The Older Workers Benefit Protection Act: Painting Age-Discrimination Law with a Watery Brush

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INTRODUCTION

The Age Discrimination in Employment Act (ADEA)\(^1\) was passed in 1967 in part to prohibit arbitrary age discrimination in the employment context. Section 4(f)(2) of the Act provides an exception to the ADEA’s general prohibitions for differential treatment of older workers that occurs as part of a “bona fide employee benefit plan.”\(^2\) In June 1989, the United States Supreme Court issued its first authoritative interpretation of the meaning of the section 4(f)(2) exception, in *Public Employees Retirement System v. Betts*.\(^3\) The Betts decision sharply reduced the burden of proof placed on employers under section 4(f)(2) by requiring no showing of a cost justification for any discriminatory treatment effected under an allegedly bona fide plan. In response, Congress passed the Older Workers Benefit Protection Act (OWBPA),\(^4\) which was drafted specifically to overturn the Betts decision.\(^5\) While the Court’s decision aroused criticism in academic and public policy circles,\(^6\) the legislative remedy intended by OWBPA has proven equally controversial.

This Comment discusses and evaluates OWBPA’s effectiveness in overturning *Public Employees Retirement System v. Betts*\(^7\) and reaffirming the cost-justification rule.\(^8\) Part I of this Comment analyzes the legis-

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5. See OWBPA § 101 (codified at 29 U.S.C.A. § 621, Historical Note (West Supp. 1991)), which states that “[t]he Congress finds that as a result of the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts . . . legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act . . . .” Id. at § 2 (citation omitted).
8. This rule, which is sometimes referred to as the “Equal Benefit or Equal Cost” rule, dictates
that a benefit plan will be legal under the ADEA only if any decrease in the amount of benefits received by an older employee is due to the increased cost in providing that benefit to older persons. See infra notes 24-26, 83-89 and accompanying text.


12. Some exceptions are made to the general application of the ADEA. Tenured faculty at higher educational institutions, executives and high government policy-makers are given lesser protection. ADEA Amendments of 1986, Pub. L. No. 99-592, §§ 6(a)-(d), 100 Stat. 3342, 3344 (1986) (codified at 29 U.S.C. § 631(d) (1988)). Tenured faculty are protected from mandatory retirement only until age seventy and this protection will cease in 1994. Id. at § 6(b), 29 U.S.C. 631(b) (1988). Executives and policy-makers who have amassed at least $44,000 in deferred compensation are protected from mandatory retirement only until age 65. Id. at § 6(c), 29 U.S.C. 631(c) (1988).


15. In fact, Congress contemplated but decided against including the "aged" as a class to receive protection under Title VII. Instead, Title VII specifically directed the Secretary of Labor to study the problem of age discrimination and to recommend legislative remedies. See THE REPORT OF THE
The ADEA's proscription of discriminatory behavior by employers is set forth in section 4(a)(1), which states: "It is unlawful 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." Older workers are given additional protections against invidious segregation or classification on account of age, age-based expulsion from labor organizations, and retaliatory discharge for revealing employer age-discrimination. Section 7 of the ADEA furnishes the victims of age discrimination with a variety of remedies which may be refined or implemented by regulations promulgated by the Equal Opportunity Employment Commission ("EEOC").


21. The responsibility for enforcing the ADEA was originally given to the Secretary of the Department of Labor. See 29 U.S.C. § 626 (1969). However, enforcement duties were transferred to the EEOC in 1978. See Reorganization Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807 (1978). This transfer concentrated the responsibility for enforcement of federal discrimination claims in the
In addition to the general prohibition of section 4(a)(1), the ADEA contained a safe harbor provision, section 4(f)(2), which was created to prevent a chilling effect in the hiring and retention of older employees.\textsuperscript{22} Section 4(f)(2) read:

It is not 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 such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.\textsuperscript{23}

Two years after the ADEA was adopted, the Department of Labor clarified this safe harbor provision by issuing an Interpretive Bulletin (IB) which explained the 4(f)(2) exception. The IB set forth the cost-justification rule, which is sometimes referred to as the "Equal Benefit or Equal Cost" rule. The rule stated:

A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.\textsuperscript{24}

Ten years after its original issuance, the Interpretive Bulletin was amended in response to congressional requests for more comprehensive guidance regarding section 4(f)(2) of the ADEA.\textsuperscript{25} The resulting amend-
The legislative history of [§ 4(f)(2)] indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.26

Despite the clarity of agencies' interpretations of section 4(f)(2), courts remained uncertain as to: 1) which plans fell within the 4(f)(2) exclusion; and 2) the meaning and purpose of the term "subterfuge" in section 4(f)(2). The United States Supreme Court addressed these issues in Public Employees Retirement System v. Betts.

B. The Betts Case

In 1985, June Betts, permanently disabled by advancing Alzheimer's disease, became too ill to perform her duties and retired from her position as a speech pathologist with the County of Hamilton, Ohio.27 Upon her retirement, the 61 year old Mrs. Betts was unable to receive disability benefits because Ohio's Public Employees Retirement System prohibited persons over sixty from applying for disability benefits.28 Although a 1976 amendment to the Ohio program guaranteed disability beneficiaries...
a minimum of thirty percent of salary, Mrs. Betts' discrimination claim arose because there was no corresponding minimum benefits provision covering ordinary pension benefits for which recipients become eligible at age sixty. As a result of the denial of disability benefits caused by the lopsided structure of these provisions, Mrs. Betts received only $158.50 per month in age-and-service retirement benefits rather than the $355 per month a similarly situated fifty-nine year old would have received under disability retirement.

The Supreme Court's response to Mrs. Betts' plight was significant in three respects. First, the majority held that employee benefit plans, including pensions, did not fall within the language of "compensation, terms, conditions, or privileges of employment" under section 4(a)(1) of the ADEA. The Court reasoned that to conclude otherwise would render section 4(f)(2) "nugatory with respect to post-Act plans." Second, the Court proceeded to reject the cost-justification interpretation of the term "subterfuge" as it had been applied by the Department of Labor, the EEOC, and the federal courts of appeals. The Supreme Court, following the case of United Air Lines, Inc. v. McMann, interpreted the term "subterfuge" in light of its "plain meaning." According to the Court, the plain meaning of "subterfuge" was a "scheme" reflecting a subjective intent to discriminate, and therefore the contemporaneous regulations and judicial interpretations of the ADEA were incorrect to adopt an objective cost justification requirement. The subterfuge language was read by the Court as providing a narrow prohibition within an otherwise broad exemption for benefit plans under ADEA.

Third, the Court determined that section 4(f)(2) did not constitute an affirmative defense for employers accused of distributing employee benefits on an age-discriminatory basis. The Court held that the minimum benefit provisions of the ADEA were not meant to apply to pension benefits and that the plaintiff had not established a causal connection between her age and her treatment by her employer. Consequently, the Court held that Mrs. Betts had failed to prove her case and that she was not entitled to the relief she sought.

30. Betts, 492 U.S. at 163. Under the Ohio program's "vesting" provisions, employees became eligible to receive their pension benefits when they reached the minimum age of 60. Their payment was calculated in proportion to the number of years they had been employed within the system. See Ohio Rev. Code Ann. § 145.35 (1984) (discussed in Betts, 492 U.S. at 162).
31. Betts, 492 U.S. at 163. Based on this disparity, Mrs. Betts alleged that Ohio's Public Employees Retirement System was discriminatory on its face. Id. at 164.
32. Id. at 177.
33. Id.
34. See infra Part II.C. of this Comment.
37. Id. at 171-75.
benefits\textsuperscript{38} in a discriminatory fashion. Rather, the Court ruled that "the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation."\textsuperscript{39}

As Congress ascertained at a hearing specifically devoted to analysis of the Betts decision, the Supreme Court's ruling in Betts had the potential to wreak havoc with employee benefits programs around the country.\textsuperscript{40} By holding that employee benefits were exempt from the general protections provided by the ADEA, the Supreme Court opened the door for employers to spend nearly half of their resources in a discriminatory fashion.\textsuperscript{41}

\textsuperscript{38} Generally, fringe benefits in the employment context are noncash benefits to employees which do not constitute part of ordinary compensation such as wages or salary. See 2 [1981-1991 Transfer Binder] HOWARD C. EGLIT, AGE DISCRIMINATION \textsection 16.35 (1990). See, e.g., Betts Hearing, supra note 6, at 89, 113-14 (testimony of Mark S. Dichter, attorney, Morgan, Lewis & Bockius, Phila., Pa.). In the context of \textsection 4(f)(2) litigation, "fringe" benefits are those types of benefits that are not sufficiently well integrated with a pension plan to allow that benefit to be offered pursuant to a "bona fide" pension plan for which the 4(f)(2) safe-harbor is available. EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 225 (3d Cir. 1983), cert. denied, 491 U.S. 820 (1984), on remand, 651 F. Supp. 1172 (D.N.J. 1987) (summary judgment granted), and aff'd, 930 F.2d 329 (3d Cir. 1991); Alford v. City of Lubbock, 664 F.2d 1263, 1272 n.12 (5th Cir.), cert. denied, 456 U.S. 975 (1982). In Betts, the Supreme Court listed hiring, firing, wages and salaries as "non-fringe" benefit areas. 492 U.S. at 177.

\textsuperscript{39} Betts, 492 U.S. at 181.

\textsuperscript{40} See Betts Hearing, supra note 6.

\textsuperscript{41} In the interim between the Betts decision and the passage of OWBPA, it was determined that "almost 40 percent of the employment dollar is designated for employee benefits." 136 Cong. Rec. S13,600 (daily ed. Sept. 24, 1990) (remarks of Sen. Hatch). While this figure demonstrates the significance of employee benefits in employers' labor cost structure, it does not prove that employers would exploit the Betts decision's exemption of employee benefits to increase their discriminatory behavior against older employees. However, the private sector has shown a marked preference for younger workers in management and supervisory positions. See Economics of Aging: Toward a Full Share in Abundance: Hearings Before the Subcomm. on Employment and Retirement Income of the Senate Special Comm. on Aging, 91st Cong., 1st Sess. (1969). Although economic and "psychological" reasons are cited to justify this result, older workers are often more costly to employ because they often have the greatest longevity with the employer, and are therefore compensated at a higher wage based either formally or informally on their seniority. See generally JAMES H. SCHULTZ, THE ECONOMICS OF AGING (2d ed. 1980). Since employers have economic incentives to discriminate against older workers, OWBPA addresses this type of discrimination directly. Other common forms of age discrimination against older workers have arisen during the 1980s as the demographics of an aging baby-boom generation have clashed with dominant corporate ideology and economic realities. Younger employees, who can often perform similar functions, though with less experience, and therefore, with some corresponding loss in efficiency, perform the same tasks at a lower wage. Corporations often believed that a staff populated with "old" workers would stigmatize them in their clients' eyes as less innovative and "go-getting" as firms with a younger face. See 1 EGLIT, supra note 38, at \textsection 2.21; Paul, supra note 15, at 990 n.14.

The legislative history of the ADEA illustrates Congressional sensitivity to the outdated psycho-
II. THE OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)

After Betts, litigants whose claims were still pending were faced with the possibility that the Supreme Court's sudden and unequivocal rejection of the cost-justification rule meant that employers were now virtually free to discriminate on the basis of age in the area of non-fringe, employee benefits. The potential impact of the Betts decision was amplified by the growing percentage of "older" Americans in our population.

Logical assumptions which employers have made regarding older employees. See 113 CONG. REC. 31,256 (statement of Sen. Young):

The view that a man or woman is so old at 65 as to warrant compulsory retirement from industry stems from an era before the turn of the century and comes to us from a period when life expectancy was about half of the life expectancy of Americans and Europeans at the present time. . . . In fact, today they are not as old at 65 [in] thought, action, physical and mental ability as men and women of Germany and the United States were at the age of 40 in the 1880's. Yet, for some reason or other, we Americans have adhered to this view of 65 as being the proper age for retirement notwithstanding the fact that this concept is today as outdated as are flint-lock muskets and candle dips of the eighteenth century.

See also id. at 31,254 (statement of Sen. Javits) (stating that assumptions about the progressing uselessness of older employees is a "widespread irrational belief"). The term "ageism" has been coined to describe the discrimination that results from these attitudes. See, e.g., Paul, supra note 15, at 990. Several organizations have been formed to promote awareness among aging Americans and the general public of the rights and potential of elder Americans in society, such as the American Association of Retired Persons, the Gray Panthers, and others. See generally HENRY J. PRATT, THE GRAY LOBBY (1976).

42. Thirty cases and over four hundred charges were unresolved when Betts was decided. Betts Hearing, supra note 6, at 222, 227 (letter from Charles Shanor, General Counsel, EEOC, to Rep. Marge Roukema, ranking minority member of the House Subcomm. on Labor-Management Relations) (Nov. 6, 1990).

43. Jacquelyn M. Broome, Comment, Public Employees Retirement System v. Betts: Employee Benefit Plans' Exemption from the Age Discrimination in Employment Act of 1967, 64 TUL. L. REV. 962, 966-67 (1990). As discussed at infra Part II.D. of this Comment, the cost-justification rule had been the line of demarcation between discriminatory and nondiscriminatory age-related differentials in benefit provision.

44. In 1987, there were an estimated 51.9 million Americans age 55 or older and 29.8 million who were at least age 65. Roughly nine percent (22 million) of the total population were between the ages of 55 and 64. STAFF OF SENATE SPECIAL COMM. ON AGING, 101ST CONG., 1ST SESS., INFORMATION PAPER ON AGING AMERICA: TRENDS AND PROJECTIONS 1 (Comm. Print 1989); see also Mary E. Metz, Comment, Waivers Under the Age Discrimination in Employment Act, 59 U. MO.-KAN. CITY L. REV. 351, 353-54 (1991).

