membership initiation requirements.\textsuperscript{12} For employees offered the incentive, such an offer "can bring a frustrated worklife to a dignified ending,"\textsuperscript{13} permit a career change,\textsuperscript{14} or a greater life of leisure.\textsuperscript{15} Even the judiciary has recognized on more than one occasion that early retirement incentives are "a humane practice well accepted by both employers and employees ... ."\textsuperscript{16}
Within the past few years, however, early retirement incentives have
come under attack. riders. Ironically, as noted in the hypothetical scenario
detailed above, the attack has come from diametrically opposite direc-
tions. On one side, some employees within the age group eligible for the
incentive who subsequently accept it contend that the early retirement
“incentive” is inherently coercive or offered under conditions or circum-
stances that make the incentive coercive. Consequently, the argument
continues, the decisions of these employees to retire are not “voluntary”
at all, but rather “discharges” based on age. Thus, to complete the anal-
ysis, the offer of the incentive violates the ADEA, which states in perti-
nent part: “It shall be unlawful for an employer: (1) to fail or refuse to
hire or discharge any individual or otherwise discriminate against any
individual with respect to his compensation, terms, conditions, or privi-
leges of employment, because of such individual’s age. . . .”

On the other side, employees either too old or too young to receive
the incentive argue that, because the incentive is offered only to a specific
age group to which they do not belong, they are deprived of a form of
compensation or a privilege of employment because of their age. Therefore,
these employees contend, the offer of the incentive to a specific age cohort of which they are not members violates the ADEA.
This tension between intra- and inter-cohort ADEA claims has caused
one federal circuit court to comment that “[t]he question of the proper
treatment of early retirement programs is the most difficult question
under the Age Discrimination in Employment Act.”

This Article will analyze the merits of these arguments against early
retirement incentives. First, this Article will examine whether an offer of
early retirement incentives violates the ADEA with respect to the se-
lected age cohort. Next, it will determine whether those employees too
young to be offered the retirement incentive have an actionable claim
under the ADEA. Then it will analyze whether those employees too

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1008 (1978) (superseded by statute) (“While discharge without compensation is obviously undesir-
able, retirement on an adequate pension is generally regarded with favor.”).
17. See, e.g., Ruane v. G.F. Business Equip., Inc., No. 86-3955, slip op. (6th Cir. 1987) (re-
ported unpublished at 828 F.2d 20); Paolillo v. Dresser Indus., Inc., 821 F.2d 81 (2d Cir. 1987)
(withdrawing earlier opinion). See infra notes 66-75 and accompanying text for further discussion of
Paolillo. See also Kass, supra note 7.
18. See Kass, supra note 7, at 77-84; Kosterlitz, supra note 6, at 2376.
20. See, e.g., the arguments of the plaintiffs in Cipriano v. Board of North Tonawanda, 785
F.2d 51 (2d Cir. 1986); Patterson v. Independent School Dist. # 709, 742 F.2d 465 (8th Cir. 1984).
See infra notes 224-51 and accompanying text for a detailed discussion of these decisions. See also
Kass, supra note 7, at 84-92.
22. Karlen v. City Colleges of Chicago, 837 F.2d 314, 317 (7th Cir. 1988), cert. denied sub
nom. CTU v. City College, 100 L.Ed.2d 622 (1988).
23. See infra Part II, notes 30-148 and accompanying text.
24. See infra Part III.A., notes 149-64 and accompanying text.
old to receive the incentive may successfully contest their exclusion under the ADEA.\textsuperscript{25}

This Article will conclude that, while early retirement incentive plans generally create age-based distinctions among employees, neither those employees within the offered age cohort, nor those outside of that cohort, have an actionable claim against their employers under the ADEA. Those employees within the offered cohort suffer no detriment from the early retirement incentive offer and are, therefore, not “discriminated against” in violation of the ADEA.\textsuperscript{26} Those employees outside of the offered age cohort are discriminated against because they are denied a benefit (the incentive offer) on the basis of age. However, those too young to receive the incentive are not protected by the ADEA since that Act does not prohibit discrimination in favor of older workers.\textsuperscript{27} Moreover, those too old to receive the incentive offer, while protected by the ADEA, have no actionable claim since such conduct on the part of the employer falls within the ADEA’s bona fide employee benefit plan exemption.\textsuperscript{28} Finally, this Article will establish a framework for the development and implementation of an early retirement incentive plan which, if followed, should allow employers to continue to use such incentives without fear of ADEA liability.\textsuperscript{29}

II

DO EMPLOYEES WITHIN THE AGE COHORT ELIGIBLE FOR THE EARLY RETIREMENT INCENTIVE HAVE A CLAIM AGAINST THEIR EMPLOYERS UNDER THE ADEA?

This section explores the potential ADEA claims of those employees within the age cohort offered an early retirement incentive who subsequently accept that offer.\textsuperscript{30} The section first explores the current approach courts have used in analyzing such claims and, finding that approach analytically flawed, presents an alternative framework for the analysis of intra-cohort ADEA claims.

\textsuperscript{25} See infra Part III.B., notes 164-292 and accompanying text.
\textsuperscript{26} See infra Part II.A., notes 31-84 and accompanying text.
\textsuperscript{27} See infra Part III.A., notes 149-64 and accompanying text.
\textsuperscript{28} See infra Part III.B., notes 164-292 and accompanying text.
\textsuperscript{29} See infra Part IV.
\textsuperscript{30} The author is aware of no decisional law examining the claim of an employee within the offered age cohort who declines the offer. Consequently, this section concentrates on those employees offered the incentive who subsequently accept that offer. But cf. Karlen, 837 F.2d at 318 (employer may not “punish” employee who declines to retire before age 65 by decreasing retirement benefits after age 65).
A. The Present Analytical Framework for Early Retirement Incentive Intra-Cohort ADEA Claims

Since the ADEA was amended in 1978 to prohibit involuntary early retirement,31 eight United States Courts of Appeals32 have examined intra-cohort ADEA claims predicated on the offer of early retirement incentives.33 These decisions, at least in theory, are fairly uniform in their analytical approach to the issue. In application, however, the approach these courts have adopted has yielded disharmonious results. Given that the Supreme Court has not yet spoken on this issue, the decisions of these United States Courts of Appeals are the requisite starting point for determining whether employees within the age cohort offered the early retirement incentive have a claim against their employers under the ADEA.

Without exception, each circuit that has analyzed intra-cohort ADEA claims has implicitly or explicitly applied the employment discrimination inquiry the Supreme Court established in McDonnell Douglas Corp. v. Green.34 According to McDonnell Douglas, an employee

31. See supra notes 1-2 and accompanying text.
33. This number does not include ADEA challenges instituted by individuals outside of the selected age cohort. For a discussion of those cases, see infra Part III., notes 149-292 and accompanying text.
34. 411 U.S. 792 (1973). McDonnell Douglas involved Title VII of the Civil Rights Act of 1964 (Title VII) which provides in pertinent part:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1) (1982). While the enforcement scheme of the ADEA is modelled after the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq. (1982), Lorillard v. Pons, 434 U.S. 575, 575-80 (1978), "the prohibitions of the ADEA were derived in haec verba from Title VII." Id. at 584. Consequently, the employment discrimination inquiry adopted by the Court in McDonnell Douglas for Title VII, see infra notes 38-42 and accompanying text, has been applied in general terms to the ADEA without much question. See, e.g., Laugensen v. Anaconda Co., 510 F.2d 307, 311-13 (6th Cir. 1975); 3A A. LARSON, EMPLOYMENT DISCRIMINATION § 102.40 (1975 & Supp. 1989) (hereinafter LARSON); see also Milone, Age Discrimination: Proving Pretext Under the ADEA, 13 EMPL. REL. L.J. 104 (Summer 1987) (hereinafter Milone). Federal District Courts have also followed suit in applying the McDonnell Douglas inquiry to the early retirement incentive context. See, e.g., Schuler v. Polaroid, 44 Fair Empl. Prac. Cas. (BNA) 1415 (D. Mass. 1987) aff'd, 848 F.2d 276 (1st Cir. 1988); Cannon v. McWane, Inc., 40 Fair Empl. Prac. Cas. (BNA) 1230 (D. Utah 1986); Kneisley v. Hercules, Inc., 577 F. Supp. 726 (D. Del. 1983). While the Supreme Court has not addressed the issue specifically, the Court by implication has approved of the application of the McDonnell Douglas inquiry to cases brought under the ADEA, at least where there is no direct evidence of age discrimination. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). The application of Title VII analysis to the ADEA context should not be taken to suggest that age
attempting to establish a cause of action for individual disparate treatment discrimination through the use of circumstantial evidence must first make out a prima facie showing of discriminatory treatment. The proof required to establish a prima facie case of discrimination depends on the nature of the adverse action taken by the employer against the employee bringing the suit. Generally, absent direct evidence of discrimination, the employee must show by a preponderance of the evidence that: (1) in the case of alleged age discrimination, he is a member of the age cohort protected by the ADEA; (2) he was qualified for the job he was performing and satisfied the normal requirements for work; (3) he was adversely affected by his employer’s conduct; and (4) others outside of the protected age group did not suffer the same adverse treatment. The first and third elements of the prima facie case, that the employee is in the protected age group and that some adverse action has
been taken against him, are no more than standing requirements under the ADEA. 40 The second requirement, job qualification and adequacy of performance, eliminates the most common non-discriminatory reasons for the employer's adverse conduct. 41 This requirement, taken with the fourth, that others outside the protected age group did not suffer the same adverse treatment, creates the presumption that the employer was motivated by unlawful age animus. 42

If the employee does establish the prima facie case, the employer then has a burden of producing evidence of some legitimate, non-discriminatory reason for the adverse action. 43 To satisfy this intermediate burden, the employer need only produce admissible evidence that would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. 44 If the employer articulates such a reason, "the presumption raised by the prima facie case is rebutted." 4

The employee then has the opportunity to prove, again by a preponderance of the evidence, that the articulated reason is a pretext for discrimination. 46 Federal courts have allowed plaintiffs to prove pretext in three ways: (1) by the employer's discriminatory statements, admissions, or other direct evidence of discrimination; (2) by evidence of comparative disparities in treatment among the protected and unprotected classes; and (3) by statistics. 47

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40. McCorstin v. United States Steel Corp., 621 F.2d 749, 753 (5th Cir. 1980).
41. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (in the context of Title VII); see also McCorstin, 621 F.2d at 753.
42. See McCorstin, 621 F.2d at 753. The plaintiff need not prove that age was the sole factor in the employment decision. Instead, the overwhelming majority of courts hold that the plaintiff must prove by the preponderance of the evidence that "but for" discriminatory motivation the employer's action would not have been taken. Larson, supra note 34 at § 102.40; see also EEOC v. Baltimore & Ohio R.R. Co., 632 F.2d 1107, 1110 (4th Cir. 1980) ("but for their age, [the employees] would not have been selected for retirement"). cert. denied, 454 U.S. 825 (1981). The "but for" inquiry implicitly recognizes that employers may have more than one motivation for taking an adverse employment action against an employee. See Larson, supra note 34 at § 102.40.
43. McDonnell Douglas, 411 U.S. at 802.
44. Burdine, 450 U.S. at 255.
45. Id.
46. Larson, supra note 34, at § 102.41.
47. B. Schlej & P. Grossman, Employment Discrimination Law 1314 (2d ed. 1983) (hereinafter Schlej & Grossman); see also Milone, supra note 34, at 111. It should be noted that, while the McDonnell Douglas inquiry is linear in structure — i.e., it progresses from prima facie case, to rebuttal, to pretext, see supra notes 34-46 and accompanying text — this structure may break down in certain circumstances. For example in United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-15 (1983), the Supreme Court stated:

Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether [the defendant] made out a prima facie case.... The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really
In applying the *McDonnell Douglas* inquiry to the early retirement incentive context, intra-cohort ADEA plaintiffs have found the third element of the prima facie case — that they have been treated adversely — the most difficult to satisfy. This difficulty stems from the fact that many courts are reluctant to find that an employee has been discharged where there is convincing evidence that he has accepted an early retirement offer. At the very least, courts are requiring a putative plaintiff to demonstrate that his decision to accept the employer’s early retirement offer was not completely voluntary before holding that the plaintiff has established a prima facie case.

The decision of the Sixth Circuit in *Ackerman v. Diamond Shamrock Corp.* is illustrative of the proof problem facing intra-cohort ADEA plaintiffs. In *Ackerman*, the plaintiff was informed that his job was going to be eliminated as part of a corporate reorganization. At the same time, he was offered an early retirement package which afforded him approximately $100,000 more than he would have received upon normal retirement. One month after the offer, the employee agreed to the package. Subsequently dissatisfied with his retirement, the employee brought suit contending that his employer gave him no alternative but to take early retirement and, therefore, the early retirement offer was “nothing more than a discharge [for no other reason] than his age.” The district court granted summary judgment for the employer.

The Sixth Circuit affirmed on appeal. In so doing, the Sixth Circuit applied the *McDonnell Douglas* inquiry to the plaintiff’s fact situation. The court concluded that since the plaintiff’s decision to retire was not coerced, and was therefore voluntary, the plaintiff had not been discharged and, thus, could not make out a prima facie case of age discrimination. As in *Ackerman*, the overwhelming majority of circuit courts are treating the voluntariness of the early retirement decision as

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48. 670 F.2d 66 (6th Cir. 1982).
49. *Id.* at 68.
50. *Id.* at 69.
51. *Id.* at 67.
52. The court pointed to the following factors to demonstrate that the plaintiff’s decision to retire was voluntary: (1) the plaintiff admitted at deposition that he signed the retirement agreement of his own free will; (2) the memorandum informing him of his benefit package stated that his entitlement to the retirement benefits would be conditioned on his decision “to elect early retirement”; (3) he continued to accept the benefits of the agreement “which are generous and by no means oppressive”; (4) he waited four weeks to sign the agreement; and (5) he stated he was going to have an attorney examine the agreement. *Id.* at 69 (emphasis in original).
53. The court adopted the following standard for the requisite prima facie case: “(1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; (4) he was replaced by a younger person.” *Id.* at 69.
part of the discharge/detriment element of the McDonnell Douglas inquiry.\textsuperscript{54}

While there is unity among the circuits as to where the issue of voluntariness fits within the McDonnell Douglas inquiry, this unity quickly breaks down; the question of what the plaintiff must do to establish the involuntariness of his decision and, thereby, meet the third element of the prima facie case has not been settled. The majority of the circuits that have addressed the issue, in particular the First,\textsuperscript{55} Fifth,\textsuperscript{56} Eleventh,\textsuperscript{57} Seventh,\textsuperscript{58} and Ninth Circuits,\textsuperscript{59} and several district courts,\textsuperscript{60} have required that the employee prove his or her early retirement incentive amounted to a "constructive discharge."\textsuperscript{61} For example, in Henn v. Na-

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Plaintiffs have made out successful prima facie cases of discriminatory treatment in the following decisions: Hebert v. Mohawk Rubber Co., 872 F.2d 1104 (1st Cir. 1989); Lewis v. Federal Prison Indus., 786 F.2d 1537 (11th Cir. 1986) (reversing award for summary judgment for employer); Calhoun v. ACME Cleveland Corp., 798 F.2d 559 (1st Cir. 1986) (aff'g judgment for employee); Kneisley v. Hercules, Inc., 577 F. Supp. 726 (D. Del. 1983) (summary judgment motion by employer denied).

