NOTES

AGE DISCRIMINATION—COMPENSATORY DAMAGES FOR PAIN AND SUFFERING HELD RECOVERABLE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967—*Rogers v. Exxon Research & Engineering Co.*, 404 F. Supp. 324 (D.N.J. 1975).

At the age of sixty, Dr. Dilworth T. Rogers, a "scientist and inventor," was forced into an early retirement by the Exxon Research & Engineering Company,[1] after approximately thirty years of employment.[2] Dr. Rogers subsequently brought an action in federal district court alleging that Exxon, in compelling his retirement, had discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA).[3] Following the death of Dr. Rogers, his wife and daughter, as co-executrices of his estate, became the plaintiffs in the proceeding.[4] The trial was then bifurcated, and the issues of liability and damages were decided separately.[5]

At the trial on the issue of liability, the jury found the actions of Exxon in terminating the employment of the plaintiffs' decedent to be violative of the ADEA.[6] Prior to the trial on the question of damages, the court granted the plaintiffs' motion to place in issue their claims for compensatory damages for pain and suffering under the ADEA,[7]

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[1] At the time of these events the defendant was named Esso Research & Engineering Company. In 1974, however, the defendant changed its corporate name to Exxon Research & Engineering Company. Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 326 (D.N.J. 1975).

[2] *Id.* at 326, 329–30. Dr. Rogers was initially employed by Exxon as a research chemist from 1938 to 1940. After a one-year period of employment with another company, he returned to Exxon and worked continuously there until the date of his early retirement. Brief for Defendant at 3, Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975) [hereinafter cited as Brief for Defendant].

[3] Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 326 (D.N.J. 1975). The ADEA is codified at 29 U.S.C. § 621 *et seq.* (1970), *as amended*, (Supp. V, 1976).

[4] Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 326 (D.N.J. 1975).

[5] *See id.*

[6] *See id.*

[7] *See* Defendant's Supplemental Trial Brief at 1, Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975). Compensatory damages are "substitutionary relief" in the sense that they provide

> the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money.

despite the absence of any express statutory authorization for such recovery.[8] After all the evidence had been presented, the jury returned a verdict for the plaintiff in the amount of $750,000, which was subsequently reduced to $200,000 on remittitur.[9]

In an opinion intended to explain and justify certain rulings in the case, the federal district court held in *Rogers v. Exxon Research & Engineering Co.*[10] that, in an appropriate case, damages for pain and suffering are recoverable under the ADEA.[11] It was asserted that the statute, in effect, creates a new tort for the redress of which the full array of tort remedies is available to an aggrieved party, once liability is established.[12] The court also analogized the ADEA to title VII of the Civil Rights Act of 1964[13] in order to illustrate both the broad remedial purpose of the ADEA and the suitability of awards for pain and suffering where compensation for discriminatory treatment is sought.[14] Since recovery appeared to be consonant with the declared purpose of the Act[15] and with its legislative history,[16] the court concluded that the language in the enforcement provision of the ADEA was broad enough to permit the award of compensatory damages for pain and suffering.[17]

D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1, at 135 (1973) [hereinafter cited as DOBBS].

[8] The enforcement provision of the ADEA provides, in pertinent part, that

> [i]n any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief* as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b) (1970) (emphasis added).

[9] Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 326–27 (D.N.J. 1975). The term "remittitur" refers to a procedure whereby a court, usually on motion of the losing defendant, gives the plaintiff the option of either remitting that portion of the jury verdict found to be excessive or submitting to a new trial. *See generally* 6A J. MOORE, FEDERAL PRACTICE ¶ 59.05[3] (2d ed. 1974).

[10] 404 F. Supp. 324, 327 (D.N.J. 1975).

[11] *Id.* at 333.

[12] *Id.* at 327.

[13] 42 U.S.C. §§ 2000e to 2000e-11 (1970), *as amended*, (Supp. V, 1976).

[14] 404 F. Supp. at 328, 331.

[15] The congressionally stated purposes of the ADEA are

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

29 U.S.C. § 621(b) (1970).

[16] *See* note 70 *infra*.

[17] 404 F. Supp. at 328–29, 330 & n.3, 333.

Congress enacted the ADEA, pursuant to its powers under the commerce clause,[18] for the stated goal of "promot[ing] employment of older persons based on their ability rather than age."[19] In order to accomplish this purpose, the ADEA prohibits arbitrary age discrimination[20] by employers,[21] employment agencies,[22] and labor

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[18] *See* 29 U.S.C. § 621(a)(4) (1970), in which appears the congressional finding that "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce."

[19] 29 U.S.C. § 621(b) (1970). For other stated congressional purposes of the statute see note 15 *supra*.

[20] Such discrimination occurs when

> age, within the limits prescribed by the Act, is [treated as] a *determining factor* in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

29 C.F.R. § 860.103(c) (1975) (emphasis added).

[21] The term "employer," as used in the ADEA, signifies

> a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. § 630(b) (Supp. V, 1976).

It should be noted that the ADEA purports to extend its coverage to the states and their political subdivisions *qua* employers. *See id.* In the recent case of National League of Cities v. Usery, 96 S. Ct. 2465 (1976), the Supreme Court held that certain amendments to the federal minimum wage law which purported to extend coverage to virtually all employees of states and their political subdivisions were unconstitutional. *Id.* at 2473–74. The *Usery* Court held that insofar as the challenged legislation tended to "interfere with the integral governmental functions of [the state]" it was beyond the power of Congress under the commerce clause. *Id.* at 2474. In reaching such a decision, the Court indicated

> that the States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce.