The ADEA presently covers all employees over the age of 40, except for tenured professors and high-level "policy-making" employees. See supra note 12. The ADEA originally extended its protections only to employees between the ages of 40 and 65. The ADEA's prohibitions were extended to apply to persons aged 69 by the 1978 amendments to the ADEA. See ADEA Amendments of 1978, Pub. L. No. 95-256, sec. 12, § 3(a), 92 Stat. 189 (1978). The ADEA previously had an upper age limit beyond which mandatory retirement systems would be outside the protection of the ADEA. However, mandatory retirement was specifically banned by the 1978 Amendment to
A. The Legislative History of the Older Workers Benefit Protection Act

The legislative history of OWBPA is tortuous. While the Legislative response to the Betts ruling was virtually immediate, the bill underwent five revisions in the House and Senate before its passage. OWBPA was enacted specifically to redress the perceived damage to age discrimination law caused by the Betts decision, through four specific means. First, OWBPA clearly places employee benefits within the § 4(f)(2) of the ADEA which dictated that § 4(f)(2) did not protect any benefit plan which “shall require or permit the involuntary retirement of any individual [between the ages of 40 and 69] because of the age of such individual.” See H.R. 5383, 95th Cong., 1st Sess. (1977). Although both H.R. 5383 and its Senate counterpart were debated before the Supreme Court spoke on the issue, the amendment did not become law until after the Supreme Court handed down its decision in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) (holding that an involuntary retirement plan initiated before the ADEA was passed in 1967 could not possibly be a “subterfuge” to evade the purposes of the ADEA because defendants could not have designed a plan to circumvent a statute they had no idea would exist). The importance of the 1978 prohibition of involuntary retirement and McMann are discussed infra at notes 88-89 and accompanying text.

§ 4(f)(2) of the ADEA which dictated that § 4(f)(2) did not protect any benefit plan which “shall require or permit the involuntary retirement of any individual [between the ages of 40 and 69] because of the age of such individual.” See H.R. 5383, 95th Cong., 1st Sess. (1977). Although both H.R. 5383 and its Senate counterpart were debated before the Supreme Court spoke on the issue, the amendment did not become law until after the Supreme Court handed down its decision in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) (holding that an involuntary retirement plan initiated before the ADEA was passed in 1967 could not possibly be a “subterfuge” to evade the purposes of the ADEA because defendants could not have designed a plan to circumvent a statute they had no idea would exist). The importance of the 1978 prohibition of involuntary retirement and McMann are discussed infra at notes 88-89 and accompanying text.

45. The first “Betts Bill,” the original version of S. 1511, was introduced only six weeks after the Supreme Court announced its decision in Betts. S. REP. No. 263, 101st Cong., 1st Sess. 50 (1990), reprinted in 1990 U.S.C.C.A.N. 1555. The rapidity with which the Congress held its hearings and drafted the OWBPA led many members to question the wisdom of passing it without further analysis of its effects. See the remarks of Sen. Hatch (R. Utah), who queried:

Have we not learned anything from our recent experiences with catastrophic health care and section 89? In both cases, we rushed to enact laws we thought the public wanted. The fact was that we enacted legislation with nice titles and noble purposes, but gave short shrift to the mechanics of the law’s implementation.

136 CONG. REC. S13,248 (daily ed. Sept. 17, 1990) (statement of Sen. Hatch); see also 136 CONG. REC. S13,297 (daily ed. Sept. 18, 1990) (remarks of Sen. Grassley) (stating that the unforeseen complexity of the issue was illustrated by the fact the Congressional Research Service was commissioned to engage in ten studies of the effects of the Betts ruling); 136 CONG. REC. H8620 (daily ed. Oct. 2, 1990) (statement of Rep. Goodling) (approving the bill, but reiterating his previous fears that a year after the bill passed, Congress was “going to have 50, 55, 60, 62-year-old workers descend [sic] upon Washington, DC [and Congress would be] hoping that the only things they were going to throw . . . were tomatoes and eggs . . . ”). But see 136 CONG. REC. S13,604 (daily ed. Sept. 24, 1990) (Sen. Mitchell’s statement that “the inconvenience of the need for adjustments is not a reason that can justify opposition to the legislation. Arbitrary, unfair age discrimination cannot be justified.”).


47. Employee benefit plans are packages of noncash benefits received in the employment context, the most economically significant of which are employer contributions to pension funds and employer-provided medical insurance. See Peter J. Widenbeck, Nondiscrimination in Employee Benefits: False Starts and Future Trends, 52 TENN. L. REV. 167, 169 (1985). Employee benefits are often used in the employment context as substitutes for higher wages, especially in collectively bargained labor contracts. See Older Workers Benefit Protection Act, Joint Hearing before the Senate Subcomm. on Labor and Human Resources and the Special Comm. on Aging, 101st Cong., 1st Sess. 415 (1989) [hereinafter Act Hearing] (prepared statement of the American Iron and Steel Institute and the National Association of Manufacturers). The wage for benefit trade-off is particularly salient in the area of pensions. Bruce Wolk, Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality, 70 VA. L. REV. 419, 454-55 (1984). Benefits which are comp-
prohibitions against age discrimination contained in section 4(a) of the ADEA.\textsuperscript{48} Second, OWBPA reaffirms that employers may offer a lesser amount of benefits \textit{only} when there is a cost justification for so doing under a bona fide benefit plan.\textsuperscript{49} OWBPA also places the burden of proof on the employer who utilizes section 4(f)(2) as an affirmative defense.\textsuperscript{50} Finally, OWBPA retroactively applies the latest version of the ADEA to all employee benefit programs outside of federal and state employment programs.\textsuperscript{51}

Although the \textit{Betts} decision itself drew widespread criticism,\textsuperscript{52} Commonly offered in “packages” include group legal service plans, transportation, educational assistance, dependent care assistance and “cafeteria” plans that allow employees to select from a range of benefits and design their own individual benefit packages. Wiedenbeck, \textit{supra}, at 170.


51. \textit{Id.} The Hatch-Kassebaum provisions which applied the ADEA to Federal employees were omitted from OWBPA out of fear that the ripple effect throughout the federal employment system would disrupt too many federal benefit programs at too great an economic cost. In addition, OWBPA could not be applied to the federal government without subjecting state government and private sector employees to the ineffectual protections currently in effect for federal employees. \textit{See infra} Part II.E. of this Comment.

52. \textit{See Betts Hearing, supra} note 6, at 80 (testimony of Karen Clause, Professor of Law, University of Wisconsin); \textit{id.} at 182 (testimony of Ellen Fredel, attorney, Shaw, Pittman, Potts & Trow-
gress' early versions of OWBPA were also criticized by labor unions, employers and commentators who feared that many types of benefit packages would be jeopardized by Congressional reinstatement of the cost-justification rule.\textsuperscript{53} Particular concern was voiced over the fate of early retirement incentives, such as "window programs,"\textsuperscript{54} and the ability to "integrate" pension payments with other types of payments, such as severance pay and disability payments.\textsuperscript{55} Critics also debated whether age-related actuarial data could still be used to provide older workers "actuarially reduced" health insurance benefits if OWBPA strengthened and codified the cost-justification rule.\textsuperscript{56} The validity of these concerns is more readily understood in the context of a step-by-step analysis of

\begin{itemize}
\item \textsuperscript{53} See infra Part II.E. of this Comment.
\item \textsuperscript{54} Early retirement window programs, or "sweetener programs" as they are sometimes called, involve financial incentives for retirement-eligible employees to accept retirement earlier than they otherwise would. These incentives are often offered by firms facing the prospect of impending workforce reductions. See S. REP. No. 263, 101st Cong., 1st Sess. 28 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 1534; 2 \textit{EGLIT}, supra note 38, \textsection 16.18A. For examples of industry concern, see \textit{Betts Hearing}, supra note 6, at 190 (testimony of Fred Rumack, Director of Tax and Legal Services, Buck Consultants, Inc.); \textit{Pending Legislation Seen as Threat to Early Retirement 'Window' Programs}, 17 Pens. Rep. (BNA) No. 24, at 1010 (June 11, 1990) (reporting the argument of Kathleen Utgoff, economist with the Washington D.C. law firm of Groom & Nordberg, that H.R. 3200/S. 1511 critically forces employers to forego early retirement incentives which will, in turn, cause them to impose "extremely expensive and unpalatable workforce reductions."); Neill A. Borowski, \textit{Legislation May Board Shut 'Window' for Early Retirement}, CHI. TRIB., July 22, 1990, \textsection 7, at 12B; Mary Rowland, \textit{Your Own Account: Walking Through 'The Window'}, N.Y. TIMES, May 20, 1990, \textsection 3, at 17.
\item \textsuperscript{55} Benefit integration is the practice by which the amount of one benefit provided is reduced by the amount of another benefit received. In the employee benefit context, pension payments are often "integrated" with Social Security payments. \textit{See Betts Hearing}, supra note 6, at 190 (testimony of Fred Rumack). The pre-OWBPA and post-OWBPA status of various types of "integrated" plans is discussed at infra Part II.E.1. of this Comment. For example, in the \textit{Betts} case, the Ohio program in effect integrated the disability payments June Betts was eligible to receive with her stored pension funds. Another example is that employers, when faced with the threat of plant-closings or workforce reductions, attempt to integrate the pension payments of retirement-eligible employees with their severance pay either by reducing their severance check by some proportion of their accrued pension fund or by denying severance pay outright.
\item \textsuperscript{56} As is discussed below, the argument was that the cost-justification rule as applied in the past, and by inference as it would be applied after its mere re-establishment, would jeopardize present health insurance and pension programs. \textit{See infra} Part II.E.1. of this Comment. However, such concerns were voiced in order to point out the uncertainty of the legislative intent behind S. 1511 and the ambiguity of its drafting. \textit{See Act Hearing}, supra note 47, at 195, 213 (statement of Fred Rumack on behalf of the Association of Private Pension and Welfare Plans (APPWP) (a non-profit group whose goal is to foster private pension and employee benefit systems)).
\end{itemize}
OWBPA and its effect on the level of protection afforded employee benefit programs.

Mechanically, OWBPA attempts to accomplish its four-part goal by: 1) inserting clarifying language into existing provisions of the ADEA; 2) creating specific exceptions and qualifications to the cost-justification protection of employee benefits; 3) specifically addressing concerns about the scope of the ADEA's protections afforded public employees and employees bound by collective bargaining agreements; and 4) by formalizing and protecting the role of voluntary decisionmaking through a newly added waiver provision.

Each of these factors com-

57. See supra notes 47-51 and accompanying text.
59. Concerns regarding specific benefit practices are addressed in OWBPA § 103 (1990) (codified at 29 U.S.C.A. § 623, Historical Note (West Supp. 1991)). Congress' present attitude toward the application of § 4(2) to various types of public employees and to collectively bargained agreements is addressed in OWBPA § 105. OWBPA §§ 105(b)(1)-(b)(4) provides:

b. Collectively Bargained Agreement. — With respect to any employee benefits provided in accordance with a collective bargaining agreement —

1. that is in effect as of the date of enactment of this Act;
2. that terminates after such date of enactment;

... 
4. that contain any provision that would be superseded, in whole or part, by this title... but for the operation of this Title... shall not apply until the termination of such collective bargaining agreement or June 1, 1992, whichever occurs first.

As the Minority Senate report indicates, the differential treatment of union and nonunion employees is a compromise with no rationale other than expedience. See Minority Views on S. 1511 in S. REP. No. 263, 101st Cong., 1st Sess. 57 (1990), reprinted in 1990 U.S.C.C.A.N. 1562 (calling the selective retroactive and prospective application of this bill to nonunion employees, both "unjustifiable and unfair."). However, private employers who are not subject to a collective bargaining agreement were given a 180 day grace period as a salve. See 136 CONG. REC. S13,598 (daily ed. Sept. 24, 1990) (statement of Sen. Metzenbaum). The grace period is granted by OWBPA § 105(a), which effectuates OWBPA 180 days after its passage. The constitutionality of this retroactively applied provision aroused some concern on the part of the Justice Department. See id. at S13,253 (daily ed. Sept. 17, 1990) (letter of Robert Amman to Sen. Metzenbaum).

61. Title II of OWBPA, codified at 29 U.S.C. § 626(f) (West Supp. 1991), is designed to ensure that any waiver of rights under the ADEA for or pursuant to a separation agreement is knowing and voluntary. S. REP. No. 263, 101st Cong., 1st Sess. 31 (1990), reprinted in 1990 U.S.C.C.A.N. 1537. Title II adopts the reasoning of Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1988) (adopting a "totality of circumstances" test with reference to the clarity of the release document, timing of the release, education of the signatory, consideration received, and opportunity to negotiate in order to ascertain whether the waiver was made "knowingly and voluntarily") and "disapproves" of the approach of Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir.) (applying ordinary contract principles in determining whether release was made knowingly and willingly; waiver rejected only if fraud, deceit, or unconscionable overreaching can be proven), cert. denied, 482 U.S. 928 (1987). As Congress recognizes, Title II of the ADEA is a sharp departure
bine to create a legislative act which clarifies the protections of the ADEA without significantly extending those protections.

B. The Inclusion of Employee Benefits in the ADEA

Section 102 of OWBPA\textsuperscript{62} was specifically enacted to overturn the first aspect of the Betts holding, thereby placing employee benefits within the general prohibitions contained in section 4(a)(1) of the ADEA.\textsuperscript{63} Section 102 amends section 11 of the ADEA\textsuperscript{64} (the ADEA's definitional section), by inserting a new subsection (l) which states that the term "compensation, terms, conditions, or privileges of employment" found in ADEA section 4(a)(1), "encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan."\textsuperscript{65} This additional definitional language unequivocally repudiates the Court's interpretation of section 4(a)(1) and harmonizes section 4(a)(1) with pre-Betts case-law and interpretations of similar provisions in Title VII of the Civil Rights Act of 1964\textsuperscript{66}.