55. Calhoun, 798 F.2d at 560-61; Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988).


57. Lewis, 786 F.2d at 1542 n.4.

58. Henn, 819 F.2d at 829; Bartman, 799 F.2d at 313.

59. Sutton, 646 F.2d at 411 n.5 (by implication).


61. There is currently a split in the circuits concerning what the ADEA plaintiff must prove in order to establish a constructive discharge. The majority of circuits require only that the employer deliberately created working conditions that were so unpleasant as to force an employee to resign. See Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986); Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986); Lewis v. Federal Prison Indus., 786 F.2d 1537, 1542 n.4 (11th Cir. 1986); Bishop v. District of Columbia, 788 F.2d 781, 789-90 (D.C. Cir. 1986); Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985); Goss v. Exxon Office Sys., 747 F.2d 885, 888 (3d Cir. 1984); Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981) reh'g denied, 656 F.2d 704 (5th Cir. Unit B Aug. 1981). The Equal Employment Opportunity Commission also uses this standard. See EEOC Dec. No. 86-6, 40 Fair Empl. Prac. Cas. (BNA) 1890, 1892 (1986). This is the so-called "reasonable person" or "objective" standard.

A minority of circuits require the plaintiff to go one step further — he or she must prove both intolerable working conditions and the employer's intent to compel the employee to resign. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); Craft v. Metromedia, Inc., 766 F.2d 1205, 1217 (8th Cir. 1985), cert. denied, 475 U.S. 1058 (1986); Easter v. Jeep Corp., 750 F.2d 520, 522-23 (6th Cir. 1984). This is the "employer intent" standard.

The employer intent standard has been the subject of much criticism, primarily because it requires an employee to meet an extremely difficult burden. See, e.g., Derr, 796 F.2d at 344; Note, Choosing a Standard for Constructive Discharge in Title VII Litigation, 71 CORNELL L. REV. 587, 601, 601 n.91, 614 (1986) [hereinafter Cornell Note]; Comment, Constructive Discharge Under Title
tional Geographic Soc'y, the National Geographic Society decided to reduce the number of its employees selling advertisements. To facilitate this result, the Society offered every ad salesperson over fifty-five the option of early retirement. Twelve of the fifteen eligible recipients accepted the offer and the three that did not continued working. Four of the twelve that accepted the offer filed suit contending that their employment separation violated the ADEA. The district court granted summary judgment for the employer, holding that early retirement incentives violate the ADEA “only if the alternative is ‘constructive discharge’ — that is, working conditions so onerous or demeaning that the employee has effectively been fired in place and compelled to leave.”

The Seventh Circuit affirmed the district court, holding that:

Only a constructive discharge, where an actual discharge would violate the ADEA, supports a claim of the sort plaintiffs pursue. [These plaintiffs] could prevail only by showing that the Society manipulated the options so that they were driven to early retirement not by its attractions but by the terror of the alternative. If the terms on which they would have remained at the society were themselves violations of the ADEA, then taking the offer of early retirement was making the best of things.

The Second and Sixth Circuits have not followed this reasoning and, consequently, have not required intra-cohort ADEA plaintiffs to prove they were constructively discharged. For the Sixth Circuit, the absence of the constructive discharge requirement may be a distinction without a difference. In the Second Circuit's decision in Paolillo v. vii and the ADEA, 53 U. Chi. L. Rev. 561, 579-80 (1986). Also, it is difficult for courts to apply. See, e.g., Derr, 796 F.2d at 344; Cornell Note, supra, at 616. But see Comment, Constructive Discharge Under the ADEA: An Argument for the Intent Standard, 55 Fordham L. Rev. 963, 976 (1987) (arguing the employer intent standard is "supported by strong policy arguments."). In addition to these prudential considerations militating against application of the "employer intent" standard, that standard is analytically inappropriate for the approach to intra-cohort ADEA claims advocated by the author. See infra notes 85-148 and accompanying text.

62. 819 F.2d 824 (7th Cir. 1987), cert. denied, 484 U.S. 964 (1987).
63. Id. at 826.
64. Id.
65. Id. According to the Court in Henn: "An employer constructively discharges an employee only if it 'makes' an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Id. at 829 (quoting Bartman v. Allis Chalmers Corp., 799 F.2d 311, 314 (7th Cir. 1986) (emphasis in original). Other standards for establishing a constructive discharge in this context are discussed supra at note 61.
67. See Paolillo v. Dresser Indus., Inc., 821 F.2d 81 (2d Cir. 1987).
68. Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982).
69. Ackerman was decided on plaintiffs' appeals from summary judgments for their respective ex-employers. In Ackerman, the court affirmed the award of summary judgment because the plaintiff's decision "to retire was voluntary." Ackerman, 670 F.2d at 70. Consequently, while this decision does not embrace a constructive discharge requirement, the evidentiary burden the Sixth Circuit
Dresser Industries, Inc., however, the court’s failure to employ a constructive discharge standard is significant. In Paolillo, the employer instituted an elective termination program for employees age sixty and over. Three of the employees eligible for the company’s program were summoned to an informational meeting about the offered incentive. From the time they were told of the details of the incentive, two of the employees had three days to accept the offer and one employee had less than one working day to accept. The three employees accepted the incentive offer and subsequently brought suit under the ADEA, contending that they had been coerced into accepting the retirement incentive. The district court granted summary judgment for the employer, holding, like the court in Ackerman, that since the employees had not been discharged, they could not establish a prima facie case of age discrimination under McDonnell Douglas.

On appeal, the Second Circuit reversed the award of summary judgment. The court refused to employ a constructive discharge standard for determining the voluntariness of the employees’ decision to accept early retirement. Instead the court stated:

We note at the outset that accepting early retirement is a major decision with far reaching impact on the lives of older workers and we emphasize that the decision must be voluntarily made. We believe that it is relevant to the determination of voluntariness whether the employees received sufficient time to make a decision. Because of the magnitude of the decision to accept early retirement, employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice.

The court held that because the three employees were not given “adequate time” to make their retirement decisions the district court erred in holding that their retirement decisions were voluntary as a matter of law. Indeed, the Second Circuit in Paolillo suggested that the employee accepting the early retirement incentive may not have to prove that his conduct was not volitional at all. Instead, the court stated that the employer “should have known that it had given appellants extremely little time to make a serious decision and, therefore, could have taken steps to ensure that appellants were not being pressured by the short deadline.”

This may be a more subtle way of stating what the Second Circuit said originally in Paolillo, that “the employer bears the ultimate burden of

has placed on intra-cohort ADEA plaintiffs may be the substantive equivalent of a constructive discharge. See supra note 61.
showing . . . that the employees acted voluntarily” in accepting the early retirement incentive offer.\textsuperscript{76}

The Seventh Circuit in \textit{Henn} has emphatically disagreed with \textit{Paolillo}’s reliance on the amount of time an employee has to make a decision to accept or reject the retirement offer to determine voluntariness. Consequently, the Seventh Circuit has refused to incorporate that factor in its constructive discharge inquiry. The \textit{Henn} court reasoned:

What distinguishes early retirement from discharge is the power of the employee to choose to keep working. This must mean a “voluntary” choice. . . . We could ask, as the court did in \textit{Paolillo}\textsuperscript{77} whether the employee had enough time to mull over the offer and whether the offer was free from “pressure”. . . . [T]he need to make a decision in a short time is an unusual definition of “involuntary”. A criminal defendant may be offered a plea bargain on a take-it-or-leave-it basis, knowing that if he does not act quickly the prosecutor may strike a deal with another defendant instead; the need to act in haste does not make the plea “involuntary” if the defendant knows and accepts the terms of the offer. A suspect being interrogated may confess in a flash; his naivete and the shortness of time do not make the confession involuntary. . . . A commodities trader may have only seconds to buy or sell huge quantities in response to movements in price; neither the shortness of time nor the fear of financial loss would enable the trader to undo as “involuntary” choices that turned out, in retrospect, to be unhappy. An employee offered a new job with higher pay (good) in a new city (bad) may have only a short time to decide; neither the brevity of the time nor the difficulty of the choice makes the decision “involuntary”.\textsuperscript{78}

Instead of relying on the amount of time allowed to make the retirement decision, the \textit{Henn} court stated: “The ‘voluntariness’ question in these and many more examples of important choices turns on such things as: did the person receive information about what would happen in response to the choice? was the choice free from fraud or other misconduct? did the person have an opportunity to say no?”\textsuperscript{79} These factors all go to whether the employee has the choice to reject the offer of retirement and continue working.

The court justified its emphasis on these factors through the following reasoning:

[W]e start by assuming that the employer is complying with the ADEA. . . . Now the employer adds an offer of early retirement. Pro-

\textsuperscript{76} Paolillo v. Dresser Indus., Inc., 43 Fair Empl. Prac. Cas. (BNA) 338, 341 (2d Cir. 1987) (reported as withdrawn, 813 F.2d 583).

\textsuperscript{77} The court in \textit{Henn} was referring to the \textit{Paolillo} decision subsequently withdrawn. See supra note 76. However, the new \textit{Paolillo} opinion (821 F.2d 81 (2d Cir. 1987)) was substantially similar to the withdrawn opinion in this regard.

\textsuperscript{78} \textit{Henn}, 819 F.2d at 828.

vided the employee may decline the offer and keep working under lawful conditions, the offer makes him better off. He has an additional option, one that may be (as it was here) worth a good deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure. He also may elect to keep working and forfeit the package. . . . When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial . . . but it does not on that account produce an "involuntary" response.  

The position of the EEOC on what factors are to be considered in the voluntariness inquiry combines those cited in Paolillo and Henn. The EEOC has stated:

Some factors which are significant in determining whether the plan was coercively administered are whether the employer 1) provides accurate information about the plan and related benefits, 2) provides honest information about future job prospects with the company to the best of its knowledge, 3) allows sufficient time for the employee to make a considered decision and 4) assures employees that they are free to decline the offer.  

In summary, the courts generally are in agreement that the McDonnell Douglas inquiry for determining the existence of discrimination upon a showing of circumstantial evidence is the appropriate inquiry for the evaluation of intra-cohort ADEA claims.  

Within the McDonnell Douglas inquiry, intra-cohort ADEA plaintiffs have found the third element of the prima facie case — that they were adversely affected by their employer’s conduct — the most difficult to satisfy. To meet this element of the prima facie case, the circuits that have analyzed the issue, with the possible exception of the Second Circuit in Paolillo, have required that plaintiffs prove their decision to retire was coerced or involuntary. In turn, to prove coercion and involuntariness the majority of circuits require intra-cohort ADEA plaintiffs to prove they were constructively discharged. However, there is disagreement among the circuits as to what factors enter into this constructive discharge/voluntariness calculation.

B. A Proposed Alternative Analytical Framework for Intra-Cohort Early Retirement Incentive Claims Under the ADEA

In most cases, the circuits have erred in applying the McDonnell

80. Henn, 819 F.2d at 826.
81. Brief for EEOC as Amicus Curiae (in Response to Petition for Rehearing in Paolillo v. Dresser Indus., Inc., 821 F.2d 81) at 20, (Nos. 86-7705, 86-7817, 86-7819) [hereinafter EEOC's Paolillo Brief]. While the EEOC's Paolillo Brief is not an official statement of EEOC policy, it provides some indicia of the EEOC's position on this issue.
82. See supra note 34 and accompanying text.
83. For a discussion of the relationship between the constructive discharge standard and the involuntariness inquiry, see infra notes 128-48 and accompanying text.
84. See supra notes 60-81 and accompanying text.
Douglas inquiry to intra-cohort early retirement incentive-related ADEA claims. As noted above, the McDonnell Douglas test is designed to ascertain the employer's motivation through certain objective, circumstantial facts when direct evidence of the employer's motivation is unavailable. If the ADEA plaintiff proceeds through the McDonnell Douglas shifting of burdens of proof and production and succeeds at all stages, the plaintiff will have proven that "but for his age," the employer would not have taken the action against him that it did. In the case of early retirement incentive plans, however, the inquiry into whether the employer has discriminated against the employee begins with the operative fact that the incentive was offered to a class of employees because of their age, and but for their age the employer would not have selected the employees for dissimilar treatment. As the Equal Employment Opportunity Commission (EEOC) recently stated: "Normally, the fact of an adverse action is undisputed and the controversy is whether the action is age based. But here [in the case of early retirement incentives], the age basis is clear and the question is whether there is an adverse action. . . ." In this way, the circuits, by applying the McDonnell Douglas inquiry, have been searching for an answer that they already know — that the employer's decision to offer the early retirement incentive is facially age-based.

Certainly, an employer can contend that an early retirement incentive plan was instituted for some motivational purpose ancillary to employee age — e.g., poor performance, disciplinary problems, economic necessity, etc. Indeed, the employer usually will have some other motivation for wanting the employee out besides the employee's age. This argument, however, misses the point. When an employer has an early retirement incentive plan, the early retirement incentive is made available to a class of individuals because of their age. Using the language of the courts, "but for" their age, the employees would not have received the incentive offer they now contend is discriminatory. That the employer has some legitimate reason for making the offer available and desiring the employees out of his workforce does not change the fact that employee

85. See supra notes 34-47 and accompanying text.
86. See LARSON, supra note 34, § 102.40 at 21-276.
87. See supra notes 42-43 and accompanying text.
88. EEOC's Paolillo Brief, supra note 81, at 16-17 n.13.
89. See United Air Lines, Inc. v. McMann, 434 U.S. 192, 207 (1977) (superseded by statute) (White, J., concurring) ("[A]ll retirement plans necessarily make distinctions based on age."); Patterson v. Ind. School Dist. #709, 742 F.2d 465, 467 (8th Cir. 1984) (citing Justice White's concurrence in McMann); Zinger v. Blanchette, 549 F.2d 901, 910 (3d Cir. 1977) (legislatively superseded on other grounds) ("An employee reaching age 60 may be forced to retire because of that fact, although one who is 59 remains at his job. From that viewpoint, there is obviously discrimination because of age, just as there is in any retirement plan — voluntary or involuntary.") (emphasis added).
90. See supra notes 6-9 and accompanying text.
91. See supra notes 42-43 and accompanying text.
age was the determinative catalyst for the offer, and therefore, the employer did not treat age neutrally.92

Putting this analysis into an analogous context, employers that discharge all employees between the ages of fifty-five and sixty are making age determinative decisions, even though they may believe, and actually prove, that employees between fifty-five and sixty are less productive and they, therefore, "actually" were motivated by the desire for a more productive workforce. In this same way, the offer of an early retirement incentive to individuals within a specified age cohort because they are in that cohort is an age-based decision on its face.93

Since, in this author's opinion, the early retirement incentive is direct evidence of the employer's motive, the McDonnell Douglas inquiry is not appropriate.94 Instead, where the employee proves, to the trier of fact through direct evidence, that "but for" his or her age the employee would not have been treated dissimilarly, "the ultimate issue of discrimination is proved; no inference is required."95 In such a case, the "employer has the burden to prove that the adverse employment action would have been taken even in the absence of impermissible motivation,

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92. Cf. Norris v. Arizona Governing Comm., 463 U.S. 1073 (1983) (where state's benefit coverage plan treated men and women differently on its face, specific sex animus need not be proven); Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 711 (1978) ("[the] simple test [of sex discrimination is] whether the evidence shows treatment of a person in a manner which but for that person's sex would be different."); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) (employer's severance pay policy which denied severance pay to employees over 55 because they were eligible for retirement is facially age-based).