Id. at 2475. Inasmuch as the ADEA is also an exercise of Congress' power under the commerce clause, *see* note 18 *supra*, it is unclear whether the hiring or firing of employees by a state on the basis of age, as opposed to a decision regarding the wages to be paid them, would be the type of "integral governmental function" which must be left to the discretion of the states. *See id.* at 2488 (Stevens, J., dissenting) (federal government may force states to act impartially when hiring or discharging).

[22] The ADEA defines "employment agency" as

> any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

29 U.S.C. § 630(c) (Supp. V, 1976).

An administrative regulation issued under the statute states that if an employment agency secures employees on a regular basis for at least one employer covered by the

organizations[23] against "individuals who are at least forty . . . but less than sixty-five years of age."[24] The employer, in particular, is prohibited from discriminating not only in hiring and discharge practices, but also with respect to the "compensation, terms, conditions, or privileges of employment."[25]

Differential treatment of workers in matters related to employment, otherwise prohibited by the ADEA, may be defended and justified in three situations. First, no actionable discrimination will be found "where age is a bona fide occupational qualification reasonably

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ADEA, the agency comes under the act "with respect to all of its activities whether they be for covered or non-covered employers." 29 C.F.R. § 860.35(b) (1975). This regulation was given judicial approval in Brennan v. Root, 8 CCH Empl. Prac. Dec. ¶ 9531, at 5335 (E.D.N.C. 1974). Thus, "the ADEA indirectly governs even the non-covered employer by denying him access to the resources of employment agencies" that do business with at least one covered employer. Comment, *Age Discrimination in Employment: Available Federal Relief*, 11 COLUM. J. L. & SOC. PROB. 281, 286 (1975).

[23] The term "labor organization" is defined by the ADEA to include

> a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

29 U.S.C. § 630(d) (1970).

[24] *Id.* § 631. The lower age limit was established at forty on the basis of testimony that this was "the age at which age discrimination in employment becomes evident." H.R. REP. No. 805, 90th Cong., 1st Sess. 6 (1967). *See Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 47 (1967). Sixty-five was chosen as the upper age limit by the drafters of the ADEA apparently for no better reason than its prior use by the drafters of the 1935 Social Security Act. *See* Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1332–33 (1974). At present, however, there are numerous bills pending in Congress which propose to remove the upper age of sixty-five from the ADEA. EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: A REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1975, at 19 (1976) [hereinafter cited as EMPLOYMENT STANDARDS ADMINISTRATION REPORT].

For more extensive discussion of the ADEA's selective protection of the age group of forty to sixty-five see Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y.L.F. 309, 321–23 (1973); Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 229–30 & nn.14–16 (1974); Note, *supra* at 1331–36. *See generally* Comment, *Age Discrimination and the Over-Sixty-Five Worker*, 3 CUMBERLAND-SAMFORD L. REV. 333 (1972); Note, *Age Discrimination in Employment: The Problem of the Worker Over Sixty-five*, 5 RUTGERS-CAMDEN L.J. 484 (1974).

[25] 29 U.S.C. § 623(a)(1) (1970). For an administrative interpretation of the phrase, with examples, see 29 C.F.R. § 860.50(c) (1975).

necessary to the normal operation of the particular business,"[26] or where the differentiation between workers is based on considerations other than age.[27] Second, no violation of the statute will be deemed to have occurred where the action complained of was taken pursuant to a bona fide seniority system or employee benefit plan.[28] Finally, employers may freely exercise their prerogative to punish or fire employees for "good cause."[29] These defenses are to be construed in such a way that the broad underlying purpose of the ADEA might best be effectuated.[30]

The ADEA has also incorporated certain enforcement provisions of the Fair Labor Standards Act of 1938,[31] including the section which authorizes suits by the Secretary of Labor.[32] Pursuant to the statutory scheme of the ADEA, a private individual contemplating an action under the Act must notify the Secretary of Labor of his intention within a prescribed period of time following the al-

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[26] 29 U.S.C. § 623(f)(1) (1970). It is the position of the Wage & Hour Division of the Department of Labor that the bona fide occupational qualification (BFOQ) exception should "have limited scope and application" and should be interpreted "narrowly [with] the burden of proof in establishing that it applies" on the party asserting the defense. 29 C.F.R. § 860.102(b) (1975). Despite the mandate, however, the cases arising under the ADEA thus far reported have generally upheld the BFOQ defense, where it has been raised. *See, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); Hodgson v. Tamiami Trail Tours, Inc., 4 CCH Empl. Prac. Dec. ¶ 7795 (S.D. Fla. 1972).

The BFOQ exception is also incorporated into the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2(e)(1) (1972). For a complete discussion of this section and its treatment by the courts see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1176–86 (1971) [hereinafter cited as *Developments*].

[27] 29 U.S.C. § 623(f)(1) (1970). This defense, like the BFOQ exception, is to "be construed narrowly, [with] the burden of proof in establishing the applicability of the exception" upon the party relying upon it. 29 C.F.R. § 860.103(e) (1975).

[28] 29 U.S.C. § 623(f)(2) (1970). The system may not be a "subterfuge to evade the purposes" of the ADEA, *id.*, and, in order to be bona fide, must be both based upon seniority and uniformly applied. 29 C.F.R. §§ 860.105(a), (c) (1975).

[29] 29 U.S.C. § 623(f)(3) (1970).

[30] *See* notes 27–29 *supra*. With respect to the weight to be accorded the regulations issued by an administrative agency, it is settled doctrine that such regulations are entitled to great deference and generally will be given effect judicially. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Budd Co. v. OSHRC, 513 F.2d 201, 204–05 (3d Cir. 1975).

[31] 29 U.S.C. § 201 *et seq.* (1970), *as amended*, (Supp. V, 1976).