As previously mentioned, the Betts majority held that employee benefits must be seen as unprotected by section 4(a)(1)'s general prohibitions, or section 4(f)(2) would be "nugatory."\textsuperscript{67} According to Justice

\begin{itemize}
\item from the stringent protections of the Fair Labor Standards Act (FLSA) § 16(e), and Congress therefore intended Title II to be strictly construed to apply only to individuals covered by the ADEA. S. REP. NO. 263, 101st CONG., 1st Sess (1990), reprinted in 1990 U.S.C.C.A.N. 1537. The Fair Labor Standards Act (FLSA) § 16(b) has been interpreted to prohibit waiver through private releases. See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 292, 302 (1985) (QLSA requirements cannot be waived by employees who work for religious organizations in exchange for food, clothing, shelter and other benefits); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (employee's rights under FLSA are not barred by a prior submission to arbitration); D.A. Schulte, Inc., v. Gangi, 328 U.S. 108, 114 (1946) (remedy of liquidated damages cannot be bargained away by settlements); Brooklyn Sav. Bank v. O'Neil, 325 U.S. 697, 707 (1945) (prohibition against waiver of statutory minimum wages, likewise, forbids the waiver of the right to liquidated damages). Because this Comment is only intended to discuss the operation of the cost-justification rule after OWBPA, an in-depth discussion of the operations of Title II of OWBPA and the merits of the policy behind that title are beyond the scope of this Comment. However, the stress on voluntariness in Title II is consistent with OWBPA's position on early retirement incentives. For a thorough discussion of the legislative history and intent of Title II see SENATE COMM. ON LABOR AND HUMAN RESOURCES, THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989, S. REP. NO. 79, 101st CONG., 1st Sess. 3-17 (1989); see generally Metz, supra note 44.\textsuperscript{66}
\item 328 U.S. 108, 114 (1946).
\item 325 U.S. 697, 707 (1945).
\item 450 U.S. 728, 745 (1981).
\item 328 U.S. 108, 114 (1946).
\item 325 U.S. 697, 707 (1945).
\item 450 U.S. 728, 745 (1981).
Kennedy, if section 4(a)(1) were read as including employee benefits, section 4(f)(2) would allow bona fide benefit plans to discriminate against older workers in a manner which was "facially irreconcilable with the prohibitions in § 4(a)(1) and, therefore, with the purposes of the Act [ADEA] itself." The majority concluded that section 4(a)(1) must be read as not including employee benefits, in order to prevent section 4(f)(2) from causing the ADEA to inconsistently permit precisely the type of discrimination the ADEA meant to prevent. Therefore, the Court concluded, section 4(f)(2) applied to employee benefits only through its use of the term "bona fide benefit plan." Justice Kennedy stated that section 4(f)(2) was specifically designed to exempt employee benefits from section 4(a)(1) to avoid fighting "the employee [pension] benefit battle" and thereby give both sections 4(a)(1) and (f)(2) their full meaning. Thus the majority applied the long-established principle that all legislative provisions were enacted to be given effect, and correctly characterized Congress' intent to avoid the death of the ADEA over the pension issue.

However, the Betts majority's efforts to reconcile these "inimical" provisions distorted Congress' intent to create a "safe harbor" for pen-

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68. Id. As discussed in infra Part II.D. of this Comment, the assertion that the cost-justification rule allows discrimination within the meaning of that term contained in the ADEA is entirely true. However, the recognition of the reality of the employment market that employers do not want to pay more for older workers when they can hire younger replacements has not been seriously questioned as a rationale for this discrimination.

69. Betts, 492 U.S. at 177.

70. Id.

71. Id.

72. HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 434 (2d ed. 1911).

73. On the first day of the 1967 pre-enactment hearings on the ADEA, Sen. Javits criticized the Johnson administration's bill (S. 830) for its specific reference to retirement plans in the § 4(f)(2) safe harbor. S. 830's version of § 4(f)(2) rendered it not unlawful to "separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purpose of this Act.["] S. 830, 90th Cong., 1st Sess. (1967), reprinted in Age Discrimination in Employment: 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. 2 (1967) [hereinafter Hearings on S.830]. Sen. Javits criticized this aspect of the administration bill, remarking that:

The age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Hearings on S.830, supra, at 27. Sen. Javits' intention was for this battle to be fought and settled by the enactment of a "comprehensive bill to deal with [the pension] problem," e.g., ERISA. 113 CONG. REC. 7076 (1967).
sions in section 4(f)(2).” 74 Pre-Betts judicial and administrative interpretations clearly demonstrated that section 4(f)(2) operated as such a provision. 75 Section 4(f)(2)'s declaration that "it shall not be unlawful . . ." follows the classic form of a "safe harbor" provision. 76

Viewing section 4(f)(2) as a proviso, or safe harbor, 77 it is apparent that the Betts majority was incorrect in its assertion that employee benefits had to be outside the scope of section 4(a)(1) in order for both clauses to have meaning. Indeed, section 4(f)(2) would be meaningless if the prohibitions of section 4(a)(1) did not include employee benefits. If employee benefits were without the protection of section 4(a)(1), there would be no need to provide a specific provision to exempt them from the effect of the ADEA because the Act would not apply to employee benefits in the first place. 78

74. See infra notes 83-89 and accompanying text.
75. See infra notes 92-95 and accompanying text.
76. The text of § 4(f)(2) conforms to the model of a savings clause because it conveys the meaning that the ADEA "shall not hold" bona fide benefit plans to be in violation of the act. See BLACK, supra note 72, at 427.
77. Historically, the terms "saving clause," "safe harbor" and "proviso" have had distinct meanings. "Saving clauses" are statutory provisions, that "save" existing, vested rights of action from extinguishment by the operative provisions of a larger act. BLACK, supra note 72, at 427. The term "saving clause" was also used to describe "safe harbor" provisions, such as § 4(f)(2). "Safe harbor"/saving clauses exempt a specific thing or class of things out of a list of general objects covered by an act. Id. While § 4(f)(2) conforms to the linguistic model of a "saving clause," its practical effect also comports with the classic definition of a "proviso"; that is, a clause that adds a limitation or condition upon the operation of a statute. Id. The precise categorization of § 4(f)(2) as a "proviso" or "saving clause" is irrelevant for the purposes of this Comment because the distinctions among these concepts have been blurred by the courts and legislators over time, and these clauses tend to be interpreted according to the same conventions. See 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 20.22 (4th ed. 1985).
78. While the federal courts have not specifically held that fringe benefits fall within ADEA § 4(a)(1), their resort to § 4(f)(2) when analyzing the legality of fringe benefit packages presupposes that fringe benefits are covered by the ADEA. Would it be necessary for an employer to raise § 4(f)(2) as a defense if an employer could not be liable for the discriminatory fringe benefit packages in the first place? See, e.g., Betts v. Hamilton County Bd. of Mental Retardation, 848 F.2d 692, 694 (6th Cir. 1988) ("When there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit exception of § 4(f)(2),"), rev'd sub nom. Public Emp. Ret. Sys. v. Betts, 492 U.S. 158 (1989); EEOC v. City of Mt. Lebanon, 842 F.2d 1480, 1488 (3d Cir. 1988) (stating that although employers may not "dole out" benefits in a discriminatory manner, "any action in observance of a bona fide employee plan is exempt from the ADEA's broad scope"); Karlen v. City Colleges, 837 F.2d 314, 319 (7th Cir.) (citing both § 4(a)(1) and EEOC regulation 29 C.F.R. 1625.10 for the proposition that "where . . . the employer uses age — not cost, or years of service, or salary — as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2).")., cert. denied sub nom. Cook County College Teachers Union Local 1600 v. Trustees of Community College, 486 U.S. 1044 (1988); Cipriano v. Board of Educ., 785 F.2d 51, 53 (2d Cir. 1986) (stating in reference to a voluntary early retirement incentive program
In the Betts decision, Justice Kennedy interpreted Senator Javits' desire to allow employers flexibility in structuring benefits that cost more to provide to older persons, and a widespread desire on the part of Congress to avoid the pension battle as necessitating a broad, blanket exception for employee benefits. However, the Court's view that section 4(f)(2) served to provide a complete exemption of employee benefits is a strained interpretation of the legislative history of the ADEA. Legislative history applying the concept of cost to section 4(f)(2), the specific language of 4(f)(2), and the Supreme Court's interpretation of similar provisions in Title VII undermine the validity of Justice Kennedy's analysis.

Section 4(f)(2) was Congress' attempt to affirm its commitment to eradication of arbitrary age discrimination with its recognition of the economic reality that some benefits cost more to provide to older workers, and older workers are therefore more expensive to employ than

that "[i]t is undisputed that, if it were not for § 4(f)(2), the incentive plan would run afoul of § 4(a)(1) of the ADEA") (citation omitted); EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 225 (3d Cir. 1983) (rejecting an employer's § 4(f)(2) defense and stating that "[f]ringe benefit plans unrelated to the age cost factor are not included in the 4(f)(2) exception"), cert. denied, 469 U.S. 820 (1984), on remand, 651 F. Supp. 1172 (D.N.J. 1987) (summary judgment granted), and aff'd, 930 F.2d 329 (3d Cir. 1991); EEOC v. Borden's, Inc., 724 F.2d 1390, 1395 (9th Cir. 1984) (stating that the language of § 4(f)(2) "suggests that Congress meant to exempt only certain benefit schemes from the antidiscriminatory provisions of the Act"); Mason v. Lister, 562 F.2d 343, 345-45 (5th Cir. 1977) (interpreting § 4(f)(2) as exempting bona fide benefit plans from the ADEA's general prohibition of age discrimination).

80. Betts, 492 U.S. at 177.
81. Id.
82. See infra notes 83-89 and accompanying text.
83. For example, pension plans and health insurance benefits may be more expensive to provide to older workers. Pension plans fall into two categories: defined benefit plans and defined contribution plans. ERISA, 29 U.S.C. § 1002(34), § 1002(35) (1988); see also Bruce A. Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan"?, 135 U. PA. L. REV. 1055, 1076 (1987). In a defined benefit plan, an employee's annual retirement income is calculated in proportion to the employee's salary and years of service. In a defined contribution plan, (such as profit sharing, savings plans, thrift accounts and IRA's) equal, defined contributions are made per employee without regard to gross salary or longevity. See generally Everett T. Allen, Jr. et al., PENSION PLANNING: PENSIONS, PROFIT SHARING AND OTHER DEFERRED COMPENSATION PLANS 86-89 (5th ed. 1984). However, an older employee is likely to end his or her employment sooner than a younger employee and would therefore contribute less toward his or her own pension fund than a younger worker. Thus, defined benefit plans tend to be more expensive to provide to older employees because employers must contribute the "equalizing" amount to older workers' defined benefit accounts. See infra note 122. Historically, most employees who are covered by the private pension system participate in defined benefit plans. See Special Comm. on Aging, Developments in Aging: 1985, S. Rep. No. 242, 99th Cong., 2d Sess. 42 (1986) ("[70 percent of] private plan participants are covered under a defined-benefit pension plan"). However, defined contribution plans are
younger employees with roughly equivalent skills. During the debates of the original ADEA, Senator Javits sponsored section 4(f)(2) as an amendment to the Johnson administration's version of the ADEA because he was concerned that the bill, as proposed, would cause employers to become "discouraged from hiring older workers because of the increased costs associated with providing benefits to them." As Senator Javits explained, the Johnson administration proposal did not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters.

becoming increasingly important in the workplace. In fact 80% of all new plans established since ERISA was passed are defined contribution plans. See Allen et al., supra, at 267 n.1.

Health insurance benefits are more expensive to provide to older workers based on the actuarial fact that older persons are more likely to become sick and require ongoing treatment. Tom Johnson, Understanding the Demographics of Aging, Risk Mgt., June 1987, at 78; Metz, supra note 44, at 354. Therefore insurers require higher premiums to provide the same amount of coverage for older workers. See id. at 408; Cohen, supra note 25, at 403-18 (discussing methods by which group insurance plans provided by employers reduce coverage for older employees for group-life and long-term disability insurance). See generally Leah Wortham, The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping, 47 Ohio St. L.J. 835 (1986); C. Arthur Williams, Jr. & Richard M. Heins, Risk Management and Insurance (1985).

84. Generally, older workers who have achieved high levels of seniority within a company cost more to employ because of their correspondingly higher level of compensation. See generally Schultz, supra note 41.


86. Senate ADEA Hearing, supra note 85, at 27. The House sponsors of § 4(f)(2) also recognized that the section was "designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits." See 113 Cong. Rec. 34,746 (1967) (remarks of Rep. Daniels), reprinted in EEOC Legislative History, supra note 25, at 157.

Congress reaffirmed this understanding of the purpose of § 4(f)(2) during the process of outlawing mandatory retirement, see infra note 89 and accompanying text, and during hearings held in preparation for the 1978 amendments to the ADEA. In order to assure skeptics that raising the age cap of the ADEA to 70 and eliminating mandatory retirement would not raise the cost of providing employee benefits to older workers, the Report of the Senate Human Resources committee stated:

Concerns were also expressed regarding potential increased costs for employee welfare benefit plans such as disability, health, life and other forms of insurance for employees. Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices.

Clearly, section 4(f)(2) was intended not to require employers to "afford older workers exactly the same pension, retirement, or insurance benefits as [they] afford[ ] to younger workers."\textsuperscript{87} The legislative history of the 1978 amendment to the ADEA that outlawed mandatory retirement\textsuperscript{88} illustrates Congress' endorsement of the cost-justification approach embodied in the original, and amended, Labor Department Interpretive Bulletin discussed in Part I.A of this Comment.\textsuperscript{89}

Section 4(f)(2) contains two operative terms which created confu-

\textsuperscript{87} 113 CONG. REC. 31,255 (1967), reprinted in EEOC LEGISLATIVE HISTORY, supra note 25, at 146. Despite the numerous expressions of legislators' concern that the increased costs of providing various benefits to older workers would discourage the hiring of older workers, some commentators viewed the cost-justification rule as a marked departure from the legislative intent of the origin of § 4(f)(2). See Cohen, supra note 25, at 386-88. It is true that "[n]o where in the 1967 history is the equal cost or equal benefit rule for employee benefit plans articulated." Id. at 387 n.21 (citations omitted). \textit{But see} Broome, supra note 43, at 966-69; Paul, supra note 15, at 994-95; Urban, supra note 25, at 171-73.


\textsuperscript{89} See Betts Hearing, supra note 6, at 260-62 (supplementary statement of Robert F. Laufman). Without specifically endorsing the Department of Labor regulations, various legislators used language that echoes IB 860.120. For example, Representative Waxman stated that

[i]n the absence of actuarial data which clearly demonstrates that the costs of [these benefits] are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the act. . . . Exceptions should only be applied in the strictest sense and only with full justification and cause.

124 CONG. REC. 7886 (1978). Representative Pepper, chairman of the House Select Committee on Aging, similarly stated:

The exception under section 4(f)(2) of the act is just that — an exception — and as such must be viewed in the narrowest sense.

. . . . The original reason for this exception was to promote the hiring of older persons. Passage of [the 1978 amendments] should not be construed by any employer, or any court, to permit the sudden, total and unilateral termination of a capable and healthy worker from a health, insurance or other welfare benefit plan solely on the basis of age and without full economic justification.

124 CONG. REC. 7886 (1978) (emphasis added). Senator Javits, the original architect of § 4(f)(2) concurred in this sentiment: "Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers." 124 CONG. REC. 8218 (1978).