93. Any employer rationales for making the early retirement incentive plan available, and the employee's responses to those rationales, are best addressed in a later stage of the direct evidence inquiry. See supra notes 6-9 and accompanying text.

94. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121; see also International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) ("the McDonnell Douglas formula does not require direct proof of discrimination."); Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1165 n.7 (8th Cir. 1985) ("Where there is direct evidence [of discrimination], consideration of inferences is unnecessary.") (citing Thurston); EEOC v. Babcock & Wilcox, 43 Fair Empl. Prac. Cas. (BNA) 736, 739 (E.D.N.C. 1987); EEOC's Paolillo Brief, supra note 80, at 17 n.13.

The only possible situation in this context where the McDonnell Douglas inquiry remains viable is if the employer's early retirement incentive offer does not intentionally draw an age line. For example, where an employer has no existing early retirement incentive plan, but instead offers an early retirement incentive to a single employee on an ad hoc, one time only, basis it would be difficult to consider that offer as intentionally drawing an age line between employees. In such a case, use of the McDonnell Douglas inquiry is appropriate since it is only by proceeding through the shifting burdens of proof and production inherent in that inquiry that the employee can prove that "but for" the employee's age the employer would not have taken the action that he did. Compare the correct application of the McDonnell Douglas inquiry in Ackerman, 670 F.2d 66 (individual employee given ad hoc special early retirement package), with the incorrect application of the McDonnell Douglas inquiry in Paolillo, 821 F.2d 81 (employer institutes elective termination program for employees over 60) and Henn, 819 F.2d 824 (employer offers every advertisement salesperson the opportunity to retire early if over 55).

95. Blalock v. Metal Trades, Inc., 775 F.2d 703, 707 (6th Cir. 1985) (religious discrimination context) (citing language in Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982)); Borden's, 724 F.2d at 1393 (age discrimination context).
and that, therefore, the discriminatory animus was not the cause of the adverse employment action.96

Applying the direct evidence test, as opposed to the McDonnell Douglas inquiry does not, in itself, answer the question whether employees within the age cohort eligible for the early retirement incentive have a claim against their employers under the ADEA. At this point in the analytical framework, a plaintiff has proven only that an early retirement incentive offer is direct evidence of an employer's age-related decision. The plaintiff must still prove that the decision the employer took, albeit based on age, was in some way detrimental to the plaintiff. Indeed, the ADEA itself provides only that employers may not "discriminate against" individuals on account of age.97 This language compels the conclusion that mere proof that the employer has made an age-based decision regarding an employee is not enough — the employee must prove that the age-based decision was detrimental.98 Simply, "[t]he law affords no protection from discrimination unless there has been some adverse employment action by the employer."99

The decisional law is almost unanimous, however, that the mere offer of an early retirement incentive does not constitute a detriment.100

96. Blalock, 775 F.2d at 712; Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525, 1529-30 (11th Cir. 1985) (in direct evidence inquiry, "[d]efendant can rebut prima facie case only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that [age] factor"). The Supreme Court left open the issue of rebuttal burden in a direct evidence case under the ADEA in Thurston. However, the Court has embraced the "same decision" test in a constitutional framework. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).


98. EEOC's Paolillo Brief, supra note 81, at 11; Henn, 819 F.2d at 826 (for discrimination to be unlawful it must be detrimental to the interests of the employee); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1254 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986).

99. Bristow, 770 F.2d at 1254 (emphasis added). The author is aware of no case that disagrees with this statement. Even in Paolillo, where the court arguably took the most lenient approach to what an employee has to show before he can succeed on an intra-cohort early retirement incentive-related ADEA claim, see supra notes 70-76 and accompanying text, the court still required some showing of employee detriment — an involuntary resignation. See Paolillo, 821 F.2d at 84.

100. See, e.g., Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988); Bodnar v. Synpol, Inc., 843 F.2d 190 (5th Cir. 1988), cert. denied, — U.S. —, 109 S. Ct. 260 (1988); Karlen, 837 F.2d at 317 ("Yet the discrimination seems to be in favor of rather than against older employees, by giving them an additional option and one prized by many older employees."); Henn, 819 F.2d at 827 ("An employee to whom the offer [to retire] has been extended . . . is the beneficiary of any distinction on the basis of age. None can claim to be adversely affected by discrimination in the design or offer of the early retirement package."); Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986) ("Absent evidence of illegal discrimination, the ADEA does not prohibit the formulation of such voluntary [early retirement] plans."); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1427 (7th Cir. 1986) ("[The early retirement plan], which selected employees on the basis of both age and years of service, showed a preference for older workers in determining which employees were eligible to receive benefits.") (emphasis added); Coburn v. Pan American Airways, Inc., 711 F.2d 339, 344 (D.C. Cir. 1983) ("Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary . . . it supports not a hint of age discrimination."); McCorstin v. United States Steel Corp., 621 F.2d 749,
Similarly, the EEOC's implementing regulations for the ADEA state: "Neither Section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age." 103

At least one commentator, however, has suggested that the mere offer of early retirement incentives should be held to violate the ADEA per se because such incentives: (1) violate the ADEA's policy of keeping older people employed; (2) violate the ADEA's policy of defeating ageist stereotypes; and (3) would be impermissible if applied in the race/sex context. 105 These arguments have little practical significance for this discussion in light of the fact that neither the EEOC, 106 the agency entrusted to enforce the ADEA, nor any court 107 has read the

755 (5th Cir. 1980) ("Permissive early retirement is a laudable attempt to provide security for those who are unable or disinclined to continue to work . . . "); Zinger v. Blanchette, 549 F.2d 901, 905 (3d Cir. 1977) ("While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor."); Sorosky v. Burroughs Corp., 37 Fair Empl. Prac. Cas. (BNA) 1510, 1519 (C.D. Cal. 1985) ("the use by Burroughs of a voluntary early retirement program to encourage the retirement of certain older employees provides no basis for an inference of age discrimination against plaintiff . . . "); aff'd in relevant part, 826 F.2d 794 (9th Cir. 1987); Curto v. Sears, Roebuck & Co., 38 Fair Empl. Prac. Cas. (BNA) 547, 552 (N.D. Ill. 1984) ("That Sears had an early retirement policy which it made available to plaintiff does not in itself suggest that Sears discriminated against plaintiff. An early retirement program is not per se discriminatory under the ADEA."); Bouwman v. Chrysler Corp., 39 Fair Empl. Prac. Cas. (BNA) 1570, 1572 n.6 (Mich. Ct. App. 1982) ("Our review of the testimony indicates that this was a permissive early retirement program, and, therefore, its mere existence does not constitute a prima facie case of age discrimination."); EEOC's Paolillo Brief, supra note 81, at 11. But see Bruno v. Western Elec. Co., 829 F.2d 957, 961 (10th Cir. 1987) (evidence of the existence of an early retirement plan may go toward establishing an inference of discrimination).

101. As originally enacted, the Secretary of Labor had authority for enforcement of the ADEA. See LARSON, supra note 34, at § 98.10 at 21-3. In 1979 that authority was transferred to the EEOC. Id. The EEOC's construction of the ADEA is entitled to "considerable weight where, as here, Congress never considered the matter." Henn, 819 F.2d at 828; see also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of . . . [an administrator], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

102. See infra note 177 and accompanying text for the text and discussion of 4(f)(2).

103. 29 C.F.R. § 1625.9(f) (1987).

104. See Kass, supra note 7, at 69-71.

105. Id. at 71-77. Kass also argues that early retirement incentives are inherently coercive. Id. at 79-84. However, on this point, the author recognizes:

As with the question of whether early retirement is really a benefit or a detriment to the employee, the problem arises of whether the courts should decide whether or not an older person's decision is truly voluntary. This paternalism smacks of the very ageism sought to be eliminated. . . . The paternalism involved in this view, and the strange way in which more attractive incentives are treated as being somehow worse for the recipients, make it a problematical point of view on which to rely.

Id. at 84. The paternalism inherent in concluding that early retirement incentives are per se coercive is particularly disturbing because that conclusion requires that the judgment of the older worker to accept the offer be second guessed as coercive in every case.

106. See supra notes 101-03 and accompanying text.

107. Id.
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statute in this way. Further, standing on their own, these policy justifications for finding early retirement incentives violative of the ADEA, while appealing at first glance, are meritless on additional examination.

First, it is not at all clear that Congress, when it enacted the ADEA and subsequently amended it, sought to encourage the indiscriminate employment of older citizens. Instead, a careful reading of the ADEA's legislative history indicates that Congress wanted to give older employees a choice between work and leisure. The statement of Senator Lloyd Bentsen (Dem.- Tex.) on the floor of the Senate during the debate on whether to extend the prohibitions of the ADEA to federal, state, and local governments is indicative: "Our long established goal in employment and retirement policy is to create a climate of free choice between continuing in employment as long as one wishes and is able, or retiring on adequate income with opportunities for meaningful activities." The legislative history of the ADEA and its amendments are replete with similar comments.

If the purpose of the ADEA is to increase employee choice, as the legislative history suggests, then early retirement incentives are completely consistent with that policy since, as the EEOC has stated: "The theory of voluntary early retirement incentives is that they offer employees that choice [desired by the ADEA]: a monetary supplement to their early retirement benefits which makes it possible for them freely to choose to continue to work or to retire."

The argument that early retirement incentives encourage ageist stereotypes, similarly, is flawed analytically. Certainly, it is plausible to suggest that the ADEA was passed, in part, to eliminate ageist stereotypes. But there is no proven correlation between early retirement incentives and the stereotypes sought to be curbed by the ADEA. To suggest, as one commentator has, that "early retirement incentives foster ageist stereotype[s] by driving older workers out of the mainstream of...

109. See Statement of Sen. Young, 113 CONG. REC. 31,256 (Nov. 6, 1967) ("While I firmly hold that a man or woman, at the age of 65 or at the age of 62, or even at the age of 60, if he or she wishes, should have the right to retire in comfort and free of insecurity, I am also convinced that no arbitrary retirement age should in all fairness be applied.") (emphasis added); S. REP. No. 493, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 504 ("The primary purpose of this legislation [raising the age limitation for coverage under the ADEA] is to strengthen and broaden the provisions of the ADEA to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age.") (emphasis added); see also EEOC's Paolillo Brief, supra note 81, at 11-12.
110. EEOC's Paolillo Brief, supra note 81, at 12.
111. See Leftwich v. Harris-Stowe State College, 702 F.2d 686, 692 (8th Cir. 1983); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir. 1983), cert. denied, 464 U.S. 992 (1983); Kelly v. American Standard, 640 F.2d 974, 980 n.9 (9th Cir. 1981).
economic life"\textsuperscript{112} simply is counterfactual. A plethora of recent studies indicates that the majority of employees that have elected early retirement would have left the workforce early even without the incentive.\textsuperscript{113} For example, the National Commission for Employment Policy ("NCEP") has concluded that the drive to leave the workforce is so great that "even reducing early retirement benefits 'would have little effect on retirement age.'"\textsuperscript{114} The contrary conclusion, that the small demographic influence early retirement incentives may have on the nation's workforce will profoundly influence the way we think about age, stretches the imagination too far.\textsuperscript{115}

In an attempt to shore up the analytical flaws in this policy-based approach to finding early retirement incentives violative of the ADEA, one commentator has resorted to an old argumentative standby — the race/sex analogy. This commentator writes: "Although there are no reported cases on the issue, it is difficult to imagine a court countenancing a plan under which women or blacks were paid $10,000 as an incentive to leave their jobs."\textsuperscript{116}

As a factual matter, the veracity of this statement is open to question. Insofar as the mere offer of an incentive is not "discrimination against" an employee, an employer may well be able to offer black and female employees money to leave the workforce. Presumably, the black or female employee that accepts the incentive offer has received a "benefit" not a detriment,\textsuperscript{117} and no actionable discrimination arises because of the offer itself. This issue need never be reached, however, since the age-race/sex analogy has a more fundamental analytical flaw.

The problem with the age-race/sex analogy is that it presupposes that groups protected by similar anti-discrimination legislation are themselves similar and, therefore, that what is true in one discrimination context is true in all others. The Supreme Court itself rejected this analysis in \textit{Massachusetts Bd. of Retirement v. Murgia}:\textsuperscript{118}

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities . . . old age does not define a discrete and

\textsuperscript{112} Kass, \textit{supra} note 7, at 72.
\textsuperscript{113} See studies reported in BNA REPORT, \textit{supra} note 4, at 63-64.
\textsuperscript{114} Id. at 63.
\textsuperscript{116} Kass, \textit{supra} note 7, at 73.
\textsuperscript{117} See \textit{supra} note 100 and accompanying text.
\textsuperscript{118} 427 U.S. 307 (1976).
insular group . . . in need of extraordinary protection from majoritarian political process. Instead it marks a stage that each of us will reach if we live out our normal span.\textsuperscript{119}

In the early retirement incentive context, the Seventh Circuit recently has stated:

Nor can it seriously be argued that the concept of early retirement for workers over a specified age stigmatizes such workers, as would a program designed to change not the age but the racial composition of the workforce by allowing blacks but not whites to retire early. Entitlement to early retirement is a valued perquisite of age — an additional option available only to older workers and only slightly tarnished by the knowledge that sometimes employers offer it because they want to ease out older workers.\textsuperscript{120}

Enough courts\textsuperscript{121} and commentators\textsuperscript{122} have recognized the fallacy of the age-race/sex analogy that, for the purposes of this discussion, it suffices to state that the analogy does not contain the analytical rigor that would be necessary to find early retirement incentives violative of the underlying policies of the ADEA.\textsuperscript{123}

Since the mere offer of early retirement incentives neither violates the underlying policies of the ADEA, nor the ADEA as it has been applied, the intra-cohort ADEA plaintiff must do more than allege the existence of such an offer to establish a case of direct evidence discrimination against his employer. Insofar as the offer itself is not actionable discrimination, the plaintiff must establish that the employer used the offer in a way contrary to the plaintiff’s interests.

There is only one set of circumstances, however, where the use of early retirement incentives is in any way detrimental to the interests of the employee. That circumstance arises, of course, when the employer forces the employee to take early retirement against the employee’s wishes.

In any other situation, the employee, acting according to his or her own best interests, can reject a detrimental offer or accept a beneficial

\textsuperscript{119.} Id. at 313-14.

\textsuperscript{120.} Karlen, 837 F.2d at 317.

\textsuperscript{121.} See, e.g., Holley v. Sanyo Mfg., 771 F.2d 1161, 1166 (8th Cir. 1985); Kelly v. American Standard, Inc., 640 F.2d 974, 980 (9th Cir. 1981).