[32] *See* 29 U.S.C. § 626(b) (Supp. V, 1976) (incorporating 29 U.S.C. § 216(c) (1970)). The other incorporated provisions of the Fair Labor Standards Act are 29 U.S.C. § 211(b) (1970) (power of secretary to use state agencies), *id.* § 216(b) (penalties for violation of statute), *id.* § 216(d) (limitations on actions), and *id.* § 217 (jurisdiction to enjoin violations). *See* 29 U.S.C. § 626(b) (Supp. V, 1976).

leged discriminatory practice.[33] The Secretary must then attempt to exact voluntary compliance with the Act through "informal methods of conciliation, conference, and persuasion"[34] and, failing this, may initiate a suit to enjoin such discrimination.[35] If the Secretary either brings suit to enforce the rights of the aggrieved party[36] or obtains voluntary compliance with the terms of the Act, the right of the private individual to bring an action is terminated.[37] Should the Secretary fail to initiate suit, the aggrieved individual may then personally seek "such legal or equitable relief as will effectuate the purposes of [the Act]."[38] The nature of the relief requested in the proceeding determines whether the right to trial by jury attaches.[39]

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[33] 29 U.S.C. § 626(d)(1) (1970). The requisite notice must be given within 180 days of the alleged unlawful act and at least 60 days prior to instituting suit. *Id.* Such notice requirements have been considered jurisdictional prerequisites to an action under the Act and, as a result, failure to satisfy either of the notice requirements will result in dismissal. *See, e.g.*, Powell v. Southwestern Bell Tel. Co., 494 F.2d 485, 487 (5th Cir. 1974); Gebhard v. GAF Corp., 59 F.R.D. 504, 507 (D.D.C. 1973); Balc v. United Steelworkers of America, 6 CCH Empl. Prac. Dec. ¶ 8948, at 6039 (W.D. Pa. 1973). *But see* Bishop v. Jelleff Assoc., 7 CCH Empl. Prac. Dec. ¶ 9214, at 7049 (D.D.C. 1974) (failure of employer to post conspicuous notice of applicability of ADEA excused plaintiff's noncompliance with notice requirements).

For a more detailed discussion of the various procedural obstacles confronting a litigant in an action under the ADEA see Comment, *supra* note 22, at 286–89; Comment, *Procedural Aspects of the Age Discrimination in Employment Act of 1967*, 36 U. PITT. L. REV. 914, 916–28 (1975).

[34] 29 U.S.C. § 626(d) (1970). A mere perfunctory attempt by the Secretary to achieve voluntary compliance is not sufficient. Rather, some type of good-faith affirmative effort must be shown. *See* Brennan v. Ace Hardware Corp., 495 F.2d 368, 375 & n.12 (8th Cir. 1974) (three conversations between company official and compliance officer, at which no attempt was made by the compliance officer to seek back wages for aggrieved employee, held insufficient to satisfy the conciliation requirements).

[35] *See* 29 U.S.C. § 626(b) (1970) (incorporating 29 U.S.C. § 217 (1970)). Under the Fair Labor Standards Act, 29 U.S.C. § 211(a) (1970), "the Secretary of Labor is vested with the exclusive authority for filing a suit . . . to restrain . . . violation" of that statute. Equal Employment Opportunity Comm'n v. American Tel. & Tel. Co., 365 F. Supp. 1105, 1121 (E.D. Pa. 1973), *modified on other grounds*, 506 F.2d 735 (3d Cir. 1974). This section is expressly incorporated by reference into the ADEA. *See* 29 U.S.C. § 626(b) (1970).

[36] When the Secretary brings an action to enjoin the alleged age discrimination pursuant to 29 U.S.C. § 217 (1970), the defendant has no right to a jury trial. Hodgson v. Bowman, 4 CCH Empl. Prac. Dec. ¶ 7601, at 5379–80 (E.D. Tenn. 1971).

[37] 29 U.S.C. § 626(c) (1970).

[38] *Id.*

[39] *See* Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974), wherein the court was confronted with an issue of first impression—namely, whether the constitutional right to jury trial attaches to "an action for damages, lost wages and benefits, liquidated damages, costs and attorney fees" under the ADEA. *Id.* at 661–62. In its analysis of the question, the court noted that

[w]hen Congress mandated that actions brought under § 626 were to be

Once such an action is brought, the plaintiff need only establish a prima facie case of age discrimination.[40] Thereafter, the burden of producing evidence to show that the actions were nondiscriminatory shifts to the defendant.[41]

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deemed actions under [the Fair Labor Standards Act of 1938,] 29 U.S.C. §§ 216(b), 217, the right to a jury trial in § 626 actions necessarily became dependent on whether such [a] right exists for § 216 or § 217 claims.

370 F. Supp. at 664 (footnote omitted). It was ultimately held that the right to jury trial under the ADEA did attach because damages are traditionally considered a legal remedy and "the case law overwhelmingly supports the right to jury trial in § 216 private damage actions." *Id.* at 665.

A seemingly contrary result was reached in the more recent case of Pons v. Lorrillard, 69 F.R.D. 576 (M.D.N.C. 1976). In *Pons*, the court was faced with essentially the same issue presented in *Chilton*, that is, whether there is a right to a jury trial in "an action for . . . reinstatement, lost wages, liquidated damages, and costs and attorney fees" pursuant to the ADEA. *Id.* at 576. In contrast to the *Chilton* court's reliance upon the enforcement machinery of the Fair Labor Standards Act of 1938, the *Pons* court considered ADEA actions to be more closely analogous to those brought under title VII. *Id.* at 579. It was therefore held that the back pay was "an integral part of [the injunctive] relief" sought, so that the plaintiff was not entitled to a trial by jury on the issue. *Id.*

For a discussion of the jury trial right in the context of title VII litigation see *Developments*, *supra* note 26, at 1264–69. *See generally* Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV. 503, 524–27 (1973).