The legislative history of the 1978 ADEA amendments is particularly persuasive evidence of the link between the original congressional intent of § 4(f)(2) and the concept of cost-justification because two of the section's original sponsors were available to clarify the intent behind the provision; namely, Senator Javits and Representative Hawkins. Urban, supra note 25, at 175. While the passage of the 1978 amendments clearly confronted Congress with the potential problem of employer refusal to hire older employees, id., the legislative history of the 1978 amendments to § 4(f)(2) should be given additional weight because Congress spoke of the need to ensure flexibility for employers at a time when that need was particularly strong. By raising the age limits of the ADEA and prohibiting involuntary retirement, the amendments lengthened the period of time over which an employer has a duty to maintain a nondiscriminatory relationship with its older employees. Without the ability to
sion among the circuit courts. Such confusion would have been less likely had these courts believed Justice Kennedy’s interpretation of section 4(f)(2) to be correct. In order to utilize the section 4(f)(2) defense, an employer must establish that age-related differential treatment is pursuant to the terms of a “bona fide employee benefit plan,” and that the plan is not a “subterfuge” employed to avoid compliance with the ADEA. These terms imply that it is possible to have benefit differentials outside of a bona fide plan, and furthermore that a bona fide plan could be created only to evade the ADEA. Such evasive plans would be lawful unless they fell under a prohibition of the Act, the only possible provision being section 4(a)(1).

Prior to the Betts decision three types of cases commonly arose under section 4(f)(2) — involuntary retirement, voluntary retirement, and unequal benefit provision cases. Although the administrative agencies responsible for the enforcement of the ADEA consistently recommended that a cost-justification be shown before a benefit plan could be deemed bona fide and not a subterfuge, considerable confusion arose in

reduce costs by reducing benefits to older employees, the 1978 amendments would have decreased employer incentives to hire older workers.

This concern for in effect forcing employers to maintain high levels of benefits for older employees has been most strongly embodied in the EEOC’s (and consequently OWBPA’s, by incorporation) treatment of long-term disability benefits. 29 C.F.R. § 1625.10(f)(ii) (1991) (permitting employers to cease all payments of disability benefits to older persons under certain circumstances).

The language of these regulations indicates that the EEOC was fully conscious of the disagreement between these exceptions and the policies behind the cost-justification rule:

[T]he Department would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:

(A) With respect to disabilities which occur at age 60 or less, benefits cease at age 65.
(B) With respect to disabilities which occur after age 60, benefits cease five years after disablement. Cost data may be produced to support other patterns of reduction as well.


Nothing in OWBPA or its legislative history clearly suggests that this portion of the EEOC regulation is invalid. However, one commentator reads the SUB integration of provision of OWBPA (see infra Part II.E.3) as providing the only permissible reduction in retiree health benefits. See Mayer Siegel & Carol Buckman, Protection for Older Workers, N.Y.L.J., Nov. 13, 1990, at 3. Congress or the EEOC should clarify whether regulation 29 C.F.R. § 1625.10(f)(ii) survives the passage of OWBPA.

90. 2 EGLIT, supra note 38, at § 16.39C.
the district courts regarding the terms "bona fide plan" and "subterfuge" within the meaning of 4(f)(2). Despite the clarity of the guidance offered by the Department of Labor and Equal Employment Opportunity Commission, the lower federal courts, prior to Betts, were given little guidance as to the weight to be given these guidelines and regulations.

The district courts espoused contradictory interpretations of section 4(f)(2), choosing either to uphold or deny the cost-justification rule under both the "bona fide plan" language and the "subterfuge" language.
While the district courts offered a confusing panoply of authority for the circuit courts, the circuits which addressed the issue of section 4(f)(2) unanimously reflected a concern that there be a strong business purpose for benefits discrimination, while differing on the precise language they used.95 Thus, Justice Kennedy’s rejection of any form of the cost-justifi-


95. Prior to Betts, the Second Circuit consistently applied a “legitimate business purpose” test to decide whether a plan was a subterfuge. See Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986); Potenze v. New York Shipping Ass’n., 804 F.2d 235 (2d Cir. 1986). Other circuits have focused more narrowly on the issue of “bona fide plan” and have come up with the same result. See Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), cert. denied, 456 U.S. 975 (1982); Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974). However, the Cipriano court rejected the plaintiff’s argument that an early retirement incentive plan could only be justified by “actuarially significant cost reductions.” 785 F.2d at 54. This language left open the possible interpretation that something less than a “cost-justification” is required to avoid the label of subterfuge, and commentators have disagreed as to whether Cipriano is a cost-justification case that was overruled by Betts. See 2A EGLIT; supra note 38, at § 16.37 (“[S]ince the Betts Court threw the cost-justification rationale out the legal window, so to speak, Crosland, Home Insurance Co., Cipriano, and City of Mt. Lebanon are no longer valid rulings . . . .”). But see Act Hearing, supra note 47, at 252-53 (statement by Mark S. Dichter on behalf of the Assoc. of Private Pension and Welfare Plans, the U.S. Chamber of Commerce, the Nat’l Assoc. of Mfrs., and the ERISA Industry Comm. labelling the “business purposes [test] as unequivocally weaker than the cost-justification rule”). However, other circuits have explicitly adopted the cost-justification rule when evaluating plans. See EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984), on remand, 651 F. Supp. 1172 (D.N.J. 1987) (summary judgment granted), and aff’d, 930 F.2d 329 (3d Cir. 1991); EEOC v. Borden’s, Inc., 724 F.2d 1390 (9th Cir. 1984); Betts v. Hamilton County Bd. of Mental Retardation, 848 F.2d 692 (1988), rev’d sub. nom Public Empl. Ret. Sys. v. Betts, 592 U.S. 148 (1989). Under the “subterfuge” language, the Fourth Circuit followed the Second Circuit in requiring a “business or economic purpose” test for determining whether a plan is a subterfuge. See Crosland v. Charlotte Eye, Ear and Throat Hosp., 686 F.2d 208, 213 (4th Cir. 1982); Abenante v. Fullflex, Inc., 701 F. Supp. 296 (D.R.I. 1988). However, “subterfuge” has also been interpreted under the cost-justification rule. See EEOC v. City of Mt. Lebanon, 842 F.2d 1480, 1491 n.9 (3d Cir. 1988) (rejecting the contention that a long term disability plan was a subterfuge because it had not proven that its reduced disability coverage had “achieved[d] approximate equivalency in the cost of providing benefits to older and younger workers”). However, no circuit applied the cost-justification rule to a plan created before the ADEA was passed. See EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988) (rejecting an age-cost test for a pre-Act plan, and noting that the court is not bound by Department of Labor/EEOC interpretive regulations); EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988) (no age-cost relationship required in case of pre-Act plan); EEOC v. State of Maine, 655 F. Supp. 223 (D. Me. 1985), aff’d mem., 823 F.2d 542 (1st Cir. 1987); see also EEOC v. Fox Point Bayside Sch. Dist., 772 F.2d 1294 (7th Cir. 1985); Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), cert. denied, 451 U.S. 986 (1981). These decisions however, do not constitute authority against the cost-justification rule, because they dealt with the procedural fairness of retroactive application of the ADEA and addressed the cost-justification requirement only in dicta. The holdings of these cases were explicitly overturned by OWBPA, Pub. L. No. 101-433, § 103(3), 104 Stat. 979 (1990) (codified at 29 U.S.C.A.}
cation requirement is inconsistent with the bulk of federal case law re-
garding the 4(f)(2) exception.

In determining the application of the section 4(f)(2) language re-
garding "subterfuge" and "bona fide" employee benefit plans, the Betts
majority followed United Air Lines, Inc. v. McMann, 96 which had de-
clared that the term "subterfuge" had to be given its ordinary meaning of
"a scheme, plan, stratagem, or artifice of evasion." 97 The McMann
Court had reasoned that plans drafted prior to the ADEA (such as the
mandatory retirement plan utilized by United Air Lines) could not possi-
ibly be subterfuges for the purposes of evading the Act. 98 The McMann
Court did not explicitly discuss the cost-justification rule. 99 The Betts
Court, however, rejected the cost-justification rule, finding it contrary to
the legislative history of the ADEA, 100 and not implicated by the lan-
guage of section 4(f)(2). 101

Furthermore, the Betts majority's exclusion of employee benefits
from the ambit of the ADEA contradicts the Supreme Court's interpre-
tation of virtually identical language in Title VII of the Civil Rights Act
of 1964. 102 Section 703(a)(1) of Title VII, which contains the general

§ 623(k) (West Supp. 1991)) which states that "a seniority system or employee benefit plan shall
comply with this Act regardless of the date of adoption of such system or plan."
97. Id. at 203.
98. Id. at 204.
99. Id. Yet, the Supreme Court did state in dictum that "[w]e reject any per se rule requiring an
employer to show an economic or business purpose in order to satisfy the subterfuge language of the
Act." Id. at 203. The Supreme Court's unwillingness to apply the cost-justification rule was pres-
saged by their approval of the severance pay-pension integration in the case of Alessi v. Raybestos-
Manhattan, Inc., 451 U.S. 504, 517 (1981), where the Court unanimously upheld the integration of
benefits as central to the accomplishment of the purposes of ERISA. The Court stated that the
"[c]ongressional purpose [of] ... promoting a system of private pensions by giving employers avenues
for cutting the cost of their pension obligations — underlies all such offset possibilities.").

Note that Congress specifically overruled McMann's validation of age-based mandatory retire-
ment by adding to § 4(f)(2) a prohibition of employee benefit plans that required or permitted invol-
untary retirement based on age. See supra notes 87-89; Betts, 492 U.S. at 167. The Labor
Department then reasserted the traditional cost-justification meaning of the term "subterfuge." See
100. Betts, 492 U.S. at 171.
101. Id. at 172.
102. Reference to the Supreme Court's treatment of these provisions is particularly apt because
4(a)(1) was adopted in haec verba to Title VII which was passed only three years earlier. See supra
note 15 and accompanying text. However, the Supreme Court did not pass on the scope of § 4(a)(1)
in its only pre-Betts ruling on the § 4(f)(2) defense, United Air Lines, Inc. v. McMann, 434 U.S. 192
(1977). Therefore, in order to evaluate Justice Kennedy's analysis of § 4(a)(1) according the prin-
ciple of stare decisis we must look to the most similar question presented to the Court prior to the Betts
decision, which was found in Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), and Los
prohibition against discrimination, was interpreted in the gender discrimination cases of Arizona Governing Committee v. Norris and Los Angeles Dept. of Water & Power v. Manhart. Both of these cases were brought under Title VII by female employees who were required by their employers to contribute more to their pension funds than their male counterparts. In the course of striking down both programs as impermissible under Title VII, the Supreme Court expressly stated that discrimination in employee benefits fell within the scope of the phrase "terms, conditions, or privileges of employment."  

103. The section provides:
It shall be an unlawful employment practice for an employer —
(1) 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 . . . .


106. Manhart, 435 U.S. at 705 (1982); Norris, 463 U.S. at 1077-80 (1982). The only significant factual difference between the two cases was that in the latter, the employer gave employees the option to purchase a pension from a variety of private pension plans rather than administering one plan directly. This distinction was held legally irrelevant and the logic of Manhart was applied in Norris. Id. at 1089. ("There can be no serious question that petitioners are legally responsible for the discriminatory terms [which employees are offered] . . . .").

107. Norris, 463 U.S. at 1079 ("There is no question that the opportunity to participate in a deferred compensation plan constitutes a 'condition[], or privilege[,] of employment,' and that retirement benefits constitute a form of 'compensation.' " (citations omitted)); Manhart, 435 U.S. at 712 n.23 ("pension benefits, and the contributions that maintain them, are 'compensation' under Title VII." (citations omitted)). It is interesting to note that although these gender discrimination cases interpret the same prohibitive language as many ADEA cases in the circuit courts, the gender cases reach markedly different results. This difference may be justified by the fact that there is no defense similar to § 4(a)(2) under Title VII. Central to the reasoning of both Manhart and Norris is the belief that gender discrimination results from the improper use of unjustified gender-related generalizations. See Manhart, 435 U.S. at 707; Norris, 463 U.S. at 1083. In both cases, the Supreme Court states that it is impermissible to assume that because women tend to live longer than men that any particular female employee will live longer than the average male employee because the protections of § 703(a)(1) are above all "individual" protections. See Manhart, 435 U.S. at 707-08 ("Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."); Norris, 463 U.S. at 1084. When § 4(a)(2) has been applied to severance pay reduction cases and involuntary retirement cases some courts have held that age-based assumptions that a retirement eligible person would "retire anyway" are impermissible. See Geller v. Markham, 635 F.2d 1027, 1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981) (using higher salary level as reason for not hiring teachers over 40 was a facially neutral policy disproportionately disadvantaging members of a protected class); see also Cipriano v. Board of Educ., 700 F. Supp. 1199, 1209, 1211 (W.D.N.Y. 1988), vacated, 772 F. Supp. 1346 (1991) (invalidating its earlier decision by interpreting ADEA § 4(a)(1) as inapplicable to fringe benefits under Betts).

However, actuarially based expectations have not been struck down in an allegedly "fringe" benefit context, such as pensions or health insurance provisions to older workers pursuant to a benefit
Having reaffirmed the common understanding of section 4(a)(1) of

plan, presumably because of §4(f)(2)'s specific intention to keep benefit problems from frustrating the hiring of older workers. See Abenante v. Fulflex, 701 F. Supp. 296 (D.R.I. 1988). Section 4(f)(2) allows benefit differentials in limited circumstances to allow flexibility in benefit provision so that older workers will not be overlooked in the hiring process. See supra notes 85-86 and accompanying text. However, it is clear that no such cost justification is possible in the race or gender context. Racial discrimination can never be justified on economic grounds because race is a "suspect classification." See, e.g., Korematsu v. U.S., 323 U.S. 214 (1944). As such, any use of race as a classification must pass the test of strict judicial scrutiny. Gender is treated as a "quasi" suspect class however, and the Supreme Court subjects gender discrimination to a test of "intermediate" scrutiny somewhere between the rational classification test and the suspect classification test. See, e.g., Craig v. Boren, 429 U.S. 190 (1976). Despite the lower level of Constitutional protection afforded women under the Equal Protection Clause, the Manhart majority rejected an argument that longevity was a factor other than sex on which a benefit differential could be based under a potential safe harbor in the Equal Pay Act. Manhart, 435 U.S. at 714 n.22 (construing the Equal Pay Act's provisions against gender discrimination in employment compensation).