\textsuperscript{123.} Indeed, there is some suggestion in the legislative history of the ADEA that Congress had in mind differences between race and age discrimination when it originally passed the Act. \textit{See Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221, Before the Gen. Subcomm. on Labor of the Comm. on Educ. and Labor of the House of Representatives, 90th Cong., 1st Sess. 449 (1967) (statement of Rep. Burke) ("Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Racial or religious discrimination results 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.").}
one. Stated alternatively, as long as the employee can choose between early retirement (a good, bad or neutral) and remaining at work (a good, bad or neutral), the employee has not suffered any detriment; the early retirement incentive only adds decision options and takes none away.\textsuperscript{124} As the EEOC recently recognized: "That is the heart of the issue — whether the plaintiffs [sic] relationship with the company was severed voluntarily or not. . . ."\textsuperscript{125}

Because intra-cohort ADEA plaintiffs must prove that they have been involuntarily separated from their employers, it follows that they must prove that they have been "discharged" on the basis of age in violation of section 4(a)(1).\textsuperscript{126} Discharge thus becomes the allegation of detriment necessary for the plaintiff to establish a claim of direct evidence discrimination.\textsuperscript{127}

How is a plaintiff to prove that his or her decision to accept an early retirement incentive offer was coerced and involuntary — actually a discharge? As noted above, the majority of circuits to analyze the issue have concluded that the plaintiff must meet the standard of a constructive discharge.\textsuperscript{128} This is also the position of the EEOC.\textsuperscript{129} Consider the analysis of the EEOC on this issue:

The Commission agrees that this claim is analogous to one of constructive discharge although the fit is not precise. Unlike a traditional constructive discharge case, this one does not involve an allegation that the employer imposed "intolerable working conditions" to induce resignation. The claim is that the employer offered the incentive in such an unreasonable and coercive manner that reasonable people would feel constrained to accept it. The constructive discharge doctrine can and should be construed to encompass such a claim. It is analogous in most important respects; \textit{viz}, despite indications that the employees chose to terminate the employment relationship, they allege that actions by the employer coerced them into resigning or retiring when they would not otherwise have done so.\textsuperscript{130}

While the author agrees with the near consensus of authorities that the constructive discharge approach is the appropriate one in early retire-

\textsuperscript{124} This, apparently, is the position of the Seventh Circuit in \textit{Henn}. \textit{See supra} text accompanying note 80.

\textsuperscript{125} \textit{EEOC's Paolillo Brief}, \textit{supra} note 81, at 10.

\textsuperscript{126} Indeed, the author is not aware of any case where a plaintiff in an early retirement incentive-related ADEA case has alleged a detriment other than a discharge in violation of § 4(a)(1). \textit{But see} the discussion of \textit{Karlen}, \textit{supra} at note 30 and accompanying text.

\textsuperscript{127} The EEOC explicitly has refused to consider early retirement incentive intra-cohort ADEA claims as alleging discriminatory "terms and conditions" of employment in violation of § 4(a)(1). \textit{See EEOC's Paolillo Brief, supra} note 81, at 13. Consequently, discriminatory discharge in violation of § 4(a)(1) is an intra-cohort ADEA plaintiff's only available allegation of detriment. \textit{Id}.

\textsuperscript{128} \textit{See} cases cited \textit{supra} at notes 61-66 and accompanying text.

\textsuperscript{129} \textit{See EEOC's Paolillo Brief, supra} note 81, at 17.

\textsuperscript{130} \textit{Id}.
ment incentive-related ADEA claims, that conclusion raises more questions than it answers. This is because the term "constructive discharge" in this context is merely a label for allegations of other detrimental conduct on the part of the employer which, taken together, suggest that the employee's decision to retire was involuntary.131 Consequently, while the constructive discharge inquiry in the intra-cohort ADEA early retirement incentive context would be whether the employer made working conditions so difficult or unpleasant that a reasonable person in the employee's shoes "would be coerced into making a precipitous decision to take early retirement," the significant question is: What events establish the requisite degree of difficulty and unpleasantness?

As noted earlier, the courts are not in agreement as to what an employee must demonstrate to prove that his decision to retire was involuntary — i.e., a constructive discharge. It is the author's opinion that the Seventh Circuit's decision in Henn is closest to the mark. This conclusion flows almost directly from two premises, established earlier: 1) an intra-cohort plaintiff must prove that he or she was forced to accept the early retirement offer in order to establish detriment; and 2) as long as the employee can choose between early retirement and remaining at work, the employee has suffered no detriment since the offer of the early retirement incentive can either be beneficial to the employee or it may be rejected. Consequently, it follows that if the term "constructive discharge" is to have any meaning in this context, the plaintiff must prove that the employer deliberately acted in such a way as to reduce or eliminate the plaintiff's option to continue working. Stated alternatively, the plaintiff must prove that the employer acted in such a way that a reason-

131. Stated alternatively, there may not be a significant difference between the term "constructive discharge" and the terms "coerced retirement," "forced retirement," or "involuntary discharge." See the discussion of the decision of the Sixth Circuit in Ackerman, supra note 68-69 and accompanying text. However, there are certain advantages to the use of constructive discharge analysis in this context. First, there is an entire body of already developed law, albeit conflicting at times, on the doctrine of constructive discharge. See supra note 61 and accompanying text. Courts are familiar with the doctrine and, therefore, less problems should arise with its application, as compared to some amorphous notion of "voluntariness." The term "voluntary" simply has too many definitions in too many different contexts for meaningful application. See Henn, 819 F.2d at 828. Second, the constructive discharge standard requires an objective valuation of voluntariness. See supra notes 55-81 and accompanying text. While it is permissible, and perhaps valuable, to allow the employee to rely on his subjective valuation of involuntariness as a detriment, the very fact that the employee is being allowed such broad latitude in demonstrating detriment, in turn, requires that proof of the involuntariness of his decision be objectively evaluated. Any other conclusion would allow an employee to make out a case of direct evidence discrimination on his own subjective evaluation of his retirement decision as involuntary. That is no requirement at all.

The author recognizes that the term "constructive discharge" is not a magic wand. In and of itself, the term means nothing unless the factors that go into the constructive discharge inquiry are explicated with some degree of specificity. The author describes those factors infra at notes 132-142 and accompanying text.

able person in the plaintiff's shoes would have felt he or she no longer had the option to continue working. If the employee does not establish that a reasonable person would have felt unable to continue working, then the employee still has the choice between the incentive and the status quo and, necessarily, suffers no detriment from the employer's offer of the incentive.

Conversely, standards for constructive discharge in this context that rely on aspects endogenous to the plan itself or on the way the plan was offered\(^{133}\) miss the point of what the constructive discharge is supposed to prove in this context. Whether the plaintiff had a small amount of time to accept the incentive offer or whether the offer is lucrative goes only to whether the offer is good, bad, or neutral, not to whether the employee had to take that offer because she had no other option or a reasonable person in her situation would have thought she had no other option. But it is only when the plaintiff has no other option that she truly suffers a detriment because of her age in violation of the ADEA. Consequently, factors endogenous to the offer should not be considered to determine whether the plaintiff has been constructively discharged.

Instead, only factors exogenous to the offer — whether the plaintiff had the choice to continue working or a reasonable person in the plaintiff's position would have thought he could have continued working — can establish a constructive discharge. This does not mean that an ADEA plaintiff in this context establishes a constructive discharge only when he was told he must take the offer or be terminated. That certainly

\[^{133}\text{See supra notes 55-81 and accompanying text. The phrase "the way the plan was offered" as it is used in this context is meant to encompass factors such as, but not limited to, timing of the offer, the amount of time given for the employee to accept, and method of information distribution. The phrase does not include information about alternatives to the employee's acceptance of the offer. This type of factor obviously does go to whether the employee has the option to continue working. Stated alternatively, "the way in which the plan was offered" does not include such things as whether the employee could say "no." See Henn, 819 F.2d at 828, quoted supra at note 79 and accompanying text. That factor is exogenous to the incentive offer and can go toward proving the existence of a constructive discharge. See infra notes 134-48 and accompanying text.}\]

\[^{134}\text{The Seventh Circuit's decision in Henn seems to support this conclusion insofar as the court suggested that whether the employee's retirement was voluntary should depend on factors exogenous to the offer such as "did the person have an opportunity to say no?" Henn, 819 F.2d at 828; see also Karlen, 837 F.2d at 317 ("a worker who elects early retirement cannot turn around and sue his employer unless he can show that he was forced to take early retirement by an explicit or implicit threat to fire (or otherwise punish) him because of his age if he did not.") (citing Henn) (parenthesis in original). The author disagrees with Henn to the extent that that decision suggests a plaintiff's showing that he lacked sufficient information about the contents of the offer itself may establish a constructive discharge. Henn, 819 F.2d at 828. Whether the plaintiff knows enough about the offer does not go to whether he has a choice to continue working. For example, the plaintiff may know that his medical benefits continue for two years after his early retirement, but his knowledge or ignorance of that fact has absolutely nothing to do with his ability to remain in his present position. Therefore, that factor is endogenous to the incentive offer and cannot establish a constructive discharge according to the standard for a constructive discharge advocated by the author.}\]
would do it, but that is an extreme case. A reasonable person might feel that he no longer had the opportunity to continue working when he has been demoted or transferred adversely with or without reprimand, or without a cut in pay, or subjected to some other humiliation in the workplace. Since these types of employer conduct are likely to be violations of the ADEA, the term “constructive discharge” as it is used in this context, will usually result in the employee proving that the terms on which he would have remained at the workplace are themselves violations of the ADEA.

135. See, e.g., Washburn v. Kansas City Life Ins. Co., 831 F.2d 1404, 1406 (8th Cir. 1987) (employee allegedly was told, “Do you want to be fired or do you want to be interested in early retirement?”); Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982) (employee given choice between retirement and termination), cert. denied, 460 U.S. 1080 (1983); Anderson v. Montgomery Ward & Co., Inc., 650 F. Supp. 1480 (N.D. Ill. 1987) (employer indicated to employees that if they did not take offer they would most likely be terminated). But cf. Cannon v. McWane, Inc., 40 Fair Empl. Prac. Cas. (BNA) 1230 (D. Utah 1986) (plaintiff was not constructively discharged where originally voluntarily agreed to resign but later changed his mind and was terminated). This should not be taken to suggest that an employer cannot indicate to an offeree that his job is not secure. However, that suggestion must be truthful, see EEOC’s Paolillo Brief, supra note 81, at 20.


138. See, e.g., Cockrell, 781 F.2d at 178-79 (court considered circumstantial evidence of other older workers offered pay cuts to stay with the company although the plaintiff was never specifically told that his “demotion” would result in a pay cut).


140. See, e.g., Lewis v. Federal Prison Indus., 786 F.2d 1537 (11th Cir. 1986) (employer, through supervisor, isolated employee, made him stand up all day, upbraided him in presence of inmates and pursued course of "other harassment"). But see Henn, 819 F.2d at 829-30 (silent treatment and threats of adverse consequences if employees did not perform better not enough to establish constructive discharge); Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) (no constructive discharge where employee was given difficult job resulting in stressful work environment).

141. See supra notes 32-45 and accompanying text.

142. See Henn, 819 F.2d at 829. This should not be taken to suggest that the plaintiff must prove that the employer manipulated the workplace in such a way as to constitute a “terms and conditions” violation of § 4(a)(1). 29 U.S.C. 629 § (4)(a)(1) (1982). Under the constructive discharge standard, the court only should be concerned with whether a reasonable person would have felt she could not remain in the workplace. See supra note 61. Presumably, there are conceivable situations where a reasonable person would have felt that she did not have the option to continue working, but could not make out a “terms and conditions” violation of the Act. Therefore, constructive discharge is used in this context as a proxy for detriment, not as evidence of an independent violation of the ADEA. Requiring a plaintiff to prove a terms and conditions violation of the ADEA would lead to the illogical result of the plaintiff being forced to prove the employer violated the ADEA (through constructive discharge) in order to prove the employer violated the ADEA (through offering the incentive). This would require the plaintiff to prove too much. Additionally, the EEOC apparently has rejected the “terms and conditions” violation approach to early retirement incentive intra-cohort ADEA claims. See supra note 127.
Once the plaintiff establishes that a reasonable person would have felt that she did not have the option to continue working, the plaintiff has proven the detriment necessary to establish a claim of direct evidence ADEA discrimination. The employee now has shown that an employer made a decision with regard to her on the basis of age and that decision was detrimental. The burden then shifts to the employer to prove that he would have made the same decision with regard to the plaintiff in the absence of age discrimination.\(^\text{143}\) Stated alternatively, since the plaintiff has proven she was constructively discharged because of her age, the employer must now prove that he would have discharged the plaintiff, even in the absence of age considerations.\(^\text{144}\) If the employer would have fired the plaintiff anyway, despite the plaintiff’s age, either because of an economically motivated job elimination,\(^\text{145}\) or some other non-discriminatory reason,\(^\text{146}\) then the plaintiff’s constructive discharge does not violate the ADEA.\(^\text{147}\) Whether the employer actually meets this burden, and thus succeeds in defeating the plaintiff’s discrimination claim, will vary widely according to specific proof presentations at trial.\(^\text{148}\)

### III

**DO EMPLOYEES OUTSIDE OF THE AGE COHORT ELIGIBLE FOR THE EARLY RETIREMENT INCENTIVE HAVE A CLAIM AGAINST THEIR EMPLOYERS UNDER THE ADEA?**

**A. Employees Too Young to Receive the Incentive\(^\text{149}\)**

Up to this point, this Article has demonstrated that employees within the age cohort offered the early retirement incentive do not have a claim against their employers under the ADEA because they have suffered no detriment through the offer and, therefore, have not been “discriminated against” in violation of the Act.\(^\text{150}\) The same analysis that led to this conclusion also compels the determination that those employees too young to receive the incentive have suffered a detriment.\(^\text{151}\) Obvi-

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\(^{143}\) See supra note 96 and accompanying text.

\(^{144}\) See Henn, 819 F.2d at 830.


\(^{146}\) Section 4(f)(3) of the Act states: “It shall not be unlawful for an employer, employment agency, or labor organization to discharge or otherwise discipline an individual for good cause.” 29 U.S.C. § 623(f)(3). An extensive examination of the term “good cause” is beyond the scope of this Article. For a discussion of cases dealing with the term “good cause,” the reader is referred to Larson, supra note 34, at §§ 100.20-29.

\(^{147}\) See supra note 96 and accompanying text.

\(^{148}\) As such, a discussion of this issue is beyond the scope of this Article.

\(^{149}\) The analysis in this section applies to that class of individuals over the age of 40, the youngest age entitled to statutory protection under the ADEA, see supra note 2 and accompanying text, but younger than the lowest age of the eligible cohort.

\(^{150}\) See supra notes 30-148 and accompanying text.

\(^{151}\) For further discussion of discrimination in employment benefits, see infra notes 165-76 and
ously, if the reason those employees offered the retirement incentive have no cause of action under the ADEA is because they have been placed in a better position vis-a-vis their younger and older counterparts, then those younger and older employees who are not offered the retirement incentive are placed in a disadvantageous position as compared to the offered cohort.

For employees to young to receive the retirement incentive, however, the obviousness of their detriment, and therefore, of the discrimination they suffer, is likely to be of little value in litigation. This is because, even assuming, arguendo, the existence of discrimination against younger employees in favor of older employees, the ADEA, at least in the context of early retirement incentives, prohibits age discrimination in one direction only — against older employees in favor of younger employees. In the jargon of the commentators, the ADEA is a “one-way street,” not a “two-way street” in the early retirement incentive context.