[40] To establish a prima facie case of age discrimination the plaintiff must show not only "that he [is] within the protected age group and that he was adversely affected by an employment decision," Bishop v. Jelleff Assoc., 7 CCH Empl. Prac. Dec. ¶ 9214, at 7049 (D.D.C. 1974), but also that the acts were prompted by arbitrary age discrimination. *See* Hart v. United Steelworkers of America, 350 F. Supp. 294 (W.D. Pa. 1972), *appeal dismissed as moot*, 482 F.2d 282 (3d Cir. 1973); Kincaid v. United Steelworkers of America, 5 CCH Empl. Prac. Dec. ¶ 8462, at 7261 (N.D. Ind. 1972). *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), wherein the more stringent criteria for a prima facie case under title VII were articulated.

For a more detailed discussion of the requirements for a prima facie case under the ADEA see Comment, *supra* note 22, at 308–12; Note, *Proving Discrimination Under the Age Discrimination in Employment Act*, 17 ARIZ. L. REV. 495, 504–08 (1975); Note, *Age Discrimination in Employment Under Federal Law*, 9 GA. ST. B.J. 114, 118–21 (1972).

[41] Although many courts speak in terms of shifting the "burden of proof" once a prima facie case of age discrimination has been established, *see, e.g.*, Shultz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1213–14 (N.D. Ga. 1973), it is more precise to speak in terms of the specific burden of producing evidence. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 336 (2d ed. 1972) [hereinafter cited as MCCORMICK]. For example, in a recent Fifth Circuit decision, the court noted that the establishment of a prima facie case of age discrimination under the ADEA results in the shifting of the burden of going forward with the evidence to the defendant-employer. Bittar v. Air Canada, 512 F.2d 582, 582 (5th Cir. 1975).

There is an apparent disagreement, however, regarding the effect of a prima facie case upon the remaining evidentiary burdens—namely, the burden of pleading and the burden of persuasion. *See* MCCORMICK, *supra*, §§ 336–37, 339–41. For example, in Bittar v. Air Canada, *supra* at 583, the Fifth Circuit indicated that, notwithstanding the fact that the burden of going forward with evidence shifts to the defendant-employer after

The absence of an express reference to compensatory damages in the ADEA itself, as well as the lack of legal precedent for the award of such damages,[42] led the *Rogers* court to construct a rationale based largely upon deductive reasoning. In so doing, both the letter and spirit of the ADEA were considered and relied upon in order to justify the allowance of recovery for pain and suffering under the statute.

The *Rogers* court first concluded that the ADEA, in essence, created "a new statutory tort."[43] Reference was made to other civil rights legislation which had been interpreted by the courts as establishing legal duties, for the breach of which damages are available to the aggrieved parties.[44] Particular attention was paid to a pronouncement of the United States Supreme Court, which stated that where there has been an infringement of a legal right protected by a federal statute providing " 'a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' "[45] Drawing upon these principles and having earlier found that the ADEA does indeed create a legal duty, the *Rogers* court

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the plaintiff establishes a prima facie case, the ultimate burden of persuasion—the burden of establishing a case of discrimination by a preponderance of the evidence —remains with the plaintiff. In contrast, the Sixth Circuit has adopted the view that

> [t]he existence of a bona fide occupational qualification is an *affirmative defense*, and the *burden* is on appellee to show that its admittedly discriminatory hiring policy is justified.

Roberts v. Union Co., 487 F.2d 387, 389 (6th Cir. 1973) (emphasis added). It appears that the burden to which the *Roberts* court referred is the burden of persuading the trier of fact that the defense asserted is valid.

Similarly, the characterization by the *Roberts* court of BFOQ as an affirmative defense indicates that the burden of pleading such a defense is upon the defendant-employer since the general rule is that such a defense is waived by the defendant if he has not pleaded it affirmatively. F. JAMES, CIVIL PROCEDURE § 49, at 146 (1965).

For a general discussion of the analytical distinctions encompassed by the term "burden of proof" see *id.* §§ 7.5–7.8; MCCORMICK, *supra*, §§ 336–41; 24 BAYLOR L. REV. 601, 607–09 (1972).

[42] There was precedent for the allowance of various equitable remedies under the Act. *See, e.g.*, Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971), where the court indicated that the aggrieved party may seek such remedies as back wages, reinstatement, and injunctive relief. *Id.* at 234–35 (dictum).

[43] 404 F. Supp. at 327.

[44] *Id. See* Monroe v. Pape, 365 U.S. 167, 172 (1961) (federal statute proscribing deprivation of constitutional rights by state officials provides remedy for persons victimized); *cf.* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1143 (4th Cir. 1975) (action brought under a federal statute proscribing racial discrimination is essentially one for redress of a tort).

For a more detailed discussion of tort liability under title VII see *Developments*, *supra* note 26, at 1259; Note, *Tort Remedies for Employment Discrimination under Title VII*, 54 VA. L. REV. 491, 497–504 (1968).

[45] 404 F. Supp. at 328 (quoting from Bell v. Hood, 327 U.S. 678, 684 (1946)).

concluded that "[o]nce liability is established under the statute . . . the panoply of usual tort remedies is available to recompense injured parties for all provable damages."[46]

The analogy drawn between the ADEA and title VII of the Civil Rights Act of 1964[47] was employed in order to illustrate both the broad remedial purpose of the ADEA[48] and the suitability of awards for pain and suffering in redressing discriminatory conduct.[49] Title VII, in general terms, prohibits discrimination in employment based upon "race, color, religion, sex, or national origin."[50] The *Rogers* court relied upon a recent Supreme Court case for the proposition that title VII was meant " 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' "[51] Viewed against this background, the court found that the ADEA embodied the same "make whole" purpose as title VII.[52] Thus, the issue was reduced to a determination of whether this purpose was intended to be effectuated by allowing the particular relief sought. To decide this question, the court examined the enforcement provisions of the ADEA and of title VII.