The Supreme Court has yet to articulate any reason for its differing protection of aged Americans and women in the employment context. Perhaps such a difference could be justified under Justice Stone's conception of a "discrete and insular minority" from which the test for suspectness was derived. See United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938). Age was denied suspect classification because the aged are not "discrete" and in need of extraordinary protection from the sway of majoritarian politics. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). Justice Powell's decision in the "wealth discrimination" case of San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) translated the discrete minority concept into a test for "suspectness," namely a suspect class is one "saddled with . . . disabilities, . . . subject to . . . a history of purposeful unequal treatment, . . . [and] relegated to . . . a position of political powerlessness." Id. at 28. The subjects of age discrimination range from octogenarians down to persons in their forties or thirties, depending on profession. Perhaps on this basis, aged Americans are less discrete and therefore merit less protection. Some circuits may have supplied a partial answer when they declared that "[t]he progression of age is a universal human process," which thus tends to distinguish age discrimination cases from "cases involving the immutable characteristics of race, sex and national origin." Laugesen v. Anaconda Co., 510 F.2d 307, 313 n.4 (6th Cir.), cert. denied, 422 U.S. 1045 (1975). See also Holley v. Sanyo Mfg. Inc., 771 F.2d 1161, 1166 (8th Cir. 1985) (repeating the above quote from Laugesen); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986); Dabrowski v. Warner-Lambert Co., 815 F.2d 1076, 1079 (6th Cir. 1987). Similar reasoning may be the unstated rationale for courts' acceptance of § 4(f)(2).

Scholars have strongly questioned the differential treatment of gender and race discriminating constitutional jurisprudence. See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 587-88 (suggesting that racial and gender discrimination be compared with respect to the characteristics of race and gender as a trait); Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment, 24 UCLA L. REV. 581 (1977) (arguing that gender discrimination can be seen as a more intractable social problem than racial discrimination because gender-based prejudices are more deeply embedded in American culture and less-unanimously seen as unjustifiable); Paul, supra note 15, at 988-89, 1036-39 (criticizing the treatment of age discrimination in terms of constitutional law and Title VII principles); but see JOHN H. ELY, DEMOCRACY AND DISTRUST 154-70 (1980). An in-depth treatment of the Constitutional justifications for the Supreme Court's treatment of race, age and gender discrimination are beyond the scope of this Comment which is intended to assess the impact of OWBPA on the operation of the ADEA. Please note that nothing in this Comment is intended to belittle the differing histories and social dynamics of the various types of discrimination discussed in this footnote. Rather, criticism is levelled at courts' reasoning in these areas.
the ADEA, and having harmonized that provision with its Title VII counterpart, OWBPA also reestablished the balance of evidentiary burdens that was upset by the Betts decision.

C. Reaffirmation of Section 4(f)(2) as an Affirmative Defense

Prior to the Betts decision, the ADEA’s section 4(f)(2) exemption of bona fide benefit plans provided the employer with an affirmative defense to charges of age discrimination. Accordingly, once a plaintiff alleged that the employer discriminated through the use of unequal benefits, the employer bore the burden of proving that any benefit disparity was merely part of a bona fide employee benefit plan. The majority in Betts, however, held that section 4(f)(2) required the plaintiff employee to prove “that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation.”

OWBPA squarely rejects the Betts majority’s interpretation of section 4(f)(2). Section 103(1) of OWBPA replaces 4(f)(2), and includes a new paragraph that explicitly and unequivocally states that the employer bears the burden of showing that any benefit differential is justified by a significant cost consideration. The proviso at the end of section 103(1) of OWBPA states that “[a]n employer, employment agency, or labor organization acting [under the new 4(f)(2)] shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act . . . .” This provision correctly places the burden of the section 4(f)(2) defense not only where past administrative practice dictates it be, but also where the Supreme Court itself had previously

108. 2 EGLT, supra note 38, at § 16.37; Urban, supra note 25, at 182-88.


110. Betts, 492 U.S. at 181.


D. Explicit Incorporation of the Cost-Justification Rule

Having clarified that ADEA section 4(f)(2) operated as an affirmative defense, Congress expressly incorporated the cost-justification rule into the ADEA, and thereby followed the consistent interpretation of the Department of Labor, the Equal Employment Opportunity Commission and the federal circuit courts that had interpreted section 4(f)(2). Section 103(1) of OWBPA replaces section 4(f)(2) with new language in order to eliminate confusion as to the scope of the cost-justification rule and to convey forcefully that "the only justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals." Not only does OWBPA remedy pre-Betts confusion about the exist-

114. Commentators have argued that the circuits have not unanimously endorsed the cost-justification rule by citing cases having to do with the retroactive application of the ADEA to plans created before 1967. See Betts Hearing, supra note 6, at 113 (testimony of Mark S. Dichter, attorney, Morgan, Lewis & Bockius, Phila., Pa.). However, the issue of the fairness of retroactivity under the Due Process Clause is quite separate from what the ADEA requires of plans formulated post-ADEA. The positions of the circuits on the inclusion of the cost-justification rule in the bona fide plan defense is discussed supra at Part II.C. of this Comment. OWBPA explicitly applies the ADEA to pre-1967 programs. See infra Part II.F.2. of this Comment.
116. S. REP. No. 263, 101st Cong., 1st Sess. 18 (1990), reprinted in 1990 U.S.C.C.A.N. 1523 (emphasis in original). It is true that even the new § 4(f)(2) permits employers to discriminate in a manner contrary to the general prohibitions of the ADEA, see supra Part I.B of this Comment, in a fashion Justice Kennedy criticized as anomalous. Public Empl. Ret. Sys. v. Betts, 492 U.S. 158, 175 (1989). However, this concession to the economics of employing older workers is precisely the purpose that has been underlying § 4(f)(2) since its adoption in 1967. See supra notes 83-89 and accompanying text. Moreover, the language of the new § 4(f)(2) inserted by OWBPA makes it clear that this discrimination receives Congressional sanction only in clearly limited circumstances. Section 4(f)(2) now requires employers:

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of [the ADEA], except that no such seniority system shall require or permit the involuntary retirement of any individual . . . because of the age of such individual; or
(B) to observe the terms of a bona fide employee benefit plan
   (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . . ; or
   (ii) that is a voluntary early retirement incentive plan consistent with the . . . purposes of this Act.

ence and importance of the cost-justification rule to a section 4(f)(2) defense, OWBPA also clarifies the meaning of section 4(f)(2) by eliminating whatever confusion may have existed between the "legitimate business purpose" standard and the cost-justification rule. OWBPA does so by making cost justification the only means by which employee benefit differentials may be justified. However, the inclusion of several "carefully considered and carefully drawn exceptions" to the cost-justification rule narrows the potentially broad impact of OWBPA.

E. Incorporation of Public Policy Exceptions: The Watering of the Cost-Justification Rule

The exceptions to the cost-justification rule contained in OWBPA are found in section 103(3), which adds section 4(l) to the ADEA. This new section 4(1) merely mirrors the loose consensus of pre-Betts decisions regarding a number of issues, and exempts certain variations in pension and insurance benefits from section 4(a)(1) of the ADEA. These exceptions to the cost-justification rule are, for the most part, uncontroversial.

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117. See supra notes 90-101 and accompanying text for full discussion of the confusion in the lower federal courts as to the exact textual link between the cost-justification rule and § 4(f)(2), and as to the precise meaning of the rule.

118. See supra note 95 for a discussion of the potential divergence between the "legitimate business purpose" test and the cost-justification rule. OWBPA also provides technical guidance as to how employers are to calculate the costs of benefits they provide by resolving the pre-Betts legal uncertainty as to whether the cost-justification rule could be satisfied by the benefits package approach or on a benefit-by-benefit basis. Prior to OWBPA, the EEOC allowed benefit packages to be judged by the amount of total benefits in a package when comparing older and younger employees, provided that a pension plan was not included in the package. See 29 C.F.R § 1625.10(d)(2) (1989).

   For example, if an employer has two employee benefit plans, one providing life insurance and the other long-term disability, and if age-based cost increases permitted a 10% reduction in each benefit, and if both benefits cost the same to provide, the benefit package approach might permit the employer to provide the full amount of life insurance while reducing the level of long-term disability by 20%.

   Act Hearing, supra note 47, at 456 (testimony of EEOC Vice-Chairman Silberman). Under a benefit-by-benefit approach, each benefit must be provided at an equal cost to older and younger employees regardless of whether they are "integrated." By adopting the EEOC regulations, OWBPA incorporates provisions allowing both approaches. See 29 C.F.R. § 1625.10(f) (1991) (allowing a benefit-by-benefit approach); see also 29 C.F.R. § 1625.10(c)(2)(ii) (1991) (allowing an employer to use the package approach). Congress specifically intended the application of both of these principles. S. Rep. No. 263, 101st Cong., 1st Sess. 19-20 (1990), reprinted in 1990 U.S.C.C.A.N. 1524.

1. **Defined Benefit and Defined Contribution Plans.** Section 103(3) provides explicit protection for the standard range of pension plans. Under "defined contribution" programs, employers make contributions toward employees' retirement funds on a pro rata basis, spending an equivalent amount on all employees in a given class, regardless of age. However, a "defined benefit" plan would violate a strict reading of the cost-justification rule because providing the defined benefit amount for newly-hired, older employees is more costly to employers than providing the same defined benefit to employees who were hired at a younger age.

OWBPA permits employers to continue to provide "defined benefit" pension plans under the ADEA while clarifying a theoretical problem which was never seriously argued in front of the courts. Prior to Betts, both the Ninth and Third Circuits had held that section 4(f)(2)'s phrase "such as retirement, pension, or insurance plan" included only those benefit plans that fit within the cost-justification rule. Therefore, in these courts, a defined contribution plan, although a retirement plan as defined by ERISA, would not necessarily be exempted by section 4(f)(2) because it lacked age-related costs. However, the legislative history of

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120. See infra note 127. For a general discussion of the range of pension benefits available, see supra note 83 and accompanying text.

121. See supra note 83.

122. For example, consider employees A and B who are both retiring at the age of 62. A was hired twenty years ago, while B was hired only five years before his retirement. Under their company defined benefit plan, A and B are both entitled to $300 a week, approximately one-half their pre-retirement salary. If A and B are assumed to reach the age of 72, A and B would receive $15,600 each in benefits over the last ten years of their lives. If the employer requires $15 per week from its employees, A has contributed $15,600 towards his retirement. Therefore, in this extremely oversimplified (inflation-free and spouse/family benefit-less) example, the employer will spend nothing to provide A his vested pension benefits. However, employee B has only placed $3,900 in his retirement fund through his five years of $15 contributions. Therefore, the employer will pay $11,700 over ten years to provide B the benefit level to which he is entitled under the defined benefit plan. Since A and B are the same age, there is no direct violation of the cost-justification rule at their retirement, but this scenario illustrates how defined benefit plans violate the intent of the cost-justification rule. Employees who are hired at a later age are, as a matter of straight mathematics, more expensive to guarantee a benefit level. Therefore, employers have a clear economic disincentive to hire a recently trained older person rather than a similarly experienced younger person for any particular position. Section 4(f)(2) was originally passed to counteract this disincentive.

123. EEOC v. Westinghouse Elec. Co., 725 F.2d 211, 224 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984), on remand, 651 F. Supp. 1172 (D.N.J. 1987) (summary judgment granted), and aff'd, 930 F.2d 329 (3d Cir. 1991). See also EEOC v. Borden's, Inc., 724 F.2d 1390, 1396 (9th Cir. 1984) (finding that § 4(f)(2) was created to "avoid disrupting pensions and other complex, on-going benefit schemes").


125. Under such a counter-intuitive reading of § 4(f)(2) an employer could offer defined contri-
section 4(f)(2) clearly indicates that pension plans that are recognized by ERISA were meant to be legal under the ADEA.126 OWBPA explicitly incorporates ERISA's standards as to what constitutes an employee pension benefit plan,127 thereby including standard pensions within the section 4(f)(2) exemption.

2. Voluntary Early Retirement Incentives. Prior to the enactment of OWBPA, some early retirement incentives had the potential to violate the ADEA if they provided similarly situated younger employees with greater amounts of wages and benefits than older employees.128 Section 103(1) of OWBPA authorizes employers to provide different amounts to employees of differing ages by exempting specifically defined early retirement incentives from the application of the cost-justification rule.

a. Legality of Voluntary Early Retirement Incentives. Section 103(1) of OWBPA states that it is not unlawful for an employer to follow a bona fide plan which "is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act."129 This clause was inserted to explicitly protect voluntary early retirement programs,130 including the window programs thought to be threatened by the strict application of the cost-justification rule.
Most employers provide enhanced benefits or supplements for limited periods of time to encourage employees to elect early retirement — so-called “windows of opportunity.” Early retirement supplements are frequently offered as part of defined benefit plans, and these supplements differ from temporary “early retirement subsidies.” OWBPA purposefully avoids adding any new textual guidance to the ADEA regarding window or “sweetener” programs of this type, choosing instead to allow the analysis of these programs to continue on a “case-by-case” basis. OWBPA requires the courts to determine whether a voluntary early retirement incentive plan is “consistent with the relevant purpose or purposes of [the ADEA].”

131. Act Hearing, supra note 47, at 200 (statement of Fred Rumack on behalf of the American Assoc. of Private Pension and Welfare Plans). Employees may retire permanently, although “temporary” retirement for a limited period of time may be an available option.

132. Id. at 201. These payments often take the form of pension supplements. Sometimes Social Security bridge payments are also used in this manner. See infra Part I.E of this Comment. Congress sees these payments as having the “primary purpose and primary effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension.” S. REP. No. 263, 101st Cong., 1st Sess. 24 (1990), reprinted in 1990 U.S.C.C.A.N. 1530.

133. Such subsidies constructively increase the age of an employee who is retiring early to the company's normal retirement age. For example, a fifty-five year old worker who wishes to retire when her plan's normal retirement age is sixty-five would, under usual circumstances, receive an actuarially reduced pension to reflect the fact that the employee would be receiving payments earlier and over a longer period of time than an employee with the same number of years on the job who retired at age sixty-five. In other words, her contribution would be spread out over ten more years. Some programs either reduce or eliminate this actuarial reduction in order to promote early retirement. Act Hearing, supra note 47, at 204-05. Under a strict application of the cost-justification rule, many of these plans would not be permissible because younger employees would require a greater amount of subsidization to approach or equal their full retirement payment.


Some commentators argue that early retirement incentives are inherently coercive devices, the use of which directly conflicts with the purposes of the ADEA. See, e.g., Paul, supra note 15, at 1050:

The reality is that a job or financial security is the gun which employers have been pointing at older employees. The options given to an older employee in too many situations resemble a sailor walking the plank. Either the sailor jumps into the ocean and hopes for the best or he returns to the ship only to be stabbed. The older employees in [retirement incentive programs] are consistently faced with these two options.

While this characterization of the economic choices that face older employees in a voluntary early retirement incentive unfortunately may be valid in many cases, Paul overstates the singleness of the antidiscriminatory intent underlying the ADEA. While Congress' opposition to age discrimination is clearly reflected in the evolving legislative history of the ADEA, see supra Parts I.A and II.B. of this Comment, Congress' concern for promoting the hiring of older workers by allowing
ognized, this language unequivocally places the courts back into the pre-
Betts legal framework under which such incentives were judged accord-
ing to both their voluntariness,\textsuperscript{136} and the legitimacy of the differentia-
tions made between participants in terms of eligibility and/or level of
participation.