The conclusion that the ADEA is a “one-way street” is supported by the legislative history of the ADEA and the judicial interpretation of that Act. The legislative history of the ADEA is replete with references to the evils of misconceptions about the abilities of older workers, not to the hazards of age classifications per se. Congress in the ADEA clearly was concerned with the plight of the older worker and the fact that discrimination seemed to intensify as employees progressed in age. In contrast, the legislative history of the ADEA does not support the inference that Congress sought to eradicate all age classifications from the workplace, regardless of which age cohort benefited from those classifications.

accompanying text. This discussion is deferred until the next section, which examines the claims of employees too old to receive the offered incentive, since, as will be demonstrated in this section, notes 149-64 and accompanying text, younger employees discriminated against in favor of older employees have no cause of action under the ADEA in any event.

152. See supra notes 97-148 and accompanying text.
153. The plight of older employees not offered the retirement incentive is examined in the next section. See infra notes 164-292 and accompanying text.
154. Kass, supra note 7, at 85.
155. See supra notes 108-09 and accompanying text; see also Kass, supra note 7, at 85-86.
156. Id.
157. Id. Indeed, this legislative concern for the older worker, as opposed to the elimination of age classifications in the abstract, found its way into the statutory construction of the ADEA in at least one respect. In § 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2) (1982), Congress demonstrated a willingness to allow employers to treat older employees more favorably than younger employees. That section provides in pertinent part that: “It shall not be unlawful for an employer ... to observe the terms of a bona fide seniority system ...” Insofar as seniority systems by their very design favor older employees over younger ones, Congress in the Act has expressed at least tacit approval of employment institutions that favor the aged over the young.

The conclusion that the ADEA is a one-way street, at least in the context of early retirement incentives, also is supported by judicial interpretation of the Act. In Rock v. Massachusetts Comm'n Against Discrimination, an employer, the owner/operator of a manufacturing plant, offered extra-contractual early retirement benefits to employees who were over fifty-five when the plant was closed. Employees between the ages of forty and fifty-five were not offered such benefits. A group of employees in the non-offered cohort brought suit under a state anti-discrimination law.

The court held that the employer's action did not violate the state act. The court reasoned that it was "common sense and practical" to deny employees younger than the offered age cohort a cause of action since older workers are "being discarded for younger, more vigorous men and women," not the other way around. The state agency decision that the Rock court affirmed similarly stated:

[A] person is protected from disparate treatment that favors younger workers. One is not, however, . . . entitled to benefits or privileges equal to those offered older workers. Expressed in the vernacular, the statutory scheme is a "one-way street" that protects older workers from discrimination in favor of younger ones, but not vice versa.

The Seventh Circuit recently followed this reasoning, stating:

"two way streets" insofar as it read those statutes as available to other than traditionally suspect classes. That holding, however, primarily was based on "uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,'" McDonald, 427 U.S. at 280 (quoting, in part, 110 CONG. REC. 2578 (1964) (remarks of Rep. Cellar)), and "cumulative evidence of Congressional intent . . . that the 1866 statute [later codified as § 1981] was not understood or intended to be reduced . . . to the protection solely of nonwhites." McDonald, 427 U.S. at 295. There is no similar legislative history with respect to the ADEA. Cf. supra notes 108-09 and accompanying text.


159. This action was based on MASS. GEN. LAWS CH. 151 B, § 4(1), which states as follows:

   It shall be an unlawful practice: (1) for an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, age, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based on a bona fide occupational qualification.

The term "age" is defined by the statute as "any duration of time since an individual's birth of greater than forty years." MASS. GEN. LAWS CH. 151 B, § 4(8) (as amended 1984). For comparative purposes, the only difference between the ADEA and the state act relevant to this discussion is that the state act does not specifically exempt bona fide early retirement plans. See Rock v. Massachusetts Comm'n Against Discrimination, 384 Mass. 198, 204 n.10, 424 N.E.2d 244, 247 n.10, 41 Fair Empl. Prac. Cas. (BNA) 1351, 1353 n.10. In rendering its decision, the state court explicitly relied on ADEA decisional law. Rock, 384 Mass. at 204-05, 424 N.E.2d at 247-48, 41 Fair Empl. Prac. Cas. (BNA) at 1353.


161. Id. (citing a Massachusetts legislative study commission report).

EARLY RETIREMENT INCENTIVE PROGRAMS

[A]n early retirement plan that treats you better the older you are is not suspect under the Age Discrimination in Employment Act. Title VII protects whites and men as well as blacks and women, but the Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger against the older. The protected zone begins at age 40, but if on that account workers 40 or older but younger than the age of eligibility for early retirement could complain... early retirement plans would effectively be outlawed, and that was not the intent of the framers of the Age Discrimination in Employment Act. The *reductio ad absurdum* of the reasoning which views early retirement plans with suspicion would be to view permitting workers to retire when they reach the age of 65 as a form of discrimination against workers aged 40 to 64. Then the employer could be confident of escaping liability under the Age Discrimination in Employment Act only by allowing retirement at age 40!163

In sum, employees too young to be offered the retirement incentive do not have a cause of action under the ADEA. While such employees are certainly the victims of an adverse employment action, the ADEA, at least in the context of early retirement benefits, is not designed to give younger employees a cause of action for employment decisions which are favorable to their older counterparts.164

**B. Employees Too Old to Receive the Incentive**

While employees too young to receive the early retirement incentive offer may have difficulty establishing a cause of action under section 4(a)(1) because of the one directional approach of the ADEA, workers too old to receive the incentive face no such barrier to their claims. Section 4(a)(1) states: “It shall be unlawful for an employer: to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, *terms, conditions or privileges of employment*, because of such individual’s age.”165 The Supreme Court has held that, while the ADEA does not compel an employer to provide a particular benefit, the benefit that the employer chooses to provide cannot be doled out in a discriminatory fashion because of an employee’s age.166 Indeed, this is true even if participation in the benefit program is purely voluntary on the part of the employee since it is “the

163. *Karlen*, 837 F.2d at 318 (citations omitted).
164. Even if these employees could establish a cause of action under § 4(a)(1) of the Act, that discrimination would be excused under the bona fide benefit plan exemption provided in § 4(f)(2) of the Act. This statutory defense is examined more comprehensively infra at notes 179-292 and accompanying text.
166. *Trans World Airlines v. Thurston*, 469 U.S. 111, 120-21 (1985) (“benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free... not to provide the benefit at all.”) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)).
opportunity to participate in [an employee benefit] plan [that] constitutes [the] 'conditio[n] or privileg[e] of employment.'” Consequently, incentive plans which make age-based distinctions in the amount of benefits distributed in favor of younger workers at the expense of older workers probably violate section 4(a)(1) of the ADEA. This conclusion not withstanding, the EEOC, in its brief in Cipriano, stated that retirement “incentive plans can be, and often are, structured so that they do not” violate section 4(a)(1). In particular, the EEOC listed the following lawful alternatives:

1. An employer could offer a flat incentive (a lump sum or cash times years of service and/or paid up insurance premiums) to all retirement eligible employees regardless of age and under the same conditions.
2. An employer could lower the age at which actuarially unreduced benefits are available under a pension plan.
3. An employer may give extra age and service credits (often five years) to each employee.

The problem with these alternatives is that, while they do not treat employees disparately on the basis of age, neither do they allow an employer to target his incentive plan to achieve a maximum return, via reduced labor costs, on his expenditures. The model retirement incentive plan analyzed in this Article gives the employer the greatest flexibility in this respect. This plan, however, also constitutes the most egregious violation of section 4(a)(1) because it deprives employees older than the offered age cohort of a benefit on the basis of age.

A fourth alternative early retirement incentive plan, suggested by


168. See Karlen, 837 F.2d at 318 (“[T]here is discrimination against the older worker. Everyone between 55 and 69 is eligible for early retirement, but those between 64 and 69 — an older age group — are disfavored relative to the younger employees in the eligible group. If the City Colleges said to their faculty, ‘[A]t age 65 you lose your free parking space (or dental insurance, or any other fringe benefit)[’], they would be guilty, prima facie, of age discrimination. Early-retirement benefits are another fringe benefit.”); Cipriano v. Board of Educ. of N. Tonawanda, 785 F.2d 51, 53 (2d Cir. 1986) (“It is undisputed that, if it were not for [the bona fide benefit plan exception], the [retirement] incentive plan would run afoul of § 4(a)(1) of the ADEA.”); Memorandum for the Equal Employment Opportunity Comm’n as Amicus Curiae at 12, in Cipriano, 700 F. Supp. 1199 (W.D.N.Y. 1988), on remand from 785 F.2d 51 (2d Cir. 1986) [hereinafter EEOC’s Cipriano Brief]. But see Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S.—, 109 S. Ct. 2854, 2866, 106 L.Ed.2d 134, 154 (1989) (“age-based restrictions in the employee benefit plans covered by § 4(f)(2) do not constitute the ‘arbitrary age discrimination in employment’ that Congress sought to prohibit in enacting the ADEA.”). See infra notes 262-92 and accompanying text for further discussion of Betts.

169. EEOC’s Cipriano Brief, supra note 168, at 13.

170. Id. at 14-18.

171. Cf. Patterson v. Independent School Dist. # 709, 742 F.2d 465, 469 (8th Cir. 1984). (“And to effect the purpose of encouraging early retirement, the sliding scale of diminishing benefits is manifestly appropriate.”).

172. See supra note 5 and accompanying text; see infra Part IV.

173. See infra notes 175-76 and accompanying text.
one commentator, purports to capture the benefits of labor cost targeting without the disadvantages of section 4(a)(1) disparate treatment. This approach is the permanent early retirement window. Under this approach, every year an employer would offer an early retirement incentive plan to all employees who turn fifty-five, or some other previously determined age, in that year. Purportedly, this plan allows an employer to "quite convincingly argue that those employees who are too old to receive the incentive have already had their opportunity to receive one [when, for example, they had turned fifty-five], but have freely chosen to pass it up." That this approach avoids the disparate treatment problems of a temporary window plan (e.g., where the offer is available for employees turning fifty-five one year, but not the next) is not altogether clear. As the Second Circuit recently stated in dicta: "We do not find [the existence of a prior opportunity to participate in the plan] material to our decision . . . since appellants' claim is not that they were denied the opportunity ever to participate in the incentive, but that they were denied the opportunity to do so on the date they ultimately chose to retire." Further, the practicability of the permanent window approach is subject to question since early retirement incentives are usually offered by employers as short term responses to unforeseen changes in economic conditions that necessitate immediate reductions in labor costs, and not as innovative personnel management.

That the retirement incentive plan violates section 4(a)(1), however, begins rather than ends the inquiry. In section 4(f)(2) of the Act, the ADEA provides a statutory exemption for otherwise unlawful conduct in that:

It shall not be unlawful for an employer . . . 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 purposes of this Chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.

174. See Kass, supra note 7, at 91.
175. Cipriano, 785 F.2d at 52 n.20.
176. See supra note 7 and accompanying text. The existence of a permanent window, however, may be significant in determining whether the employer enacted the plan as a subterfuge. See infra notes 270-92 and accompanying text.
177. 29 U.S.C. § 623(f)(2) (1982). The ADEA affords an employer six statutory exemptions to otherwise unlawful conduct: the bona fide occupational qualification (BFOQ); the reasonable factor other than age (RFOTA); the laws of a foreign workplace; the bona fide seniority system; the bona fide employee benefit plan; or another reason constituting "good cause." Of these, only the bona fide benefit plan exemption is relevant to this discussion. For an analysis of other exemptions, the reader is referred to Larson, supra note 34, at § 100.10; Eglit, The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other than Age Exception, 66 B.U.L. REV. 155 (March 1986).
As the statute makes clear, the bona fide employee benefit plan exemption has four elements. To obtain the benefit of the exemption, the employer (1) must have been observing the terms (2) of a bona fide (3) employee benefit plan (4) which is not a subterfuge to evade the purposes of the Act. Each element of the bona fide benefit plan exemption must be analyzed to determine whether early retirement incentive offers fall within the scope of protection afforded by section 4(f)(2).

I. Observation of the Terms

The phrase "to observe the terms of" has been judicially construed to mean that "the terms of the plan must expressly sanction the practice or expressly give the employer the option of engaging in the activity." The EEOC has taken a narrower position. The implementing regulations to this section state:

[T]he section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer . . . is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply.

According to the EEOC's implementing regulations, the requirement that the plan must actually prescribe the discriminatory action, in contrast to merely permitting it, serves two purposes. The implementing regulations state:

Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

Despite the disagreement between the EEOC and the courts over

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178. See Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S.—, 109 S. Ct. 2854, 106 L.Ed.2d 134 (1989); Potenze v. N.Y. Shipping Ass'n, 804 F.2d 235, 237 (2d Cir. 1986), cert. denied, 481 U.S. 1029 (1987); Patterson, 742 F.2d at 466-67; EEOC v. Borden's, Inc., 724 F.2d 1390, 1395 (9th Cir. 1984). Many decisions analyzing the § 4(f)(2) bona fide benefit plan defense merge the "bona fide" and "employee benefit plan" elements. See, e.g., EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982). For analytical clarity, however, these terms are analyzed separately herein.

179. EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 223-24 n.9 (3d Cir. 1984), cert. denied 469 U.S. 820 (1984); Sexton, 630 F.2d at 486; Smart v. Porter Paint Co., 630 F.2d 490, 494 (7th Cir. 1980) ("the terms of the Plan provide for involuntary retirements at age 60 or older at the option of the Company . . . differing treatment accorded others under the same Plan is not a matter which we may now question under the rubric of 'observ[ing] the terms' because the Plan's terms give the Company the option of retiring its employees at different ages.") (brackets in original). See also Betts, 492 U.S.—, 109 S. Ct. 2854, 106 L.Ed.2d 134 (1989).

180. 29 C.F.R. § 1625.10(c) (1988) (emphasis added).

181. Id.
the meaning of the phrase "to observe the terms," this element of the section 4(f)(2) exemption has not been a stumbling block for employers either inside or outside the early retirement context.\textsuperscript{182} In fact, the author is aware of only one decision analyzing an employer's defense under section 4(f)(2) where the employer had not met the "to observe the terms" element.\textsuperscript{183} Indeed, even the EEOC recently has stated: "We . . . believe that this [element of the section 4(f)(2) exemption] will seldom be a disputed issue in litigation attacking retirement incentives."\textsuperscript{184} Consequently, this element of the bona fide employee benefit plan exemption is not likely to be problematic for those employers offering early retirement incentives who subsequently seek the protection of section 4(f)(2).