In contrast to the ADEA,[53] the enforcement provision of title VII, on its face, appears to limit the available remedies to equitable relief.[54] Such a construction was adopted in *Van Hoomissen v. Xerox Corp.*,[55] wherein the court held that neither compensatory nor puni-

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[46] 404 F. Supp. at 327.

[47] Pub. L. No. 88-352, tit. VII, 78 Stat. 253, *as amended*, 42 U.S.C. §§ 2000e to 2000e-11 (Supp. V, 1976).

[48] For a discussion of the legislative history of the statute and some of the considerations underlying its passage see note 71 *infra*.

[49] 404 F. Supp. at 328-29, 331-32. For reference to some of the cases in which compensatory damages for pain and suffering have been awarded in other discriminatory contexts see note 66 *infra*.

[50] 42 U.S.C. § 2000e-2(a)(1) (1970).

[51] 404 F. Supp. at 328 (quoting from Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

[52] 404 F. Supp. at 328.

[53] The enforcement provision of the Act, set out in note 8 *supra*, specifies the availability of both legal and equitable relief.

[54] *See* 42 U.S.C. § 2000e-5(g) (Supp. V, 1976). This section provides that, upon finding an intentional violation of the Act, a

> court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

Id.

[55] 368 F. Supp. 829 (N.D. Cal. 1973).

tive damages were available under title VII.[56] It was noted that Congress, fully aware that neither compensatory nor punitive damages were compensable under the National Labor Relations Act,[57] consciously patterned the relief provisions of title VII after that Act.[58] Additionally, the *Van Hoomissen* court reasoned that since the legislative history of title VII indicated that it was to be enforced in a corrective rather than a punitive manner, the remedies under such a statute should be limited to equitable relief.[59]

Although a number of courts have adopted the view taken in *Van Hoomissen* with respect to the remedies available under title VII,[60] it was held in *Humphrey v. Southwestern Portland Cement Co.*[61] that compensatory damages for "psychic injuries" could be recovered under that Act.[62] Rather than relying upon prior decisional law and legislative history, the *Humphrey* court chose to effectuate the ultimate purpose of title VII, namely ending discrimination, by allowing

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[56] *Id.* at 836, 838. In *Van Hoomissen* an employee of Xerox claimed that, in retaliation for his efforts to influence his employer to end discriminatory hiring practices directed against Mexican-Americans, he was denied job advancement opportunities, demoted, and ultimately discharged. *Id.* at 831. Relying upon title VII, the plaintiff sought compensatory and punitive damages, as well as back pay and reinstatement. *Id.* The court denied such relief, however, finding that neither "the general legislative history" nor the express statutory language could support such a construction. *Id.* at 837–38.

[57] 29 U.S.C. § 151 *et seq.* (1970). The enforcement provision of the Act states, in pertinent part, that

> [i]f upon the preponderance of the testimony taken the [National Labor Relations] Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

Id. § 160(c).

[58] 368 F. Supp. at 837. Reference was made to Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235–36 (1938), which held that the Board's affirmative action power was "remedial, not punitive," so that penalties could not be imposed upon an employer engaging in an unfair labor practice, even if "the policies of the [National Labor Relations] Act might be effectuated by such an order." *See* 368 F. Supp. at 837.

[59] 368 F. Supp. at 836–38.

[60] *See, e.g.*, Loo v. Gerarge, 374 F. Supp. 1338, 1341–42 (D. Hawaii 1974); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854, 856 (N.D. Ga. 1974). *But see* Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 95–96 (3d Cir. 1973) (compensatory damages held recoverable under title VII, since court felt bound to make victim whole by remedying past discrimination as well as barring same in future).

[61] 369 F. Supp. 832 (W.D. Tex. 1973).

[62] *Id.* at 835.

the aggrieved party to seek both legal and equitable relief.[63] The holding in *Humphrey*, however, may well be limited to its facts since the traditional equitable remedy of reinstatement could not be granted due to the plaintiff's physical disability.[64]

The *Rogers* court relied upon the *Humphrey* decision to support its analogy of the ADEA to title VII, but failed to acknowledge the unique factors involved in that case.[65] Nevertheless, the court noted numerous instances in which such compensatory damages have been awarded, absent express statutory authorization, in differing discriminatory contexts.[66] Thereafter, although acknowledging the cases which have denied compensatory damages for pain and suffering under title VII,[67] the court distinguished such authority on the basis of the differing statutory language of the ADEA and title VII, noting that the ADEA refers to "legal or equitable relief," while title VII speaks exclusively in terms of "equitable relief."[68]

In addition to the analogy to title VII, the *Rogers* court viewed the legislative history of the ADEA as supporting a construction of the statute which would include compensatory damages.[69] The history of the Act was viewed as clearly indicating that its proscriptions were intended to protect not only against mere economic loss due to arbitrary age discrimination, but also against the less apparent, yet potentially more devastating, damage to the victim's self-esteem.[70]

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[63] *See id.*

[64] *See id.* at 843. It was found that under the circumstances "the Court could only 'promote the ends of justice' by granting the requested relief." *Id.*

[65] *See* 404 F. Supp. at 331–32.