Under the ADEA, claims that early retirement was involuntary turn
on a factually-based, reasonable person analysis of whether the employ-
ees to whom a retirement incentive was offered had no choice but to
accept the incentive.\textsuperscript{137} Prior to OWBPA, the circuit courts applied
slightly different tests to determine the legality of these early retirement

employers flexibility when they are faced with age-related costs is also strongly expressed in the
§ 4(f)(2) exemption and its legislative history. \textit{See supra} notes 82-88 and accompanying text. The
characterization of early retirement incentives as discriminatory within the context of the cost-justifi-
cation rule is entirely fair. However, truly voluntary early retirement incentives are not antithetical
to the overall intent of the ADEA.

\textsuperscript{136} The Senate Report explaining OWBPA commented:

Because early retirement incentive plans, by definition, target older workers, the circum-
stances surrounding their implementation must be carefully analyzed to ensure that they
provide older workers with an uncoerced and free choice. Employees eligible . . . must
be given sufficient time to consider their options [and] . . . complete and accurate infor-
mation regarding the benefits available under the plan.


\textsuperscript{137} These cases are most urgent during layoffs and plant closings when threats of sudden lay-
off, intimidation or subtle coercion can be used to influence older workers to retire. \textit{See Paolillo v.
Dresser Indus., Inc.,} 821 F.2d 81, 84 (2d Cir. 1987). The analysis utilized in these cases is akin to
the reasonable person test of constructive discharge cases. \textit{See generally} Paul, \textit{supra} note 15, \textit{passim}
( viewing early retirement incentives as inherently coercive). Courts have applied constructive dis-
charge/involuntary retirement analysis to those plaintiffs stranded
by the prospective application of
(BNA) 191, 205 (3d Cir. Feb. 19, 1992) (complaint filed by three plaintiffs who utilized early retire-
ment incentives was dismissed when the court found that they had voluntarily retired and failed to
"make out a claim of constructive discharge"); Finnegan \textit{v. Trans World Airlines, Inc.,} 767 F. Supp.
867, 877 n.12 (N.D. Ill. 1991).

To the extent ascertainable, OWBPA now follows the Equal Opportunity in Employment Com-
mision's position on window programs. The EEOC's regulations prohibit window programs be-
cause they offer more incentives to younger employees than to older employees. \textit{See 29 C.F.R.
§ 1625.10(d) (1991) (requiring a cost justification to avoid being deemed a subterfuge within the
meaning of § 4(f)(2)).} However, the EEOC has recognized that businesses and employees may ben-
efit under a well-designed early retirement incentive program which gives enough incentive to em-
ployees so as not to distort their economic calculation of whether to retire, and which provides
employers the economic benefit of a relatively painless reduction in the workforce. The Equal Em-
ployment Opportunity Commission views an unequal provision of incentive payments as permissible
so long as the plan is truly voluntary and the benefit differential is based on an assessment of increasing
Cost or declining benefit to the employer in providing the incentive across the board. \textit{See EEOC's
Amicus Curiae Memorandum,} Cipriano \textit{v. Board of Educ.,} 700 F. Supp. 1199 (W.D.N.Y. 1988),
ing, supra} note 47, at 97.
incentives. To resolve this divergence, section 103(1) of OWBPA firmly places the burden of proving voluntariness on the employer.

Section 4(f)(2) has traditionally played an important role in the analysis of voluntary incentive plans that are challenged by employees who alleged that they were treated differently than others, by having been excluded from an offered program or offered a lesser incentive to retire. Such problems arise when employers offer early retirement incentives to younger employers while offering no or lesser incentives to employees who are close to retirement age, based on the employer’s expectation that the older employees will be retiring soon and do not need additional incentives to retire. Unfortunately, the case law addressing these issues is a circular recitation of the voluntariness rationale and the cost-justification rule, which provides very little guidance for litigants.

138. The Second Circuit applied a “voluntariness” test to determine whether an incentive was legal under the ADEA. See Paolillo v. Dresser, 821 F.2d 81, 84 (2d Cir. 1987). This case is sometimes referred to as Paolillo II because the Second Circuit withdrew an earlier opinion decided under the McDonnell-Douglas standard for Title VII forced retirement cases. In the Paolillo case, three employees were given less than three days to decide whether to take an early retirement plan. See Paolillo I, 43 Fair Empl. Prac. Cas. (BNA) 338, withdrawn, 821 F.2d 81. The court concluded that “the shortness of time given to appellants to make a decision [and] . . . the apparent complexity of the options open to them certainly raised a material issue as to whether [the plaintiffs] were given sufficient time to make a considered choice.” Paolillo II, 821 F.2d at 84 (noting that in its withdrawn opinion the court also took cognizance of the brevity of the time period plaintiffs had to decide on taking the program.). For a general discussion of the withdrawn Paolillo I opinion, see Paul, supra note 15, at 1031-36 (praising Paolillo I as an accurate rendition of the legislative intent of the ADEA).

The Seventh Circuit required plaintiffs in early retirement cases to satisfy the more difficult standards applied in constructive discharge cases. See Henn v. National Geographic Soc’y, 819 F.2d 824, 826 (7th Cir. 1987). Plaintiffs bore the burden of proving that (1) the employer made his or her working conditions so intolerable that involuntary resignation was effectively forced upon the employee, and (2) that the employee would have been discharged in violation of the ADEA if he or she had not already retired. Id. at 829-30. While rejecting the particular plaintiffs’ claim, the Henn court also cited voluntariness as a relevant factor to consider. Id. at 828-29.

139. In the flush language below, the new § 4(f)(2)(B) of the ADEA states that the employer “shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Chapter.” 29 U.S.C.A. § 623(f)(2) (West Supp. 1991). Nothing in the Act implies that constructive discharge cases will no longer occur. Various types of harassment could still occur which could make a sham of the seemingly voluntary acceptance of a well-written, well-timed proposal. However, by placing the burden on the defendant to prove compliance in the simple early retirement case, OWBPA prevents the constructive discharge rationale from forcing plaintiffs to bear the burden of proof in ADEA early retirement cases. The Equal Employment Opportunity Commission itself acknowledged that this was the implication of the Henn line of cases. See MINORITY REPORT of S. REP. No. 263, 101st Cong., 1st Sess. 53 (1990), reprinted in 1990 U.S.C.C.A.N. 1558. “Since . . . the determination whether the retirements were voluntary must be resolved within the context of Section 4(a)(1), it follows inexorably that the plaintiffs bear the ultimate burden of persuasion.” Id. (citing the amicus curiae brief of the EEOC in Paolillo I).

140. 2 EGLIT, supra note 38, at § 16.64.
and courts attempting to determine the legality of early retirement incentives.141

Cases involving differential inclusion have injected further uncertainty into analysis under the section 4(f)(2) exemption by relying on a determination of the employer's purposes behind offering a greater incentive to younger employees. For example, in Britt v. E.I. DuPont de Nemours & Co.,142 an enhanced severance program was offered to employees who were pension-eligible and employees who were not. The former were required to defer their pension plans, while the latter were not. The court reasoned that no discrimination had occurred because severance is merely a substitute for income, and both pension-eligible and ineligible employees merely deferred their pensions in order to receive "wages" in the present.143 This test is applied by comparing the purposes of the differential treatment involved with the purposes of the ADEA.144 This highly subjective analysis has allowed courts to uphold plans which resulted in large differentials between younger and older employees.145

141. Some courts have upheld a retirement incentive under the "voluntariness" rule, where participation was "strictly optional with the employees." See, e.g., Mason v. Lister, 562 F.2d 343, 346 (5th Cir. 1978); see also EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 369 (E.D. Pa. 1986), aff'd, 869 F.2d 696 (3d Cir.), vacated, 493 U.S. 801 (1989) (vacated in light of Public Emp. Ret. Sys. v. Betts, 492 U.S. 158 (1989)), and on remand, 925 F.2d 619 (3d Cir. 1991). For example, the case of Patterson v. Independent Sch. Dist. No. 709, 742 F.2d 465 (8th Cir. 1984), involved a plan which offered a $10,000 lump sum to teachers at age 55 and a lump sum reduced by $500 for each year a teacher was older than age fifty-five for each year thereafter. The plaintiff, who was 67 when she retired, was ineligible for the retirement plan because of her age. In upholding this plan the court cited to Mason v. Lister, 562 F.2d at 345.

Other courts have held retirement incentives to be within the realm of the "legitimate business purpose" that courts substitute for the cost-justification rule. See Cipriano v. Board of Educ., 785 F.2d 51, 58-59 (2d Cir. 1986) (finding that the retirement incentive was within the realm of "legitimate business purpose"). See also cases cited supra note 95.

142. 768 F.2d 593 (4th Cir. 1985).

143. Id. at 594-95.

144. See Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1429 (7th Cir. 1986) (plan where younger workers benefitted more than workers over age seventy-five because equal monthly payments were made to each retired worker until the sum of age and years worked reached seventy-five, served the "ADEA purpose" of providing financial support to families of workers). See Karlen v. City Colleges, 837 F.2d 314 (7th Cir.), cert. denied sub nom. Cook County College Teachers Union Local 1600 v. Trustees of Community College, 486 U.S. 1044 (1988). In Karlen, a voluntary retirement program offered lump sum payments for unused sick leave which decreased as the age of the recipient rose. Id. at 316. Workers under sixty-five received payments equal to 80% of their accumulated sick leave. Those over 65 received only 45%. The court stated that the Board showed a legitimate business reason because it needed to offer greater incentives to younger employees to get them to retire. Id. at 323. The fact that being released from salary obligations of the younger group of employees saved the City $818,074 as opposed to the $193,256 netted through offering the same incentive to older workers illustrated the wisdom of the program. Id. at 324. In a real sense, the ends justified the means. The court further reasoned that the differential...
While nothing in OWBPA prohibits the type of distorted mathematics utilized by these cases, the ADEA's differentiation between the purposes of severance pay and pension benefits makes it unlikely that courts will be able to rely on this "wage substitute" rationale in severance-pension integration cases in the future.\(^{146}\)

b. Pension Supplements. OWBPA allows employers to utilize two common retirement incentives — supplemental unemployment compensation benefit payments (SUBs) and social security bridge payments. SUBs are payments made to employees who are eligible for retirement was a legitimate cost-adjustment because it reflected the fact that older employees had accumulated more sick leave. \(^{146}\) Id. at 325-27.

146. However, this "wage substitute" rationale need not be viewed only as a weapon available to the employer. As suggested by Niall Paul, this argument may provide relief to plaintiffs who will be subject to the Betts decision, prior to the effective date of OWBPA. See Paul, supra note 15, at 1643-45. The argument flows from the following dictum in Betts:

[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 based discrimination in wages, as an activity forbidden by § 4(a)(1). Betts, 492 U.S. 180.

If a plaintiff can show that younger employees are being given benefits in lieu of their normal salary, and that their older counterparts receive lesser amounts of these benefits, a court may hold that the older employees receiving a lesser amount of benefits are in fact receiving a reduced amount of wages, in violation of the ADEA. At least one court has viewed an otherwise "fringe" benefit as a form of wages, and not merely as a fringe benefit. See Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593, 595 (4th Cir. 1985) (viewing severance pay provided under a voluntary workforce reduction as a wage substitute and not a fringe benefit); see also Paul, supra note 15, at 1046. This argument makes economic sense in that fringe benefits are often viewed as substitutes for wages (by both employers and employees). See supra note 47.

One court has utilized this line of logic to prevent a harsh application of the Betts standard. In Bell v. Trustees of Purdue Univ., 761 F. Supp. 1360 (N.D. Ind. 1991), Purdue University's defined contribution pension plan ceased to contribute to a worker's pension at the end of the fiscal year in which that employee reached the normal retirement age of sixty-five. \(^{146}\) Id. at 1362. The Bell plaintiffs alleged that employer contributions to pension funds were "in the nature of basic compensation, [and] that § 4(f)(2) does not even apply." \(^{146}\) Id. at 1363. The court denied defendant's motion for summary judgment because the court could not "conclude as a matter of law that a reasonable jury could not infer from [the] facts that Purdue [utiliz[ed] its pension plan as a subterfuge for age-based discrimination in wages." \(^{146}\) Id. at 1367 (citing Betts, 492 U.S. at 180).

However, since the enactment of OWBPA, other courts have strictly applied the Betts Court's interpretation of § 4(f)(2), which leaves the burden of proof of subterfuge on the plaintiff. See Finnegan v. Trans World Airlines, Inc., 767 F. Supp. 857, 874 (N.D. Ill. 1991) (limitation on airline employees' accrued vacation time held outside the scope of § 4(f)(2) analysis because the claim alleged disparate impact without evidence of intent to subvert the ADEA); Darchuk v. Kellwood Co., 56 Fair. Empl. Prac. Cas. (BNA) 1579 (E.D. Mo. Sept. 18, 1991) (exclusion from benefit increases held not to violate § 4(f)(2) as a "facial subterfuge" in the absence of evidence of intent to evade the ADEA). These courts, finding plaintiffs unable to bear the burden of proof of subterfuge, avoided further analysis of the nature of the relationship between fringe benefits and wages.
prior to reaching their employer's normal retirement age, and who are thereby eligible to receive proportionately reduced retirement benefits.\textsuperscript{147} Employers often provide SUBs to close the gap between the amount of reduced pension pay an early retirement-eligible employee would receive and the full pension amount the employee will receive upon reaching the employer's normal retirement age.\textsuperscript{148} OWBPA section 103(2), which adds new section 4(l)(1)(B) to the ADEA, allows an employer to offer SUBs which are provided for as part of a "defined benefit plan" offered by that employer.\textsuperscript{149} Congress inserted this authorization of SUBs to explicitly provide a safe harbor for these payments, which would otherwise be invalidated by the cost-justification rule.\textsuperscript{150}

Similarly, OWBPA section 103(2), which adds new section 4(l)(1)(B)(ii) to the ADEA, expressly permits the use of social security bridge payments — pension supplements that are calculated to supplement an employee's social security benefits rather than his or her pension payments,\textsuperscript{151} so long as the total of the social security and supplement

\begin{footnotes}
\item[149] OWBPA § 103(2), codified at 29 U.S.C.A. § 623(l)(1)(B)(i) (West Supp. 1991). The requirement of “permanence” stems from this provision’s incorporation of ERISA’s definition of a “defined benefit plan.” \textit{See} 29 U.S.C. § 1002(35) (1988). While Congress intended ADEA § 4(l)(1)(B) to allow these supplements as well as Social Security bridge payments on a permanent basis, OWBPA legislative history suggests that an employer could argue that the temporary use of these benefits is legal under the general authorization of voluntary retirement incentives of ADEA § 4(l)(2)(B): If one of the programs described in section 4(l)(1) is offered on a temporary basis, it may be lawful under section 4(l)(2)(B) if the employer proves that such a program is voluntary and furthers the purposes of the Act. No inference as to the status of such temporary programs under section 4(l)(2)(B) is to be drawn from the existence of section 4(l).
\item[151] OWBPA § 103(2) (codified at 29 U.S.C.A. § 623(l)(1)(B)(ii) (West Supp. 1991)). S. REP. No. 263, 101st Cong., 1st Sess. 21 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 1526; Walter W. Miller, the legislative history of OWBPA implies that employers are not required to treat SUBs as an “all or nothing” proposition. \textit{See id.} (describing defined benefit plans which “forego the imposition of part or all of the permissible actuarial reduction” without criticism). Without OWBPA’s approval, SUBs would violate the cost-justification rule, because, for example, a fifty-eight year old employee would require greater supplemental payments to achieve the equivalent of full retirement benefits than would a sixty year old employee. Because the older employee’s early retirement payments would be subjected to a smaller actuarial reduction, her actual retirement payments would be larger than the younger employee’s, thereby requiring a smaller employer-paid subsidy. \textit{Cf. supra} note 133 and accompanying text.
payments does not exceed the amount the employee would receive at age sixty-two.\(^\text{152}\) Social security supplements violate the cost-justification rule because an employer will pay more, for example, to a fifty-nine year old than a sixty year old in order to ensure that each receives the equivalent of his or her full social security benefits. Without an explicit exception protecting them from the scope of the cost-justification rule, bridge payments would not qualify for the section 4(f)(2) exemption.