2. Bona Fide

Like the phrase "to observe the terms of," the term "bona fide" has not given employers seeking the protection of the section 4(f)(2) exemption much trouble.\textsuperscript{185} This is probably due, in no small part, to the breadth of the meaning the judiciary has ascribed to the term. The term "bona fide" has been held to mean no more than that the plan "exists and pays benefits,"\textsuperscript{186} i.e. that it is "not a sham."\textsuperscript{187} Moreover, the plan benefit need not be paid to all employees for the benefit plan to qualify as "bona fide."\textsuperscript{188}

The EEOC has taken a similar approach to the term "bona fide." The implementing regulations state, \textit{inter alia}: "A plan is considered

\begin{itemize}
\item \textsuperscript{182} See \textit{Patterson}, 742 F.2d at 466 (there was no contest about whether or not the requirement was met); \textit{Borden's}, 724 F.2d at 1395 (not disputed that the employer observed the terms of its benefit plan); \textit{Home Ins. Co.}, 672 F.2d at 257-58 (parties stipulated that the plan in question was observed); \textit{Babcock & Wilcox Co.}, 43 Fair Empl. Prac. Cas. (BNA) at 742; EEOC v. City of Mt. Lebanon, 651 F. Supp. 1259, 1262 (W.D. Pa. 1987) (parties agreed that terms of the plan were observed), \textit{vacated}, 842 F.2d 480 (3d Cir. 1988).
\item \textsuperscript{183} See EEOC v. Baltimore & Ohio R.R. Co., 632 F.2d 1107 (4th Cir. 1980), \textit{cert. denied}, 454 U.S. 825 (1981) (employer failed to meet "observing the terms" element where employer involuntarily retired employees under age 65 and company pension plan contained no provision allowing employer to do so, but instead employer claimed involuntary early retirement was an "inherent right of management.").
\item \textsuperscript{184} \textit{EEOC's Cipriano Brief, supra} note 168, at 19.
\item \textsuperscript{185} \textit{Cipriano}, 785 F.2d at 54 (plan is bona fide on its face); \textit{Patterson}, 742 F.2d at 466 (plan bona fides are not contested); \textit{Home Ins. Co.}, 672 F.2d at 257 (bona fides of plan are stipulated).
\item \textsuperscript{187} \textit{Patterson}, 742 F.2d at 466.
\item \textsuperscript{188} \textit{See Cipriano}, 785 F.2d at 51 (both older and younger employees excluded from early retirement incentive offer and plan is still bona fide); \textit{Alford v. City of Lubbock}, 664 F.2d 1263 (5th Cir. 1982), \textit{cert. denied}, 456 U.S. 975 (newly hired older employees excluded from municipal retirement plan and plan is still bona fide); \textit{Smart v. Porter Paint Co.}, 630 F.2d 490, 494 (7th Cir. 1980) (plan may be applied differently to different participants and still be bona fide). The author is aware of no decision holding that a plan was not bona fide because it was offered to too few employees. Evidently, there is no requisite number of participating employees that makes a plan bona fide, or conversely, not bona fide.
\end{itemize}
‘bona fide’ if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefit in accordance with the terms of the plan. . . .”

According to judicial construction and administrative rule, therefore, an early retirement incentive offer will usually meet the “bona fide” requirement of section 4(f)(2), or it easily can be altered to do so.

3. Employee Benefit Plan

The term “employee benefit plan” has been the subject of much litigation, both in and outside of the early retirement context. No less than six United States Courts of Appeals, as well as numerous district courts, and the EEOC have attempted to define the term. The result of all this litigation largely has been confusion. Because the understanding of this term is essential to the determination of whether an early retirement plan falls within the section 4(f)(2) exception, and because the current state of the law in this area is less than obvious, the decisional law analyzing the term warrants extended discussion.

The first circuit court to analyze the “employee benefit plan” requirement of section 4(f)(2) was the Fifth Circuit in Brennan v. Taft Broadcasting Co. In Brennan, an employer attempted to involuntarily retire an employee pursuant to a company “Profit Sharing Retirement Plan” (“PSRP”). The Secretary of Labor brought suit on behalf of the employee, contending that the PSRP was not the kind of plan Congress intended to exempt from scrutiny under section 4(f)(2) because the retirement plan cost was independent of the ages of the covered employees. The Fifth Circuit rejected this argument, holding that the PSRP

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189. 29 C.F.R. § 1625.10(b) (1987).
190. See, e.g., Potenze, 804 F.2d at 237-38; Cipriano, 785 F.2d at 54-56; Britt v. DuPont Co., 768 F.2d 593, 595 n.4 (4th Cir. 1985); Patterson, 742 F.2d at 466-67; Borden’s, 724 F.2d at 1395-97; EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 224-25 (3d Cir. 1983); Alford v. City of Lubbock, 664 F.2d “1263, 1271-72 (5th Cir. 1982), cert. denied, 456 U.S. 975 (1982); Brennan v. Taft Broadcasting Co., 500 F.2d 212, 215-16 (5th Cir. 1974).
192. 29 C.F.R. § 1620.10(b) (1987).
193. 500 F.2d 212 (5th Cir. 1974).
194. Id. at 214-15. Significantly, the Brennan decision was issued before the ADEA was amended to prohibit involuntary retirement. See supra note 2 and accompanying text.
195. As amended, the ADEA now allows the EEOC to bring suit on behalf of individual employees. See 29 U.S.C. § 626(c) (1982).
196. Brennan, 500 F.2d at 215. The plaintiff referred to the legislative history of § 4(f)(2) which suggests that Congress enacted the § 4(f)(2) defense to prevent the employment of older workers from becoming prohibitively expensive. Id. at 216. Indeed, the legislative history of § 4(f)(2) makes it clear that members of Congress were concerned that employers would be “discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to
was an “employee benefit plan, such as [a] retirement, pension or insurance plan.” 197 While the court did not enunciate any criteria for this classification, it did state “[t]he key phrase is ‘employee benefit plan.’ The words, ‘retirement, pension or insurance’ are added in a clearly descriptive sense, not excluding other kinds of employee benefit plans if, conceivable, there could be any.” 198

The next decision analyzing the term “employee benefit plan” also came from the Fifth Circuit. In Alford v. City of Lubbock, 199 two employees were denied reimbursement for accumulated sick leave when they retired. They brought suit alleging that the employer’s refusal to pay for their accumulated sick leave violated the ADEA. 200 The court agreed, and clarified its opinion in Brennan, stating:

[W]e do not believe that Congress, in developing the ADEA exemption for employee benefit plans meant to countenance the discriminatory dispensation of all fringe benefits whether or not they are part of a specific and established ‘benefit plan’. . . . Sick leave — a simple fringe benefit administered in a single, easily calculated payment — is not [an employee benefit plan]. Rather, the payment for unused sick leave is akin to the other . . . fringe benefits that the City voluntarily pays its employees regardless of the age at which they are hired. 201

The Alford court issued no criteria for distinguishing “simple” fringe benefits, not included within section 4(f)(2), from “complex” ones, which presumably are included within the statutory benefit plan exemption. 202

In EEOC v. Westinghouse Electric Corp., 203 decided just one year after Alford, the Third Circuit grappled with the term “employee benefit plan” for the first time. In that case, the plaintiffs were denied layoff

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197. Brennan, 500 F.2d at 215-16.
198. Id. at 215. The court also refused to adopt the participant age/plan cost test finding that there was no need to consider congressional intent since the statutory language of § 4(f)(2) was unambiguous on its face. Id. at 216-17.
199. 664 F.2d 1263 (5th Cir. 1982), cert. denied, 456 U.S. 975 (1982).
200. The employees were denied their accumulated sick leave under an employer policy that denied accumulated sick leave to employees like the plaintiffs who were hired after age 50. Id. at 1265. The plaintiffs were also denied pension benefits, but the court held that this policy fell clearly and unquestionably within the § 4(f)(2) exception. Id. at 1267-71.
201. Id. at 1272 (citations omitted).
202. The court did hint, however, that a simple fringe benefit may receive different treatment if it were considered part of a larger, integrated benefit scheme. Id. This concept of benefit plan “integration” becomes a more dominant theme in later decisions in this area. See infra notes 211-23 and accompanying text.
203. 725 F.2d 211 (3d Cir. 1983).
income and benefits ("LIB")\(^{204}\) when Westinghouse closed one of its plants, because the plaintiffs were eligible for retirement at the time of the closing.\(^{205}\) The EEOC brought suit and Westinghouse defended its actions under section 4(f)(2).\(^{206}\)

The Third Circuit held that the LIB was not a bona fide employee benefit plan under section 4(f)(2). The court stated:

By the express language of 4(f)(2), a plan qualifies if it is a retirement, insurance or pension plan. We are aware that the words 'such as retirement, pension or insurance' were added in a descriptive sense, not excluding other kinds of employment benefit plans. [citation omitted]. Even though these words are descriptive, their description contains substance. These words are to be interpreted as indicative of the types of plans in which Congress intended to allow age distinctions; they are of the type whereby the costs of benefits increases with age.\(^{207}\)

The court reasoned further that, since "[t]he thread common to retirement, insurance and pension plans . . . is the age related cost factor,"\(^{208}\) and since age-related cost factors are "not found in the LIB plan,"\(^{209}\) the LIB plan is a "[f]ringe benefit plan unrelated to the age cost factor [and] not included in the 4(f)(2) exception."\(^{210}\)

In addition to the *Westinghouse* court's holding that the LIB plan was not protected under section 4(f)(2) as an "independent" employee benefit plan, the court also held that the LIB plan was not integrated with an otherwise protected benefit scheme. The court, therefore, refused to apply the approach first suggested in *Alford*,\(^{211}\) reasoning: "The LIB Plan . . . is functionally independent of the pension plan. . . . The mere fact that the benefits available to employees under the Pension Plan were to be considered when determining the eligibility for LIB . . . does not merge the two plans into a single 'coordinated benefit plan.'"\(^{212}\)

The Ninth Circuit in *EEOC v. Borden's, Inc.*,\(^{213}\) was faced with a similar situation. In that case, a severance pay program had been adopted as an addendum to the collective bargaining agreement.\(^{214}\) That

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\(^{204}\) According to the applicable collective bargaining agreement, Westinghouse was required to offer the LIB to "eligible employees" affected by a layoff or plant closing. *Id.* at 214.

\(^{205}\) *Id.* at 215.

\(^{206}\) *Id.* at 215.

\(^{207}\) *Id.* at 224 (emphasis in original). As a factual matter, this statement is of questionable validity insofar as many kinds of retirement and insurance plans do not have age-related costs. *See* Reinhart, *supra* note 196, at 1073.

\(^{208}\) *Westinghouse Elec. Corp.*, 725 F.2d at 224.

\(^{209}\) *Id.*

\(^{210}\) *Id.* at 225.

\(^{211}\) *See supra* notes 199-202 and accompanying text.

\(^{212}\) *Westinghouse Elec. Corp.*, 725 F.2d at 225.

\(^{213}\) 724 F.2d 1390 (9th Cir. 1984).

\(^{214}\) *Id.* at 1391.
policy denied benefits to employees eligible for retirement.\footnote{215} The EEOC filed suit under the ADEA on behalf of fourteen employees denied severance pay.\footnote{216} Borden’s asserted that the plan was protected under section 4(f)(2).\footnote{217} The Ninth Circuit rejected Borden’s claim, finding instead that “...Borden’s severance pay policy was a ‘simple fringe benefit,’ outside the scope of § 623(f)(2).”\footnote{218} The court reasoned that, through section 4(f)(2), “Congress sought to avoid disrupting pensions and other complex, ongoing benefit schemes ... [not] a one-time, ad hoc cash payment.”\footnote{219} This rationale is similar to the “complex versus simple benefit” analysis of the Fifth Circuit in \textit{Alford}.\footnote{220}

The court’s holding in \textit{Borden’s} also tracks the participant age/plan cost language of \textit{Westinghouse}. The court stated:

Congress also meant to encourage the hiring of older workers by relieving employers of the duty to provide them with equal benefits — where equal benefits would be more costly for older workers. But severance pay costs no more for a newly hired older worker than for his or her younger counterpart.\footnote{221}

Finally, the court rejected Borden’s argument that its severance pay policy was an integral part of its retirement and pension package and, therefore, protected by section 4(f)(2), because the severance pay plan was negotiated separately and was contained in a separate document.\footnote{222} However, the court did leave the door open for future application of the integration approach, stating: “We recognize that a severance pay policy which is an integral part of a complex benefit scheme might be regarded differently ...”\footnote{223}

The next circuit to analyze the term “employee benefit plan,” the Eighth Circuit in \textit{Patterson v. Independent School Dist. #709},\footnote{224} was also the first circuit to apply the term in the early retirement incentive context. In \textit{Patterson}, teachers too old to receive a statutorily prescribed early retirement incentive brought suit under the ADEA.\footnote{225} The em-

\begin{itemize}
\item \textit{Id.} at 1391-92.
\item \textit{Id.}
\item \textit{Id.} at 1396.
\item \textit{Borden’s}, 724 F.2d at 1396.
\item Indeed, the court adopts this framework from \textit{Alford}. \textit{Id.}
\item \textit{Id.}
\item \textit{Id. But see} EEOC v. Fox Point-Bayside School Dist., 772 F.2d 1294, 1301 (7th Cir. 1985) (“Our prior decisions do not require that, for the plan to afford protection to the employer under section 4(f)(2), all portions of the plan be incorporated into one document.”).
\item \textit{Borden’s}, 724 F.2d at 1396-97.
\item 742 F.2d 465 (8th Cir. 1984).
\item \textit{Id.} at 466. The court in \textit{Patterson} described Minnesota’s “Teacher early retirement incentive” program as follows:
\item The ... plan, it was hoped, would furnish an incentive for teachers to trigger ... the
ployer school district defended the plan under section 4(f)(2). The court upheld the plan, stating: "An early retirement plan is certainly a 'retirement... plan,' which if bona fide is exempted by § 623(f)(2).... The plan therefore being intrinsically valid, it is not vitiated by the fact that by reason of the chronological sequence of events plaintiff could not take advantage of all its ramifications." The rationale for this conclusion is not altogether clear from the decision. The court cites the Fifth Circuit's decision in Mason v. Lister as "strong authority" for the conclusion that early retirement incentives do not violate the ADEA. It is difficult to see how Mason could be read in this way. Mason involved an employee's challenge to a federal retirement plan which allowed employees to retire early, without any additional incentives, during a mass layoff. The Mason court upheld the plan. Insofar as no benefit outside of the basic retirement plan was involved in Mason, it is not obvious, as the Patterson court suggests it is, that Mason supports the legality of early retirement incentives. Additionally, the Patterson court states that an employee benefit plan "[p]rima facie... would include any genuine plan for the benefit of employees. It need not necessarily be a retirement, pension or insurance plan; reference to those types of plans is simply by way of illustration." This language is in accord with Brennan, Alford and Borden's. However, in the very next paragraph the Patterson court states:

Possibly the fringe benefit ruling [of Alford] demonstrates the requirement that there must be a plan in order to qualify for exemption under 623(f)(2). Perhaps a plan... must be a systematic and inter-related structure where consideration of age is an actuarial necessity in order to attain fairness in computing benefits.

Yet, the court never applies the "actuarial necessity" standard to the early retirement incentive offer. Indeed, if the court did so, the plan involved in Patterson probably would fail since a lump-sum payment costs...