[66] *Id.* at 332. *See, e.g.*, Jeanty v. McKey & Poague, Inc., 496 F.2d 1119, 1121 (7th Cir. 1974) (compensatory awards for emotional distress and humiliation recoverable under title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (1970)); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970) (damages for emotional and mental distress available for intentional violation of 42 U.S.C. § 1983); Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200, 1205 (E.D. Va. 1973), *modified*, 515 F.2d 1082 (4th Cir.), *cert. granted*, 423 U.S. 945 (1975) (awards for embarrassment, humiliation, and mental anguish available under Civil Rights Act of 1964, 42 U.S.C. § 1981 (1970)).

[67] 404 F. Supp. at 333. *See, e.g.*, Bradshaw v. Zoological Society, 10 F.E.P. 1268 (S.D. Cal. 1975), in which the plaintiff brought suit under the federal civil rights act for the recovery of both compensatory and punitive damages, alleging discrimination on the basis of sex in both the hiring and membership policies of the defendant. *Id.* at 1269–70. In denying the legal relief sought by the plaintiff, the court indicated that it was reluctant to go beyond the equitable relief exclusively provided for in the statute. *Id.* at 1272. *Accord*, Jiron v. Sperry-Rand Corp., 10 F.E.P. 730, 739 (D. Utah 1975).

[68] 404 F. Supp. at 333. *Compare* note 8 *supra with* note 54 *supra.*

[69] 404 F. Supp. at 330.

[70] *Id.* at 328–29, 333. The court's conclusion appears correct, for the legislative history of the ADEA is replete with references to the psychological ills which frequently result from age discrimination. Representative Kelly has remarked that " 'the greater

The court concluded that such a patent legislative intent mandated an award of compensatory damages for pain and suffering where factually warranted.[71]

It appears that, overall, the court's holding in *Rogers* is both legally sound and morally equitable. Nevertheless, a number of issues and policy considerations were not raised in the case and, therefore, not resolved by the decision. For example, no express reference was made to the possible alternative of allowing the plaintiff to recover punitive damages in lieu of a compensatory damage award under the ADEA.[72] Although there is no existing case law on this precise issue,[73] the appropriateness of a strictly punitive remedy has been

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loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families.' " 113 CONG. REC. 34744 (1967) (quoting from Speech by President Johnson, Older American Message to the Congress, Jan. 23, 1967). *See also* 113 CONG. REC. 34752 (1967), wherein it was asserted by Representative Dwyer that

> discrimination consist[ing] of the blunt, blind refusal, rigid and unbending, to employ workers once they have passed an arbitrary age, however able or qualified they may be . . . only adds to long-term unemployment, higher relief costs, and extensive human suffering and despair.

For further information relating to the legislative history surrounding the ADEA see 113 CONG. REC. 31248–57, 34738–55 (1967); H.R. REP. No. 805, 90th Cong., 1st Sess. (1967); S. REP. No. 707, 90th Cong., 1st Sess. (1967); *Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. (1967); *Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. (1967).

[71] 404 F. Supp. at 330, 333.

[72] Punitive damages are considered to be those sums awarded to plaintiff not to compensate him for his injuries but to punish the defendant, discourage him from repeating the tortious conduct in the future, and deter others from similar actions. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (4th ed. 1971) [hereinafter cited as PROSSER]. Such damage awards may also serve the function "of reimbursing the plaintiff for elements of damage which are not legally compensable, such as his wounded feelings or the expenses of suit," *id.*, or may be viewed as a kind of "bounty" or reward inducing plaintiffs to bring actions which are in the "public interest" but which would not otherwise be profitable, DOBBS, *supra* note 7, § 3.9, at 205.

There is no indication that the plaintiff in *Rogers* actually sought punitive damages, either in lieu of or in addition to compensatory relief. *See* Plaintiffs' Supplemental Brief in Support of Their Claim to Damages at 1–9, Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975), wherein the arguments were confined to the recovery of compensatory damages for mental and physical suffering.

[73] There is some support, however, for the allowance of punitive damages in lieu of compensatory awards in other employment discrimination contexts, absent express statutory authorization. For example, in Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972), the court allowed a claim for punitive damages under title VII while at the same time striking down, in a rather conclusory manner, a claim for compensatory damages. *See id.* at 18.

For a more detailed discussion of the propriety of allowing punitive damages for discriminatory employment practices see 20 WAYNE L. REV. 1337, 1338–42 (1974).

argued in the context of title VII litigation.[74] Specifically, it has been asserted that punitive damages have an advantage over compensatory damages in that 1) mental suffering is difficult to prove and cannot be valued with precision for purposes of a compensatory award; 2) the availability of the remedy would encourage private individuals to bring suit; 3) punitive damage awards would be more likely to deter discriminatory conduct; and 4) punitive damages are fairer to defendants in that they are directly proportional to the outrageousness of the discriminatory conduct,[75] in contrast to compensatory damages, which vary with the nature and gravity of the injury to the plaintiff.[76]

While there is undoubtedly some merit in such an argument, one obvious drawback is that punitive damages are traditionally only available when the defendant's conduct is willful.[77] Thus, when an unlawful act of discrimination was due to mere inadvertence or negligence, its victim would go uncompensated despite the existence of psychological harm or humiliation.[78] Similarly, if the objectionable conduct were intentional but not egregious, the damages recoverable would theoretically be low even if the damages caused to the plaintiff were of a much greater magnitude.[79] These considerations appear to militate against the utilization of punitive damages as a substitute for compensatory damages under the ADEA, especially in view of the legislative intent of "making whole" individuals damaged by acts of unlawful discrimination, willful or otherwise.[80] Thus, it would seem that if the focus of the legislation is on alleviating the plight of the

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[74] *See Developments*, *supra* note 26, at 1259–63.