3. Integration of Severance Pay and Retirement-related Benefits. In an effort to extend the maximum level of benefits to the largest number of workers, employers design plans which offset the payment of one type of benefit against an entitlement payment. The variety and complexity of benefit packages have increased over the last twenty years, as employers developed separate pieces of benefits packages designed to meet the demands of various employees whose needs were inadequately covered under preexisting compensation scales.\(^\text{153}\) Benefit integration can occur as a permanent feature of a company's pension plan or as a sudden cost-shaving tactic in the face of impending work-force reduc-
tions. However, critics warn that younger employees gain more than their older coworkers when non-retirement benefits are integrated with pensions.\textsuperscript{154} Section 103(2) of OWBPA, adding new ADEA section 4(l)(2)(A), defines when the integration of various benefits with pensions is acceptable, by emphasizing that the integration of the enumerated benefits under the section must be based on a "contingent event unrelated to age."\textsuperscript{155}

\textbf{a. Retiree Health Benefits.} The new ADEA section 4(l)(2)(A) allows severance pay to be reduced by the amount of retiree health benefits and/or pension benefits for which an employee is eligible following a "contingent event unrelated to age."\textsuperscript{156} The events unrelated to age contemplated by the Act are those which trigger the payment of severance pay.

\begin{quote}
Assume the plant is about to lay off all of its employees at a particular plant and that the company has a normal retirement age of 65, at which time an employee's retirement benefits are one percent of the employee's monthly salary times the number of years of service. Assume that layoffs result in a lump sum severance payment of weekly pay multiplied by the number of years of service. A 45 year-old employee (employee A) with 20 years of service will fare better in this layoff than his 65-year-old counterpart (employee B) with equal experience.

Employee A is entitled to a $10,000 lump sum payment immediately upon the layoff. ($500 salary x 20 years). At his retirement at age 65, A will also be entitled to $400/month (1% x $2,000 in average monthly salary).

Employee B will receive no severance pay at layoff if complete integration is allowed. He receives only a $400 monthly retirement payment. The only difference between these employees is their age. See \textit{Act Hearing, supra} note 47, at 301 (testimony of Christopher Mackaronis). However, this is the most stark and simple example of "complete integration." Many companies allow employees to become eligible for retirement at earlier ages such as forty and forty five at rates that are actuarially reduced from the firms "normal retirement" pay-scale. See \textit{supra} Part II.E.2. Moreover, employers could choose to offset severance pay by only a percentage of an employee's authorized retirement payments.
\end{quote}

\textsuperscript{154} See Betts Hearing, supra note 6, at 154-55 (testimony of Christopher Mackaronis). This argument is best illustrated by simple example.

\textsuperscript{155} See supra note 47, at 301 (testimony of Christopher Mackaronis).

\textsuperscript{156} The Act reads: (2)(A) It shall not be a violation [of the ADEA] solely because following a contingent event unrelated to age —

\begin{quote}
\begin{enumerate}
\item the value of any retiree health benefits received by an individual eligible for an immediate pension;
\item the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension;
\item are deducted from severance pay made available as a result of the contingent event unrelated to age.
\end{enumerate}
\end{quote}

pay, such as plant closings or layoffs.\textsuperscript{157}

Prior to the Betts decision, the legal status of severance pay integration was uncertain.\textsuperscript{158} Courts that had struck down the integration of severance pay with pension plans based their decisions on the differing purposes of pension benefits and severance pay. For example, the court in EEOC \textit{v. Westinghouse Electric Corp.},\textsuperscript{159} (Westinghouse II) reasoned that while severance pay was designed as a short term mechanism to enable out-of-work employees to find new employment, pensions were designed to provide for long term income security. Therefore, these benefits could not be considered together as part of a bona fide plan, and their integration violated the ADEA.\textsuperscript{160} Other courts held specific severance integration plans to be discriminatory based on the specific manner in which they were negotiated,\textsuperscript{161} leaving unresolved the merits of severance integration generally. However, other courts have found integrated severance packages to be acceptable under ERISA and/or nonviolative of the ADEA.\textsuperscript{162}


\textsuperscript{158} \textit{See} Reinhardt, \textit{supra} note 83, at 1082 (remarking that such integration schemes could be viewed as legal to the extent to which they are bona fide employee benefit plans).


\textsuperscript{161} \textit{See e.g.}, EEOC \textit{v. Borden's, Inc.}, 724 F.2d 1390 (9th Cir. 1984) (severance payment program not integrated with pension plan because severance pay plan was negotiated only two months prior to the plant closing and was contained in letters separate from both the collective bargaining agreement and the documents describing the company's pension, retirement and insurance plans); EEOC \textit{v. Babcock & Wilcox Co.}, 43 Fair Empl. Prac. Cas. (BNA) 736 (E.D.N.C. 1987).

\textsuperscript{162} Both layoff pay (i.e. separation pay calculated at a different rate than normal discharge severance pay) and severance pay have been held by various Courts to be "welfare benefit plans" under ERISA. \textit{See e.g.}, McClendon \textit{v. Continental Group, Inc.}, 602 F. Supp. 1492, 1499 (D.N.J. 1985); Mamula \textit{v. Satralloy, Inc.}, 578 F. Supp. 563, 566 (S.D. Ohio 1983); EEOC \textit{v. Westinghouse Elec. Corp.}, 577 F. Supp. 1029, 1034 (D.N.J. 1982) (layoff income and pension benefit plan is a "welfare plan" within the terms of ERISA). On the status of severance pay under ERISA, see, \textit{e.g.}, Gilbert \textit{v. Burlington Indus.}, 765 F.2d 320, 325 (2d Cir. 1985), \textit{aff'd}, 477 U.S. 901 (1986); Scott \textit{v. Gulf Oil Corp.}, 754 F.2d 1499, 1502-04 (9th Cir. 1985).

ERISA cases have classified severance pay as a "welfare" benefit under ERISA regulations or under the statute itself. \textit{See e.g.}, Gilbert, 765 F.2d at 325; Jung \textit{v. FMC Corp.}, 755 F.2d 708, 710 n.2 (9th Cir. 1985) (severance pay is an unemployment benefit within § 1002(1)(A) or under ERISA regulations); Blau \textit{v. Del Monte Corp.}, 748 F.2d 1348, 1352 (9th Cir. 1984) (regulation 29 C.F.R. § 2510.3-1(1)(a)(3) (1986) "includes[s] within the definition of 'welfare plan' those plans which provide holiday and severance benefits"); \textit{see also} Britt \textit{v. E.I. DuPont de Nemours & Co.}, 768 F.2d 593 (4th Cir. 1985) (rejecting challenge to provision of a severance pay plan which limited severance benefits to employees who had deferred their pension eligibility); Parker \textit{v. FMNA}, 741 F. 2d 975
Section 103(2) of OWBPA, which adds ADEA § 4(l)(2), allows integration of severance pay with health benefits and pension payments, but only for persons who became eligible for pension payments because of an impending layoff.\textsuperscript{163} In passing OWBPA, Congress recognized that severance payments and pension benefits were separate, unrelated benefits,\textsuperscript{164} yet legislators were sensitive to the needs of employers to flexibly allocate their scarce resources at the time of a plant closing or layoff period.\textsuperscript{165} The new ADEA section 4(l)(2) represents a compromise among the policy positions of the EEOC, advocates for older persons, and industry. OWBPA allows severance pay to be integrated with retiree health benefits, and consequently one admittedly illegal pre-Betts practice is now permitted under the ADEA.\textsuperscript{166}

\textsuperscript{163} OWBPA § 103(2) (codified at 29 U.S.C.A. § 623(1)(2) (West Supp. 1991)). The "contingent event" requirement will prevent companies from first firing an individual for an allegedly non-discriminatory reason, and then reducing his pension by a severance offset.

\textsuperscript{165} The Senate Labor and Human Resources Committee stated that OWBPA did not allow benefits to be coordinated with severance payments:

\begin{itemize}
\item First, pension benefits are age-related . . . . Accordingly, it is per se age discrimination to use pension eligibility as a basis for denying an older worker any other benefit. Second, pension benefits are special under federal law. Unlike severance (or any other benefits), pensions are protected through statutory vesting provisions; they are guaranteed [through ERISA's reporting, financing and fiduciary obligations] . . . . It would make little sense for Congress to accord special status to pension eligibility under ERISA and then allow the status to be used under the ADEA as a basis for eliminating other employee benefits.
\end{itemize}


In response to this type of argument, industry representatives bolster their policy argument for severance integration by highlighting the hardship of young workers with family obligations who will not have a guaranteed stream of income after unemployment insurance runs out. \textit{Id.} at 22, 1990 U.S.C.C.A.N. 1527. Thus, their need for a lump sum payment spread out over time is said to be greater.


\textsuperscript{166} OWBPA § 103(2) (codified at 29 U.S.C.A. § 623(l)(2) (West Supp. 1991)). The amount of health benefit integration depends on each individual employee's retirement status. The provisions are aimed at plans that provide retiree health benefits in addition to regular pensions. If an employee is eligible for retirement as of the layoff event, his or her severance pay may be reduced by the actuarially-computed value of any retiree health benefits he or she is allowed. For those employees
It is uncertain whether OWBPA will provide adequate protection for older workers once employers begin to test the limits of the integration of health benefits and pensions now allowed under the ADEA. While OWBPA inserts protections into the ADEA to insure that employers do not use meager health benefits to offset severance pay\footnote{OWBPA provides that any plan which requires actuarially reduced pensions to be taken can offset severance pay with retiree health benefits, only after the retiree health benefits are also proportionally reduced, for the purposes of calculating the severance effects. \textit{Id.} at 1530.} and to assure uniform valuation of health benefits for severance reduction, there is no guarantee that these protections will prevent pensions and severance arrangements from being drastically altered through integration, thereby providing older laid-off employees with inadequate financial protection. While some evidence suggests that employers may be inflexible in their benefit practices and therefore unlikely to respond to any slight loosening of present law. However, it is possible that employers will attempt to lower the costs associated with workforce reductions by either reallocating severance benefits from non-pension eligible workers who are not yet eligible for their full pension benefit, but are eligible to take an unreduced total pension level because of the layoff event, the employer may, pursuant to a plan or agreement, reduce the severance payment by the difference between the actuarially reduced pension and the full lay-off pension. This payment may be reduced to the extent the difference is made up by special, layoff retiree health benefits. \textit{Id.} at 1529. OWBPA provides that any plan which requires actuarially reduced pensions to be taken can offset severance pay with retiree health benefits, only after the retiree health benefits are also proportionally reduced, for the purposes of calculating the severance effects. \textit{Id.} at 1530.

\footnote{167. OWBPA \textsection 103(2) (codified at 29 U.S.C.A. \textsection 623(i)(2)(D)(i) (West Supp. 1991)), which applies to workers under the age of 65, requires that health plans provide at least as much coverage as Medicare (Title XVIII of the Social Security Act, 42 U.S.C. 1395 et seq. (1988)). \textit{S. REP. No. 263, 101st Cong., 1st Sess. 25 (1990), reprinted in} 1990 U.S.C.C.A.N. 1530. OWBPA \textsection 103(2) (codified at 29 U.S.C.A. \textsection 623(i)(2)(D)(ii) (West Supp. 1991)) requires that the health benefit given to employees over the age 65 be equivalent to at least one fourth the coverage of Medicare. \textit{Id.} This difference accounts for the fact that persons over the age of 65 become eligible for Medicare.}

\footnote{168. OWBPA \textsection 103(2) (codified at 29 U.S.C.A. \textsection 623(i)(2)(E) (West Supp. 1991)) provides a valuation scale for retiree health benefits providing a higher value for those benefits which are of unlimited duration. See \textit{Pub. L. No. 101-433, \textsection 103(2)(E)(i),(ii), 104 Stat. 978, 980 (1990).} These figures were taken from a medical cost survey conducted by the General Accounting Office and are to be adjusted annually according to the Medical Component Section of the Consumer Price Index. \textit{S. REP. No. 263, 101st Cong., 1st Sess. 27 (1990), reprinted in} 1990 U.S.C.C.A.N. 1531.}

\footnote{169. \textit{Act Hearing, supra} note 47, at 344 (statement of Douglas S. McDowell, General Counsel, Equal Employment Advisory Council (representing an association of employers and trade associations)). The most persuasive argument to that effect is that employers will find benefit reductions to be economically detrimental as they become increasingly reliant on older workers. The Department of Labor has recently reported that "[w]hile the declining number of workers means that companies that can attract and retain productive older workers will have to take steps to improve the dynamism of an aging workforce, it also means that companies will most successfully meet the challenge of a tight market for skilled labor." \textit{U.S. DEP’T OF LABOR, OPPORTUNITY 2000} at 147 (1988). An assumption of inflexibility in the offering of benefits is supported by the fact that employers have not sought to reduce long-term disability benefits because they are not integratable with pension benefits. \textit{Cf. Act Hearing, supra} note 47, at 526 (responses of Kevin McCarthy, Vice-President of UNUM (an association of insurance companies, the leading provider of disability benefits in the nation)).}
to pension-eligible employees\textsuperscript{170} or by increasing the proportion of health benefits to pension benefits provided by their retirement plans.\textsuperscript{171}

b. Pension Supplements. Subject to the “contingent event” requirement, as discussed above,\textsuperscript{172} OWBPA section 103(3), which adds new ADEA section 4(l)(2)(C), allows employers to offset SUBs against severance pay.\textsuperscript{173} Without this provision, SUB integration could be barred by OWBPA’s prohibition of severance-pension integration, because SUBs are necessarily calculated with reference to an employee’s retirement payments, and are explicitly designed to supplement reduced pension payments for early retirees. SUBs could be viewed as pension payments, and the integration of SUBs and severance pay would therefore be prohibited by OWBPA. However, Congress remedied this prob-

\textsuperscript{170} This possible manipulation of benefit packages under severance integration of OWBPA was sharply criticized by Senator Grassley who saw it as “tantamount to a mandatory retirement policy.” 136 CONG. REC. S13,608 (daily ed. Sept. 10, 1990) (remarks of Sen. Grassley).