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226. Id. at 466.
227. Id. at 468 (emphasis and first ellipses in original).
228. 562 F.2d 343 (5th Cir. 1978).
229. Patterson, 742 F.2d at 468.
230. Mason, 562 F.2d at 345.
231. Id. at 346.
232. See Kass, supra note 7, at 98.
233. Patterson, 742 F.2d at 266-67 (emphasis added).
234. Patterson, 742 F.2d at 467 (emphasis added).
EARLY RETIREMENT INCENTIVE PROGRAMS

the employer the same amount regardless of the age of those offered.\textsuperscript{235} The "actuarial necessity" standard also seems to contradict the court's holding that an early retirement plan is "intrinsically valid,"\textsuperscript{236} since not all retirement plans are based on actuarial necessity.\textsuperscript{237}

The reasoning of the Second Circuit in \textit{Cipriano v. Board of Educ. of N. Tonawanda}\textsuperscript{238} is much clearer than that in \textit{Patterson}.\textsuperscript{239} In \textit{Cipriano}, the collective bargaining agreement between teachers and a school district offered retirement incentives\textsuperscript{240} to members of the bargaining unit between the ages of fifty-five and sixty who had at least twenty years of service and who retired during a specified window period.\textsuperscript{241} Plaintiffs were sixty-one years old at the beginning of the window period and, therefore, were ineligible for the incentive plan.\textsuperscript{242} The plaintiffs brought suit against their employer and their union under the ADEA, both of whom defended the plan under section 4(f)(2).\textsuperscript{243}

The Second Circuit held that the early retirement incentive plan was a bona fide employee benefit plan,\textsuperscript{244} but left open the question of whether the incentive was a subterfuge to evade the purposes of the ADEA.\textsuperscript{245} With regard to the issue of whether the plan was an employee benefit plan under section 4(f)(2), the court stated: "Apart from the fact that the phrase 'such as retirement, pension or insurance plan' provides illustrations rather than limitations, we see no reason to doubt that the incentive plan, when read as a supplement to an underlying general re-

\textsuperscript{235} See Kass, \textit{supra} note 7, at 99.
\textsuperscript{236} See \textit{supra} note 227 and accompanying text.
\textsuperscript{237} See \textit{Karlen v. City Colleges of Chicago}, 837 F.2d 314, 319-20 (7th Cir. 1988). Despite the flaws in its reasoning, the decision in \textit{Patterson} has been cited with approval by both the Second and Fourth Circuits. See \textit{Cipriano}, 785 F.2d at 56; \textit{Britt v. DuPont Co.} 768 F.2d 593, 595 n.4 (4th Cir. 1985) ("The result in \textit{Patterson} is consistent with our distinction . . . ").
\textsuperscript{238} 785 F.2d 51 (2d Cir. 1986).
\textsuperscript{239} See \textit{supra} notes 224-37 and accompanying text.
\textsuperscript{240} According to the Second Circuit:
The incentives consisted of two options. Under Option A the Board would pay the cost of Blue Cross/Blue Shield and Major Medical Insurance until the retiree reached the age of 65 at the same level as was accorded to regular staff members, and also $2,000 plus $50 for each complete year of service beyond 20 years. Under Option B the Board would pay a lump sum of $10,000. \textit{Cipriano}, 785 F.2d at 52 n.1.
\textsuperscript{241} \textit{Id}.
\textsuperscript{242} The Board asserted that the plaintiffs would have been entitled to incentives under a "window" provision in the agreement if they had retired when the incentive plan was first enacted. \textit{Id} at 52 n.2. The window provision was not part of the record, however. \textit{Id}. Furthermore, the Second Circuit rejected the relevance of a window period as a matter of law. See \textit{supra} note 175 and accompanying text.
\textsuperscript{243} The case arose before the Second Circuit on the union's motion to dismiss for failure to state a claim. The asserted failure to state a claim was premised on § 4(f)(2). The district court granted that motion. \textit{Id} at 53-54.
\textsuperscript{244} \textit{Id} at 53-56.
\textsuperscript{245} \textit{Id} at 57-59. See \textit{infra} Part III.B.4. (notes 270-92) for a discussion of the subterfuge issue. The Second Circuit in \textit{Cipriano} remanded on the subterfuge issue.
retirement plan, was a ‘retirement’ plan for the purposes of § 4(f)(2).”246

The court also responded to the plaintiff’s argument that section 4(f)(2)’s protections are limited to plans in which age-based benefit reductions “are justified by actuarially significant cost reductions.”247 The court rejected any actuarially based cost consideration requirement, stating:

The [Department of Labor] interpretation says nothing to the effect that “cost considerations” must be actuarially based. The phrase “cost considerations” was used, as the interpretation states, to rule out from the scope of 4(f)(2) plans that would curtail or reduce such benefits as “paid vacations and uninsured sick leave” for older workers since reduction in these benefits would not be justified by significant cost considerations.248

In contrast to sick leave and paid vacations, the court concluded that early retirement incentive plans did fall within the scope of the section 4(f)(2) “employee benefit plan” requirement because such plans are justified by “significant cost considerations.” The court reasoned:

Significant cost considerations are often involved, however, in designing incentives for older employees voluntarily to leave the workforce because those who continue working beyond a certain age will often draw a salary that is significantly higher than the periodic payments obtainable under a pension plan. Since the employer’s goal in offering early retirement incentives is often to save expenses by reducing the size of the workforce, it is only reasonable for the employer to offer more to those employees who chose to leave at a younger age, saving the employer more years of continued full salary, than to those who remain in the workforce and do not confer on the employer the sought-after benefit.249

246. Cipriano, 785 F.2d at 54 (citations omitted). Here the court apparently embraced the “integrated benefit plan” approach first suggested in Alford. See supra note 199-202 and accompanying text; see also Karlen, 837 F.2d at 318-19 (“The Early Retirement Program, to which the challenged features are integral, is part of the overall retirement plan — a genuine retirement plan — that the City Colleges negotiated with the teachers’ union and embodied in their collective bargaining agreement.”).

247. Id. The plaintiffs referred to 29 C.F.R. § 860.120(l)(1) (repealed Dec. 11, 1985), issued by the Department of Labor before its functions were transferred to the EEOC. See infra note 273-75 and accompanying text for the text of that regulation. It may now be found at 29 C.F.R. § 1625.10 (1987). The regulation’s current validity has been cast into doubt by the Supreme Court’s ruling in Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S.-, 109 S. Ct. 2854, 106 L.Ed.2d 134 (1989). For the Court’s discussion in Betts of this regulation, see infra notes 273-79 and accompanying text.

248. Cipriano, 785 F.2d at 54 (quoting, in part, Department of Labor regulations) (emphasis added).

249. Cipriano, 785 F.2d at 54-55; Cf. Potenze, 804 F.2d at 237 (guaranteed annual income plan that provided for social security insurance offset at age 65 is a bona fide employee benefit plan because the offset “results in significant savings to the [plan] fund.”); EEOC v. Fox Point-Bayside School Dist., 772 F.2d 1294, 1302 (7th Cir. 1985) (“Indeed, since the cost of employing someone and
Because early retirement incentive plans often involve "significant cost considerations," the Cipriano court distinguished Alford.250 Westinghouse and Borden's.251

A recent decision by the Supreme Court in a related context added to the confusion. In Fort Halifax Packing Co. v. Coyne,252 the Court examined whether Maine's severance pay law was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").253 To reach its decision, the Court was required to determine whether a one-time severance payment mandated by state law related to an "employee benefit plan" under an ERISA preemption provision that reads: "[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title."254

providing insurance and retirement benefits can vary with the age of the employee, the reasoning of these cases [Borden's, Westinghouse and Alford] indicates that the [mandatory retirement provision which was part of a bona fide retirement plan] is of the type that was meant to be protected [by § 4(f)(2)]."

250. With respect to Alford, the court in Cipriano stated:

The sick-pay policy in Alford, however, had nothing to do with retirement itself, but was a reward for past conduct — staying healthy and on the job — which was equally valuable to the employer regardless of the employee's age or length of service. Age, or retirement eligibility, was completely unrelated to the purpose of the challenged benefit. Cipriano, 785 F.2d at 56.

251. The Cipriano court distinguished Westinghouse and Borden's because the severance plans in those cases were "functionally independent . . . and simply unrelated" to the benefit schemes protected by § 4(f)(2). Id.; see also Britt v. DuPont Co., 768 F.2d 593, 595 (4th Cir. 1985) ("When an employer gives severance pay or related benefits to employees as part of a plant closing, no relationship exists between the value of the job given up and the value of the benefit. Severance pay in that context is an arbitrarily determined amount that can be thought of as a fringe benefit rather than compensation for not working. In contrast . . . severance pay[ments] . . . designed exclusively to induce employees legally entitled to continue to work to forego that entitlement . . . represent[] compensation for giving up the right to earn wages. As such, they are properly viewed as a wage substitute, not as a fringe benefit.")

253. Id. at 7 (interpreting 29 U.S.C. §§ 1001-1381 (1982) [hereinafter ERISA]).
254. 29 U.S.C. § 1144(a) (1982). ERISA defines an "employee benefit plan" as an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3) (1982). Further, the statute defines an "employee welfare benefit plan" as:

[A]ny plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . . .

29 U.S.C. § 1002(1)(A) (1982). The statute also defines the term "employee pension benefit plan" as:

[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless
The Court concluded that a one-time severance payment did not constitute an "employee benefit plan" that would trigger ERISA's pre-emption provision. The Court stated:

The requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. To do little more than write a check hardly constitutes the operation of a benefit plan.\(^{255}\)

To the extent that analysis under ERISA can be applied to the ADEA, the Court's analysis in Halifax implicitly affirms the reasoning of Alford, Westinghouse and Borden's.\(^{256}\) The applicability of analysis under ERISA to the ADEA, however, is unclear. On the one hand, Congress recently amended the ADEA in a way that strongly suggests terms in ERISA and the ADEA are to be accorded similar interpretations.\(^{257}\) On the other hand, there is legislative history that supports the conclusion that ERISA and the ADEA were meant to be distinct and independent.\(^{258}\)

The decisions of the courts in Brennan, Alford, Westinghouse, Borden's, Patterson and Cipriano, taken together, make generalizations about the meaning of the term "employee benefit plan" difficult. Alford appears to require that a plan attain a certain amount of complexity before it is an "employee benefit plan" for the purposes of section 4(f)(2).\(^{259}\) In sharp contrast, Westinghouse builds the definition of "employee benefit plan" entirely around age-related costs.\(^{260}\) The decisions in Borden's, Patterson and Cipriano appear to require a combination of both complexity and age-related costs.\(^{261}\)

The Supreme Court's recent decision in Public Employees Retire-
ment System of Ohio v. Betts\textsuperscript{262} has ameliorated a good deal of this confusion. Betts involved a challenge to a facially age-based disability retirement policy.\textsuperscript{263} The employer argued that the policy was covered by the section 4(f)(2) exemption and therefore did not constitute actionable discrimination. Both the district court and the court of appeals held the plan was not protected by section 4(f)(2) because the age-related reductions in benefits to older workers were not justified by the increased cost of providing those benefits.\textsuperscript{264}

The Supreme Court reversed, holding that section 4(f)(2) imposed no requirement that age-based distinctions in benefits be based solely on differences in plan cost.\textsuperscript{265} Significantly, the Court examined the participant age/plan cost relationship relied on in Westinghouse, Borden’s, Patterson and Cipriano in the context of whether the plan was a “subterfuge,” not whether the plan was an “employee benefit plan” within the meaning of section 4(f)(2).\textsuperscript{266} However, the Court’s rejection of the participant age/plan cost requirement applies equally well to the “employee benefit plan” inquiry:

The second possible source of authority for the cost-justification rule is the statute’s requirement that the § 4(f)(2) exemption be available only in the case of “any bona fide employee benefit plan such as a retirement, pension, or insurance plan.” The EEOC argues, and some courts have held, that the phrase “such as a retirement, pension or insurance plan” is intended to limit the protection of § 4(f)(2) to those plans which have a cost justification for all age-based differentials in benefits. See EEOC v.


\textsuperscript{263} The retirement plan in Betts provided for both age-and-service and disability retirement benefits. Age-and-service retirement benefits were available to those employees who (1) had accumulated at least five years of service credit and were at least 60 years old; (2) had 30 years of service credit; or (3) had 25 years of service credit and were at least 55 years of age. Betts, 492 U.S. at —, 109 S. Ct. at 2858, 106 L.Ed.2d at 145. Disability benefits were available to employees who suffered from a permanent disability, had at least five years of service, and were under the age of 60 at retirement. Those employees who qualified for disability retirement had a benefit floor of no less than 30 percent of their final average salary. 492 U.S. at —, 109 S. Ct. at 2859, 106 L.Ed.2d at 145. No such floor applied to age-and-service retirees. The plaintiff, while disabled at the time she retired, exceeded the disability retirement age limit. Consequently, she was forced to take age-and-service retirement, which provided her with retirement benefits below the 30 percent salary floor established for disability retirees. 492 U.S. at —, 109 S. Ct. at 2859, 106 L.Ed.2d at 146.

\textsuperscript{264} 492 U.S. at —, 109 S. Ct. at 2859, 106 L.Ed.2d at 146.

\textsuperscript{265} See 492 U.S. at —, 109 S. Ct. at 2865, 106 L.Ed.2d at 153.

\textsuperscript{266} With respect to the “employee benefit plan” requirement, the Court in Betts stated: “[W]hatever the precise meaning of th[at] phrase . . . it is apparent that the disability retirement plan falls squarely within that category.” 492 U.S. at —, 109 S. Ct. at 2860, 106 L.Ed.2d at 147. See infra notes 270-92 for further discussion of § 4(f)(2)’s “subterfuge” requirement.
There are a number of difficulties with this explanation for the cost-justification requirement. Perhaps most obvious, it requires us to read a great deal into the language of this clause of § 4(f)(2), language that appears on its face to be nothing more than a listing of the general types of plans that fall within the category of “employee benefit plan.” The statute’s use of the phrase “any employee benefit plan” seems to imply a broad scope for the statutory exemption, and the “such as” clause suggests enumeration by way of example, not an exclusive listing. Nor is it by any means apparent that the types of plans mentioned were intentionally selected because the cost to the employer of the benefits provided by these plans tends to increase with age. Indeed, many plans that fall within these categories do not share that particular attribute at all, defined contribution pension plans perhaps being the most obvious example. [Footnote omitted.] We find it quite difficult to believe that Congress would have chosen such a circuitous route to the result urged by respondent and the EEOC.

The interpretation is weakened further by the fact that the regulation itself does not support it. According to 29 C.F.R. § 1625.10(b) (1988), “[a]n ‘employee benefit plan’ is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as ‘fringe benefits.’” This definition makes no mention of the limitation urged by the EEOC, and indeed seems sufficiently broad to encompass a wide variety of plans providing fringe benefits to employees, regardless of whether the cost of those benefits increases with age...

For these reasons, we conclude that the phrase “any bona fide employee benefit plan such as a retirement, pension, or insurance plan” cannot reasonably be limited to benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations.268

While it is too soon to make anything other than an educated guess as to how the lower federal courts will apply Betts, it does seem clear that the participant age/plan cost requirement relied on in Westinghouse, Borden’s, Patterson and Cipriano no longer is viable. In contrast, the plan complexity requirement relied on in Alford and, to a lesser extent, in Borden’s, Patterson and Cipriano, was not addressed in Betts and, therefore, probably remains sound. Insofar as the “employee benefit plan” requirement does presuppose some degree of “complexity,” an early retirement plan can meet this requirement because, at the very least, such a plan usually is a “supplement to an underlying general retirement

267. See infra notes 273-79 for discussion of the EEOC’s position on the participant age/plan cost relationship requirement.
EARLY RETIREMENT INCENTIVE PROGRAMS

4. Subterfuge

The Supreme Court squarely addressed the meaning of the term "subterfuge" in its recent decision in *Betts*. As discussed above, the Court in that case examined the lawfulness of a disability retirement policy that created age-based distinctions among employees. The Court held that the policy otherwise met the requirements of section 4(f)(2) and would be protected "unless [the] plan is 'a subterfuge to evade the purposes of' the Act." The plaintiff contended that the employer’s disability retirement plan was not protected by section 4(f)(2) because the age-based distinctions in benefits were not cost related.