[75] *Id.* at 1260–62. The "outrageousness" of conduct sufficient to justify an award of punitive damages refers not only to the nature of the defendant's conduct, *see* DOBBS, *supra* note 7, § 3.9, at 204, but also comprehends a particular mental state such that the defendant either

> was actuated by ill will, malice, or evil motive . . ., or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.

C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79, at 280 (1935) (footnotes omitted).

[76] *See* 1 J. JOYCE & H. JOYCE, A TREATISE ON DAMAGES § 26 (1903). *See also* note 7 *supra*.

[77] *See* PROSSER, *supra* note 72, § 2, at 9.

[78] *See* Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 325, 368 (1974).

[79] *Cf.* DOBBS, *supra* note 7, § 3.9, at 204. This is implicit in the concept of punitive damages, which are "awarded . . . because of particularly aggravated misconduct on the part of the defendant." *Id.* (emphasis added) (footnote omitted). *See also* note 75 *supra* and accompanying text.

[80] *See* text accompanying notes 51–52 *supra* and notes 70–71 *supra* and accompanying text.

victims of discrimination rather than punishing the discriminating party, then compensatory damages are properly a part of any enforcement scheme established under the ADEA.

A more interesting question, also not presented in the *Rogers* case, is whether punitive damages as well as compensatory damages should be available to persons who have suffered injury as the result of acts of discrimination prohibited by the terms of the ADEA. Since the rationale in *Rogers* of allowing compensatory damages for pain and suffering was based, in part, upon the express statutory reference to legal relief,[81] an argument may be made that punitive damages, which have historically been considered legal relief,[82] should also be recoverable under the ADEA. Under traditional principles of statutory construction, a court interpreting the ADEA could award punitive as well as compensatory damages either if the literal meaning of the express language would comprehend such relief or, if the express language did not clearly settle the question, if the intent behind the statute would support such a construction.[83]

Applying these principles, it appears that if a court considered the language of the enforcement provision of the ADEA to be clear on its face, punitive damages could be allowed under the rubric of "legal relief." If, however, the court referred to the legislative history of the statute for such a determination,[84] it is questionable whether punitive damages would or should be allowed. Although the purposes of the ADEA are rather general,[85] it would seem that punitive damages are not consonant with the underlying purpose of the statute to

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[81] *See* 404 F. Supp. at 333.

[82] Loo v. Gerarge, 374 F. Supp. 1338, 1341 (D. Hawaii 1974).

[83] *See, e.g.*, Globe Seaways, Inc. v. Panama Canal Co., 509 F.2d 969 (5th Cir. 1975). In that case the court, in construing a portion of a federal act, asserted that it

> must not refer to legislative history if the statutory language is clear. . . . This salutary doctrine is predicated upon the notion that since Congress is presumed to have meant what it said, [the court] must look first to the literal meaning of the words of the statute in order to determine how best to effectuate the Congressional intent. . . . Of course, [the court] must not allow such literal-mindedness to lead [it] to absurd or unreasonable conclusions at war with the very policy that Congress intended to implement in the statute in question.

Id. at 971 (citations omitted).

For a detailed discussion of the varying principles used in the construction of civil rights statutes see 3 SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION, §§ 60.01–.03, 72.05–.07 (4th ed. Sands 1974).

[84] The Act itself may direct such a reference by authorizing the "grant [of] such legal or equitable relief *as may be appropriate to effectuate the purposes of this chapter*." 29 U.S.C. § 626(b) (1970) (emphasis added).

[85] For the congressional statement of intent see note 15 *supra*.

"make whole" the aggrieved party,[86] since such damages are intended not to compensate plaintiffs but to punish defendants, and, by so doing, to deter others from engaging in similar conduct.[87]

A further issue with respect to the allowance of punitive along with compensatory damages arises in relation to the express statutory authorization of liquidated damages. Such damages may be awarded in an amount equal to the out-of-pocket loss to the party injured by an unlawful act of discrimination,[88] and have an obviously punitive quality, in that they are permitted only upon a demonstration of a *willful* violation of the statute.[89] The argument could therefore be made that where Congress has specifically authorized such quasi-punitive damages, courts should not construe the legislation to comprehend any further punitive relief. Nevertheless, liquidated damages do not reflect the outrageousness of the defendant's conduct, as would true punitive damages[90] but instead result in a mere doubling of the economic loss suffered by the plaintiff, which loss may have been mitigated by such fortuitous factors as the value of any retirement benefits received or the amounts earned as the result of other employment.[91] These distinctions may be substantial enough so that the possibility of permitting the recovery under the ADEA of punitive damages in the traditional sense should not be dismissed out of hand.

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[86] *See* 404 F. Supp. at 328.

[87] *See* PROSSER, *supra* note 72, § 2, at 9. While punitive damages may be used by a plaintiff to cover the costs of litigation, including attorneys' fees, *see id.* at 11, such costs are not generally recoverable by successful plaintiffs, so that punitive damages would still be "a windfall to the plaintiff" where awarded, *id.* at 11, 13.

[88] 29 U.S.C. § 626(b) (1970). This section provides, in pertinent part:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subdivision (a) thereof), and 217 of this title, and subsection (c) of this section.

Section 216(b) provides:

> Any employer who violates the provisions of . . . this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216(b) (1970). Section 626(b) further provides:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages . . . for purposes of sections 216 and 217 of this title; *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter.

29 U.S.C. § 626(b) (1970).

After referring to precisely these sections of the statute, one commentator noted that "[i]t [was] difficult to understand how such an important remedy could be couched in language so obscure." Agatstein, *supra* note 24, at 317–18 & n.62.

[89] *See* note 88 *supra*.

[90] *See* note 75 *supra* and accompanying text.

[91] 404 F. Supp. at 329.