\textsuperscript{171} Although the bargaining process (collective or individual) preceding the implementation of such insurance-skewed plans may serve to limit the scope of these benefit shifts, it must be remembered that bargaining employees are, to an extent, at the mercy of the labor market. All employer-employee negotiations involve trade-offs, and employees have access to mechanisms that can moderate the potentially harsh consequences of unchecked employer-employee negotiations. Collectively bargained agreements by a union may be sought to be invalidated by employees who feel their union is failing to represent their interests. Actions can be brought under the ADEA since it covers the behavior of union negotiators. See 29 U.S.C. § 623(b) (1988) (making age discrimination by an employment agency unlawful). Collusive bargaining may violate a union’s duty of fair representation. See Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (Railway Labor Act required labor union to represent all employees in craft without discrimination because of race); see also Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944) (“By its selection as bargaining representative, [the union] has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.”); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 699-701 (1976) (a union’s violation of its duty of fair representation may violate NLRA §§ 8(b)(1), (2), (3)). However, nonunion contracts may be under less protection. Courts have invalidated employee benefit plans by incorporating contract principles to employee benefit plans. See EEOC v. Great At. & Pac. Tea Co., 618 F. Supp. 115, 122 (N.D. Ohio 1985) (suggesting that when bargaining power is unfairly one-sided, the resulting plan is not “bona fide”).

\textsuperscript{172} See supra notes 155-157 and accompanying text.

\textsuperscript{173} This definitional section effectively circumnavigates OWBPA’s pension-severance integration prohibition by providing:

(C) For purposes of [the severance integration exception], severance pay shall include that portion of supplemental unemployment compensation benefits . . . that —

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the employee becomes eligible for an immediate unreduced pension.

lem by treating SUBs as a type of severance pay.\footnote{174} For the purposes of section 4(l)(2)(C), Congress deems these payments to be severance payments, not pension benefits, in order to avoid a conflict between the philosophy of this section and its recognition that pension and severance benefits are not fungible. Therefore, the provision which specifically authorizes pension supplement-severance integration, new ADEA section 4(l)(2)(A)(ii), does not technically contradict OWBPA's general approach to severance integration.\footnote{175}

In sum, OWBPA reaffirmed the validity of the cost-justification rule in § 4(f)(2) analysis. Thereby OWBPA clarified which voluntary retirement incentives are legal under the ADEA — those in which the size of the incentive offered and the manner of its presentation indicate that an individual has free and uncoerced choice to accept it. However, OWBPA does not offer any guidance to individuals who feel they are unjustly excluded from full or partial participation in otherwise valid incentive plans. Such individuals must rely on the morass of pre-OWBPA case-law. OWBPA further compromised the cost-justification rule by expressly permitting a form of severance-retirement benefit integration. Thus, by adding these provisions to the ADEA, OWBPA limits its own impact, renders the Act a mere correction of the Betts decision, and precludes itself from being a step forward in age discrimination law.

\footnote{174. Because these payments have “the primary purpose and primary effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension” they are interpreted by Congress to be a form of severance pay. S. Rep. No. 263, 101st Cong., 1st Sess. 25 (1990), reprinted in 1990 U.S.C.C.A.N. 1530.}

F. Further Definition of the Scope of the ADEA

1. Exemptions/Exceptions for Government Employees. Recognizing that OWBPA's amendments to the ADEA may have a severe financial impact on state governments, section 105(c)(1) of OWBPA gave state governments two years to implement the new provisions, and permitted state governments to continue practices which would otherwise be prohibited by the ADEA, if state employees so elect. Federal employees were exempted from OWBPA out of fear that the costs of compliance would place too great a strain on the Federal Treasury during deficit-related fiscal crises.

176. The minority report on OWBPA accused the House Labor-Management Subcommittee of failing "to recognize, let alone analyze" the effect OWBPA will have on the states. S. Rep. No. 263, 101st Cong., 1st Sess. 36 (1990), reprinted in 1990 U.S.C.C.A.N. 1561. However, the various states lobbied their plight. For example, one senator estimated that it would cost Maine between fifty and one-hundred million dollars over a twenty year period. 136 Cong. Rec. S13,604-05 (daily ed. Sept. 24, 1990) (remarks of Sen. Mitchell). Congress was also cognizant of the ripple effect state costs would have on the federal treasury as states asked for federal monies to help meet their expenses. See id. at S13,248 (daily ed. Sept. 17, 1990) (remarks of Sen. Hatch).

177. OWBPA § 105(c) provides:

(c) STATES AND THEIR POLITICAL SUBDIVISIONS. —

(1)(B) ... that maintained an employee benefit plan at any time between June 23, 1989 [the date of the Betts decision] and the date ... of [OWBPA] ... that would be superseded ... by this title, ... this title will not apply until ... 2 years after ... the enactment of this Act.

(2)(A) ... may with regard to disability benefits provided pursuant to such a plan —

(i) following reasonable notice to all employees, implement new disability benefits that satisfy [OWBPA] ...; and

(ii) then offer to each employee covered ... the option to elect such new disability benefits in lieu of existing disability benefits, if ... [reasonable notice is given].

(B) Previous disability benefits. — If the employee does not elect ... the new disability benefits, the employer may continue to cover the employee under previous disability benefits even though such previous benefits do not otherwise satisfy the requirements of [the ADEA].

(C) Abrogation of right to receive benefits. — An election ... shall abrogate any right the electing employee may have had to receive [pre-election] benefits ... OWBPA §§ 105(c)(1)-(c)(2)(C) (codified at 29 U.S.C.A. § 623, Historical Note (West Supp. 1991)). The Secretaries of Labor and the Treasury are also directed to provide States with assistance in identifying and obtaining advice on compliance. Id. at § 105(c)(3).

178. The saga of the federal employees inclusion-exclusion issue is intriguing. Neither the original S.R. 1511 nor H.R. 3200 extended the ADEA's protections to federal employees. Critics charged that it was inconsistent to force the states to do what the federal government could not. 136 Cong. Rec. S13,287 (daily ed. Sept. 18, 1990) (remarks of Sen. Pryor). A version of OWBPA that extended it to the federal government was offered soon thereafter, subjecting the federal government to the same two year compliance deadline as the states. Id. at S13,288 (remarks of Sen. Pryor). Senator Pryor believed that the federal coverage issue was brought up to defeat OWBPA by making its application too costly to be politically palatable. The cost of federal compliance was estimated to be between were $80 million and $114 million. See id. In response, Senator Hatch offered two amendments. The "first degree" Hatch-Kassebaum amendment would apply OWBPA to private or
2. Definition of the Temporal Scope of the ADEA. The final mission of OWBPA was to make clear that employee benefit plans would be subject to the ADEA regardless of when the benefit plans were created.\(^{179}\) Section 103(2) of OWBPA adds section 4(k) to the ADEA, which places all employee benefit plans under the purview of the Act "regardless of the date of [the plans'] adoption."\(^ {180}\) This provision reaffirms Congress' unequivocal rejection of the McMann decision which had exempted plans constructed before the enactment of the ADEA,\(^ {181}\) and overturns the Betts Court's resurrection of that rationale.\(^ {182}\) It must be noted, however, that other provisions of OWBPA sharply reduce the scope of the seemingly sweeping language of ADEA section 4(k).\(^ {183}\)

state employees only if the federal government was in compliance with the ADEA. *See id.* at S13,291 (remarks of Sen. Pryor). The "second degree" amendment merely stated that the federal government would be included within the ADEA. *Id.* One commentator has argued that these amendments, when combined, may have eviscerated OWBPA by mandating federal compliance, which would have been costly, if not impossible to achieve. *See id.* at S13,291-92. Senator Pryor therefore charged that "[u]nder the guise of parity, Senator Hatch create[d] a giant loophole that threaten[ed] to swallow up the substantive protections of this Act." *Id.* Therefore "a vote for the Hatch amendment [was] a vote to kill the bill." *Id.* at S13,292 (remarks of Sen. Pryor). Because the uncertain cost of federal compliance threatened to divide the Senate and defeat the bill, federal employees were exempted from coverage. *See id.* (daily ed. Sept. 24, 1990), at S13,257-58 (remarks of Sen. Metzenbaum, who viewed this and other last minute changes as "very painful concessions"). As a result, OWBPA does not apply to the nearly three million federal employees in the United States and abroad. *See id.* (remarks of Sen. Pryor).


181. *See S. REP. No. 263, 101st Cong., 1st Sess. 29, reprinted in 1990 U.S.C.C.A.N. 1509, 1534.* This Congressional rejection of McMann was intended by the 1978 Amendments to the ADEA, which forbade mandatory retirement. The Conference report stated that "[t]he conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under Section 4(f)(2) by virtue of the fact they antedate the act or these amendments." H.R. CONF. REP. NO. 950, 95TH CONG. 2D SESS. 8 (1978).

182. *See supra* note 95 and accompanying text.

183. Pre-OWBPA plans entered pursuant to pre-OWBPA collective bargaining agreements are exempted, while nonunion firms must instantaneously change their plan structures. *See supra* note 60. Plans which apply to federal employees are not covered. *See supra* note 178. State disability plans are not covered if employees so desire. *See supra* notes 175-176 and accompanying text. In short, the temporal scope of the ADEA is irrelevant to those employers otherwise exempted, leaving only nonunion, private employers to comply with the ADEA. The practical effect of the sweeping guarantee of OWBPA § 103(2), which added § 4(k) to the ADEA (codified at 29 U.S.C. § 623 (West Supp. 1991)), are completely negated for plaintiffs whose cases were pending before the Supreme Court's decision in Betts was rendered and plaintiffs who initiated their lawsuits prior to October 16, 1990. Section 103 of OWBPA was amended on November 5, 1990 to give OWBPA prospective effect only. OWBPA § 103, Pub. L. No. 101-433, § 103, 104 Stat. 978, 981 (Oct. 16, 1990) (as amended by Pub. L. No. 101-521, 104 Stat. 2287 (Nov. 5, 1990)). For these plaintiffs, § 4(f)(2) "analysis remains controlled by Betts's definition of the subterfuge requirement and its placement of the burden of proof on the plaintiffs." Darchuk v. Kellwood Co., 56 Fair Empl. Prac. Cas. (BNA) 1579, 1580 (E.D. Mo. Sept. 18, 1991); accord Gray v. York Newspapers, Inc., 58 Fair Empl. Prac. Cas. (BNA)
CONCLUSION

The Older Workers Benefit Protection Act (OWBPA) had the potential to add force to the general prohibitions of the ADEA. OWBPA, as originally proposed, would have simply inserted the cost-justification rule into the ADEA without qualification. Therefore, early retirement incentives that offered greater benefit to younger workers and integrated packages that linked benefits which had no age-related costs (such as severance pay) to pension payments would have been rendered illegal.\(^{1}\)

As such, OWBPA would have been a broad stroke, overturning the Supreme Court's decision in *Public Employees Retirement System v. Betts* and brushing aside non-lump sum retirement windows and severance integration. However, examination of the numerous exceptions and qualifications added to the bill as originally proposed illustrates that OWBPA emerged from Congress a much weaker law.

The most significant change caused by OWBPA is the prohibition of pension-severance pay integration. However, even this prohibition may be easily sidestepped through future increases in the amount of health benefits pension plans offer in relation to actual pension payments, by the shifting of severance benefits generally to the retirement eligible employees, or through the simple execution of a knowing and voluntary waiver of the ADEA under Title II of OWBPA.\(^{185}\) In every other area addressed by Title I of OWBPA, the Act, at best, slightly reduces the con-

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First, the decision to be applied nonretroactively must establish a new principle of law. . . . Second, [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. . . . Finally, [the court] . . . must weigh the inequity imposed by retroactive application . . . .


One court has dealt with the issue of the fairness of applying the Betts decision retroactively. Despite the marked differences between the Betts Court's reading of § 4(f)(2) and prior precedent and EEOC interpretation, see infra Parts II.B, II.C. of this Comment, courts have held that Betts may be applied retroactively because the decision was foreshadowed by the Supreme Court's earlier decision in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), discussed infra notes 96-99 and accompanying text. See e.g., Bell v. Trustees of Purdue Univ., 761 F. Supp. 1360 (N.D. Ill. 1991). The holding in *Bell* suggests that the standards established in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), will be applied loosely in the employee benefit area. The *Bell* court found that Betts was fair and proper under retroactivity analysis despite the fact that it "reshaped the law under § 4(f)(2) in some significant respects." *Bell*, 761 F. Supp. at 1364.

\(^{184}\) *See supra* Parts II.E.2., II.E.3.

\(^{185}\) *See supra* notes 61.
fusion of pre-existing law. As Senator Jeffords stated, OWBPA is "truly in the nature of a negotiated compromise," and does no more than reinstate the cost-justification rule of the pre-Betts ADEA by providing a strong affirmation of that principle and then whittling it away with exceptions and qualifications.

Plaintiffs and defendants must await future judicial or legislative clarification of important issues, such as what constitutes a legitimate basis on which to exclude an employee from an early retirement incentive program. OWBPA accomplishes its stated primary goal — it overturns the decision of Public Employees Retirement System v. Betts, and reaffirms the existence, if not the strength, of the cost-justification rule in section 4(f)(2) litigation, but it does little more.

187. See supra Part II.E. of this Comment.