As support for this argument, plaintiff relied on an interpretive regulation promulgated by the Department of Labor, the agency initially charged with enforcing the ADEA in 1979. The regulation recites that the purpose of the section 4(f)(2) exemption "is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations," and that "benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers." With respect to disability benefits, the regulations specifically state that "[r]eductions on the basis of age in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations . . ." The requirement that an employer demonstrate "a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself." As *amicus*, the EEOC contended that the rule could be drawn from the section 4(f)(2) requirement that "age-based distinctions in benefit plans not be a subterfuge to evade the purposes of the Act." The Court flatly rejected this argument:

269. Cipriano, 785 F.2d at 54. See supra note 246 and accompanying text. Presumably, such plans may be "complex" in their own right. Individual complexity, however, may be difficult to prove since no court has established objective criteria for determining the requisite degree of complexity.
270. See supra notes 262-64 and accompanying text.
271. 492 U.S. at —, 109 S. Ct. at 2860, 106 L.Ed.2d at 147 (citation omitted).
272. The EEOC participated as an *amicus curie* in support of plaintiff’s interpretation of § 4(f)(2). 492 U.S. at —, 109 S. Ct. at 2862, 106 L.Ed.2d at 150.
274. 29 C.F.R. § 1625.10(f)(1)(ii).
275. Id.
276. *Betts*, 492 U.S. at —, 109 S. Ct. at 2862, 106 L.Ed.2d at 150.
277. Id. The EEOC also argued that the § 4(f)(2) phrase "employee benefit plan, such as a retirement, pension, or insurance plan" is intended to limit the protection of § 4(f)(2) to those plans which have a cost justification for age-based differentials in benefits. *See Id.* The Court’s rejection of this argument is discussed supra at notes 267-68 and accompanying text.
[The EEOC's] approach to the definition of subterfuge cannot be squared with the plain language of the statute . . . "[S]ubterfuge" means a "scheme, plan, stratagem, or artifice of evasion," which, in the context of § 4(f)(2), connotes a specific "intent . . . to evade a statutory requirement." [United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).] The term thus includes a subjective element that the regulation's objective cost-justification requirement fails to acknowledge.\textsuperscript{278}

Thus:

'(t)he "subterfuge" exception to the § 4(f)(2) exemption cannot be limited in the manner suggested by the regulation.\textsuperscript{279}

Having determined that the EEOC's definition of subterfuge is invalid, the Court went on to determine the precise meaning of the term. Relying on section 2(b) of the ADEA,\textsuperscript{280} the Court reasoned that "the only purpose that the [disability retirement plan] could be a 'subterfuge to evade' is the goal of eliminating 'arbitrary age discrimination in employment.'"\textsuperscript{281} The Court then looked to section 4(a) of the Act\textsuperscript{282} "[i]n order to determine the type of age discrimination that Congress sought to eliminate as arbitrary,"\textsuperscript{283} and concluded that the "plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions [section 4(a)] of the Act."\textsuperscript{284}

Section 4(a)(1) of the ADEA, however, prohibits discrimination in "compensation, terms, conditions or privileges of employment."\textsuperscript{285} The Court recognized that this phrase could be read to encompass employee benefit plans of the type also covered by section 4(f)(2).\textsuperscript{286} The Court, however, rejected this interpretation of the Act, because it "would in effect render the § 4(f)(2) exemption nugatory with respect to post-Act plans."\textsuperscript{287} The Court reasoned:

Any benefit plan that by its terms mandated discrimination against older workers would also be facially irreconcilable with the prohibitions in

\textsuperscript{278} 492 U.S. at —, 109 S. Ct. at 2863, 106 L.Ed.2d at 150.
\textsuperscript{279} 492 U.S. at —, 109 S. Ct. at 2864, 106 L.Ed.2d at 151.
\textsuperscript{280} Section 2(b) of the ADEA states:

It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

\textsuperscript{29} U.S.C. § 621(b).

\textsuperscript{281} 492 U.S. at —, 109 S. Ct. at 2865, 106 L.Ed.2d at 153.

\textsuperscript{282} 29 U.S.C. § 623(a).

\textsuperscript{283} 492 U.S. at —, 109 S. Ct. at 2865, 106 L.Ed.2d at 153-54.

\textsuperscript{284} 492 U.S. at —, 109 S. Ct. at 2865-66, 106 L.Ed.2d at 154.


\textsuperscript{286} 492 U.S. at —, 109 S. Ct. at 2866, 106 L.Ed.2d at 154. Earlier in its opinion, the Court had held that an employee benefit plan could not be a subterfuge to evade the purposes of the ADEA where the plan was enacted prior to the Act. See 492 U.S. at —, 109 S. Ct. at 2860-61, 106 L.Ed.2d at 148-49.

\textsuperscript{287} 492 U.S. at —, 109 S. Ct. at 2866, 106 L.Ed.2d at 154.
§ 4(a)(1) and, therefore, with the purposes of the Act itself. It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes, at least where the plan provision was adopted after enactment of the ADEA.

On the other hand, if § 4(f)(2) viewed as exempting the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship, both statutory provisions can be given effect. This interpretation of the ADEA would reflect a Congressional judgment that age-based restrictions in the employee benefit plans covered by § 4(f)(2) do not constitute the "arbitrary age discrimination in employment" that Congress sought to prohibit in enacting the ADEA. Instead, under this construction of the statute, Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other nonfringe-benefit terms and conditions of employment. 288

Based on this analysis, the Court concluded:

Congress intended to exempt employee benefit plans from the coverage of the Act except to the extent plans were used as a subterfuge for age discrimination in other aspects of the employment relation. . . . 289

. . . [W]hen an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation. 290

As the Court recognized, the result in Betts "permits employers wide latitude in structuring employee benefit plans." 291 While Betts did not involve an early retirement incentive plan, the Court's interpretation of the phrase "subterfuge to evade the purposes of the Act" certainly applies equally well in that context. Accordingly, early retirement incen-

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288. Id.
289. 492 U.S. at —, 109 S. Ct. at 2867, 106 L.Ed.2d at 156.
290. 492 U.S. at —, 109 S. Ct. at 2868, 106 L.Ed.2d at 157. Under the Court's interpretation of "subterfuge," § 4(f)(2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. . . . § 4(f)(2) redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act.
492 U.S. at —, 109 S. Ct. at 2868, 106 L.Ed.2d at 156-57.
291. 492 U.S. at —, 109 S. Ct. at 2867, 106 L.Ed.2d at 156. The Court stated, however, that its decision "does not render the 'not a subterfuge' proviso a dead letter. Any attempt to avoid the prohibitions of the Act by cloaking forbidden discrimination in the guise of age-based differentials in benefits will fall outside the § 4(f)(2) exemption." Id. For example:
[W]hile § 4(f)(2) generally protects age-based reductions in fringe benefits, an employer's decision to reduce salaries for all employees while substantially increasing benefits for younger workers might give rise to an inference that the employer was in fact utilizing its benefits plan as a subterfuge for age discrimination in wages . . .
492 U.S. at —, 109 S. Ct. at 2868, 106 L.Ed.2d at 156.
tive plans may contain age-based distinctions that are not justified by
differences in plan cost without running afoul of the ADEA. Moreover,
after Betts an employee attempting to establish that an early retirement
plan is a subterfuge has the difficult burden of proving that the plan "ac-
tually was intended to serve the purpose of discriminating in some nonfr-
inge-benefit aspect of the employment relation."²⁹² Obviously, whether
an employee meets this burden will depend on the facts of a given case.
It is significant, however, that early retirement incentive plans are not per-
se subterfuges to evade the purposes of the Act, even when those plans
contain age-based differentials in benefits.

In sum, older workers outside the eligible age cohort have no cause
of action against their employers. While those employees certainly have
suffered some form of discrimination, they have no actionable claim since
the conduct on the part of the employer falls within the ADEA's bona
fide employee benefit plan exemption.

IV
EMPLOYER BEHAVIORAL GUIDELINES

The previous three sections have explored the legal implications of
an early retirement incentive plan within the context of the ADEA. As
those sections make clear, there is still some uncertainty in this area and
more litigation will have to take place before even some basic questions
about early retirement incentives can be answered with confidence. This
existing uncertainty means that employers seeking to implement or con-
tinue early retirement incentive plans may be operating on shifting
ground. Insofar as early retirement incentive plans are important
workforce management tools, however, the aura of uncertainty concern-
ing these plans in all probability will not, and should not, militate against
their use. How, then, is an employer to exit the bind of the need to use
early retirement incentives and the ensuing potentiality of legal liability?
The author suggests that the employer should follow the following guide-
lines. These guidelines may be viewed as aspirational asymptotes, beyond
which a risk-averse employer should not operate.

A. Planning

No early retirement incentive plan should be adopted without care-
ful planning. The need for planning exists whether the employer envi-
visions making early retirement a permanent fixture of his retirement
program or using early retirement as a one-time, short-term response to
excessive labor costs. In both situations the cases make clear that a lack
of consideration of plan characteristics, administrative structure, and im-

²⁹² 492 U.S. at —, 109 S. Ct. at 2868, 106 L.Ed.2d at 157.
plementation environment, such as those contained in the guidelines listed below, raises the risk of ADEA liability. Employers must give themselves ample time to explore different possibilities and consider the legal implications of each alternative before adopting a permanent plan. Similarly, those employers that view early retirement incentives only as short-term, temporary measures, should plan for that contingency early enough so that important decisions are not made in the face of impossible deadlines.

B. Plan Characteristics

1. Benefit Types

There are no restrictions on the type of benefit an employer may offer to encourage early retirement. The employer may choose to offer a lump-sum cash payment, improved or liberalized pension benefits, or a combination of both.

2. Lucrativeness

The benefit plan should be as financially beneficial to the recipient as possible, while retaining the labor cost savings that motivated the adoption of the plan in the first place. Logically, it is more difficult for an employee to argue that he was "coerced" into accepting a $100,000 incentive than it is for him to argue that he was coerced into accepting a $100 incentive.

3. Signed Agreement

The incentive offer should appear as a signed agreement between the employer (offeror) and employee (offeree), with both the major and minor aspects of the plan described in vocabulary commensurate with the education of the offeree. The suggestion that the plan be a written agreement stems from the section 4(f)(2) requirement that an employer must "observe the terms" of a plan. It is much easier for the employer to prove that he has "observed the terms of a plan" when he can produce for the court a written copy of the plan, signed by the offeror and offeree. Additionally, an in-depth description of the plan's characteristics mutes potential offeree allegations that he did not receive enough information to adequately make his retirement decision. Several courts have suggested that inadequate plan information may go toward establishing involuntariness and coercion within the offered age cohort. The use of lay vocabulary serves a similar function; it prevents the employee from arguing that he could not understand the plan because it was written in legal jargon. Further, the offeree's and offeror's signatures on the agreement serve as evidence of acceptance of its terms. To promote this evidentiary end, the use of disclaimers (e.g., "I have read and fully understand the terms of
this agreement”; “My acceptance of this agreement is completely voluntary and of my own accord”) is strongly encouraged. At best, such disclaimers may constitute evidence of the offeree's voluntariness. At worst, disclaimers are only excess verbiage.

4. **Window Period**

The benefit plan's window period — the time given to the employee to accept or reject the incentive offer — should be as lengthy as practicable. The retirement decision is a difficult one for the employee, requiring careful analysis of numerous factors. This being the case, courts have looked with disfavor on short window periods (e.g., the two-to-three day period in *Paolillo*).293 There is no discernible magic number of weeks or months in which to allow the employee to make his decision. However, the employer should err on the side of having a window that is “too long” instead of a window that is “too short.” A window that is too short may raise the specter of coercion, while a window that is too long merely may be administratively inconvenient. Of course, there may be occasions when a lengthy window period is a near impossibility (e.g., when a plant is scheduled for immediate closing), but these are exceptions. And even in those cases, careful planning would allow the employer to prepare the older members of his workforce for the occurrence of just that event.

5. **Age of the Eligible Cohort**

The employer should target his incentive offer, to the extent economically practicable, to the older employees in the forty- to seventy-year-old ADEA protected age bracket. Stated alternatively, the employer runs less risk of ADEA liability by excluding younger employees, as opposed to their older counterparts. This is because the ADEA is a one-way street in the benefit plan context and does not afford employees too young to receive the offered incentive a cause of action for their employer's more favorable treatment of their older counterparts. Consequently, if the employer must choose between excluding older or younger employees from the incentive offer, the younger employees are, legally speaking, more expendable.

6. **Absence of "Subterfuge"**

The plan should be free of any terms which would be independently actionable under section 4(a)(1) of the Act and, thereby, demonstrate that the plan was enacted as a subterfuge to evade the purposes of the Act.294 Under section 4(d) of the ADEA, for example, it is unlawful for

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293. *See supra* notes 70-76 and accompanying text.

294. *See, e.g.*, Betts, 492 U.S. —, 109 S. Ct. at 2867, 106 L.Ed.2d at 156.
an employer to discriminate against an employee who has opposed any action made unlawful by the Act or who participated in the filing of any age-discrimination complaint or litigation. Nothing in section 4(f)(2) would insulate from liability an employer who adopted a plan provision formulated to retaliate against such an employee.

C. Administrative Structure

1. Integration

Incorporation of the early retirement incentive plan into the employer's existing retirement structure is strongly encouraged. Fully integrated early retirement incentive plans are more easily defended as "employee benefit plans" for the purposes of section 4(f)(2). While there is no requisite degree of integration, courts have cited such factors as whether the early retirement incentive plan is contained in the same document as the employer's normal retirement plan; whether both plans have overlapping qualifications; and whether both plans were adopted at roughly the same time.

2. Administrative Infrastructure

Employers should avoid having their early retirement incentive plans appear as one-time, lump-sum payments with all the administrative complexity of writing a check. Such "simple" plans may run afoul of the complexity requirement some courts have read into the section 4(f)(2) employee benefit plan exception. Instead of oversimplifying the early retirement process, employers should operate their early retirement incentive plans much as they run their normal retirement plans. A suggested administrative structure for early retirement incentive plans would include data collection (see below), disbursement oversight, and post-disbursement follow through.

3. Data Collection

The employer is encouraged to obtain and maintain data relevant to the early retirement plan. Such data includes anticipated working life of employees, expected retirement ages of employees, anticipated cost of early retirement inducement, and anticipated payroll savings from early retirement inducement. This data certainly will be useful, and may be essential, should the employer ever have to establish that his benefit plan structure was not a "subterfuge" to evade the purposes of the ADEA.

D. Plan Implementation Environment

As the above cases indicate, the workforce environment in which the early retirement incentive plan is adopted may be as significant as the structure of the plan itself. The environment in which the plan is
adopted must not coerce an offeree's acceptance. An employer who, in addition to offering an otherwise lawful plan, tells an offeree, "Do you want to talk about early retirement, or do you want to talk about discharge," will almost certainly run afoul of section 4(a)(1) of the Act. The offeree must be given an opportunity to say, "no", to the offer and continue working until non-discriminatory exigencies force his discharge. In addition, the employer should give the offeree honest information about his future with the company absent early retirement. If non-discriminatory exigencies loom large on the horizon, the offeree should be informed to that effect. Similarly, if the employer has reason to believe that the offeree's position will be secure indefinitely, the offeree should be so informed. Simply put, the offer should be made in an environment that is free from fraud and misrepresentation, lest the offeree attempt to challenge, at some later date, the volitional nature of his acceptance.