With respect to those instances of arbitrary age discrimination which are beyond the coverage of the ADEA,[92] the victims might challenge such activities on a constitutional basis[93] where the discriminatory entity is one which is subject to constitutional restraint.[94] For example, in the recent case of *Massachusetts Board of Retirement v. Murgia*,[95] the Supreme Court was confronted with an equal protection challenge to the actions of an administrative agency taken pur-

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[92] For a discussion of the limitations in the coverage of the ADEA see notes 21–25 *supra* and accompanying text.

[93] For a detailed discussion of the increased litigation in this area and a summary of the due process and equal protection arguments which have been raised see Comment, *Mandatory Retirement: The Law, the Courts, and the Broader Social Context*, in *Symposium: The Rights of The Disadvantaged*, 11 WILLAMETTE L.J. 398, 411–16 (1975); Note, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748, 762–91 (1975).

[94] Where the entity is not subject to the strictures of the constitution, the victim of the discrimination may seek the protections of state age discrimination laws, which exist in many jurisdictions. In New Jersey, for example, not only is there a statutory proscription against discrimination in employment on the basis of age, but the coverage of the statute also extends to individuals twenty-one years of age and over, with no upper age limitation. Law Against Discrimination, N.J. STAT. ANN. § 10:5–1 *et seq.* (Supp. 1976–77). Although the enforcement powers of the act are entrusted to the Division of Civil Rights, the statutory scheme allows private individuals to vindicate their rights and seek damages under the statute. *See* Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 416, 301 A.2d 754, 763 (1973) (compensatory damages for pain and suffering, together with out-of-pocket loss, recoverable under the New Jersey Law Against Discrimination for discrimination on the basis of sex); Harvard v. Bushberg Bros., 137 N.J. Super. 537, 541–42, 350 A.2d 65, 67–68 (App. Div. 1975).

For more detailed information regarding the various state statutory proscriptions against age discrimination in employment see EMPLOYMENT STANDARDS ADMINISTRATION REPORT, *supra* note 24, at 32–58; Kovarsky, Irving & Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 915–25 (1974); Comment, *supra* note 93, at 405 & n.30.

In view of the existence of such statutory schemes for the redress of discrimination in employment on the basis of age, the issue arises whether a litigant must exhaust any available state remedies before proceeding under the ADEA. The statute itself provides, in part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days *after proceedings have been commenced under the State law*, unless such proceedings have been earlier terminated.

29 U.S.C. § 633(b) (1970) (emphasis added). From this language, it is unclear whether a plaintiff contemplating an action under the ADEA must first resort to state law, or must merely wait 60 days to initiate a federal proceeding *if* prior resort to state law has been made. However, the two federal appellate courts which have considered the issue found that utilization of state enforcement procedures, where they exist, is a prerequisite to an action in federal court under the ADEA. *See* Curry v. Continental Airlines, 513 F.2d 691, 692–93 (9th Cir. 1975); Goger v. H. K. Porter Co., 492 F.2d 13, 15 (3d Cir. 1974).

[95] 96 S. Ct. 2562 (1976).

suant to a state statute making the retirement of police officers mandatory at age fifty.[96] The Court found that the provision in question rationally advanced the state's objective of "protect[ing] the public by assuring physical preparedness of its uniformed police," and, accordingly, was not violative of the constitution.[97] As noted by the dissent, however, the Court did not hold that every mandatory retirement policy would be constitutional, so that in a case where age was not reasonably related to job performance, the victim of the discrimination could still consider mounting a constitutional challenge.[98]

One final question may be raised in connection with the decision of the *Rogers* court as to the relief available under the ADEA. Specifically, it is unclear whether a plaintiff who—unlike the plaintiff in *Rogers*—is available and able to work may obtain the equitable remedy of reinstatement with back pay in addition to the legal remedy of damages, or whether such a plaintiff must elect one remedy or the other.[99] Whatever the answer, it is clear that a significant segment of the populace is now afforded extensive relief for both physical and psychological damage resulting from arbitrary differentiation in employment based upon age.[100] Hopefully, the decision in *Rogers* will prompt employers to comply voluntarily with the statutory guidelines and deal with both present and prospective employees on the basis of their experience and ability, and not on the basis of chronological age alone.

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[96] *Id.* at 2564–65. For reasons not explained by the Court, no claim for relief was asserted under the ADEA. *Id.* at 2565 n.2.

[97] *Id.* at 2567–68 (footnote omitted). In reaching this result, the Court reaffirmed its reliance upon the traditional two-tiered equal protection analysis. *Id.* at 2566–68. Under this analysis, legislative classifications which are based upon "suspect" categories or which infringe upon a "fundamental right" are subjected to "strict judicial scrutiny" and must be justified by a "compelling state interest" in order to be sustained. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973). All other classifications need only be rationally related to the purpose of the legislation in order to be upheld. *See* Dandridge v. Williams, 397 U.S. 471, 485–87 (1970). The *Murgia* Court applied the rational basis test since, in its view, aged persons were not a suspect class and the right to government employment per se was not fundamental. 96 S. Ct. at 2566–67.

For a review of the two-tiered analysis of equal protection see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076–1132 (1969).

[98] *See* 96 S. Ct. at 2573 n.8 (Marshall, J., dissenting).

[99] For a general discussion of the election of remedies and of the prerequisites for the grant of any equitable relief see DOBBS, *supra* note 7, § 1.5, at 13–23, § 2.1, at 27.

[100] It was recently reported that approximately forty-six percent of the population in the United States is between forty and sixty-five years of age, and it has been estimated that by 1990 approximately 63,000,000 persons will be within the coverage of the ADEA. EMPLOYMENT STANDARDS ADMINISTRATION REPORT, *supra* note 24, Table 2, at 28.