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TAKING THE EARLY FLIGHT OUT TO PASTURE: THE SECOND CIRCUIT ADDS A NEW WRINKLE TO VOLUNTARY EARLY RETIREMENT PROGRAMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The decision to accept early retirement may be the single most important decision in an employee's career. Federal age discrimination law requires that this decision be made voluntarily by the employee free from coercive pressure exerted by the employer. The Second Circuit, through its decision in Paolillo v. Dresser Industries, held that adequate time to make this choice is essential to its voluntariness, and its absence may negate a signed acknowledgment attesting to the employee's freedom of choice. Other circuits, particularly the Seventh Circuit, have ignored the Paolillo decision's reasonable time requirement by focusing upon the signed acknowledgment, finding that its existence proves voluntariness as a matter of law, regardless of the time allotted for acceptance. This division brings to light a significant split in circuit authority going to the very meaning of voluntariness under the age discrimination laws, and whether the concept of reasonable time can ever be divorced from its legal definition. The ultimate resolution of this question, assuming that the Supreme Court chooses to address it, will have to strike a delicate balance between an employer's legitimate objectives in structuring its early retirement plan with a short time frame and the equally valid concern of allowing the employee enough time to arrive at a reasoned choice.

IN THE FIRST HALF of 1987, a significant split of authority arose in the circuits when two conflicting court of appeals decisions were handed down concerning voluntary early retirement programs offered solely to employees above a given age.¹ The di-

¹ Compare Paolillo v. Dresser Indus., 821 F.2d 81 (2d Cir.) (holding that employees' acceptance of early retirement offer, and signed acknowledgment that acceptance was freely made, did not preclude subsequent age discrimination claim as a matter of law;
vergence of opinion centered upon the issue of whether these plans raise inferences of age discrimination under the Age Discrimination in Employment Act\(^2\) (ADEA) and whether retired employees can later challenge the validity of a plan that they had previously agreed to accept. An important issue addressed in both cases, and forming the prime concern in one of them, was whether a claim could arise over the adequacy of the time given to the employees to make their decision.\(^3\)

In *Paolillo v. Dresser Industries*,\(^4\) Chief Judge Wilfred Feinberg, writing for the Second Circuit Court of Appeals, held that an employee's decision to accept the offer of early retirement may not be totally voluntary when that employee is given an inordinately short time to make such an important decision.\(^5\) The facts

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\(^3\) The plans at issue were so-called "window plans" in which "the employee has a limited time to opt in . . . with an improved pension benefit or cash payment as an incentive and possibly extended health coverage." Gottuch, *Early Retirement Plans and Worker Choice*, 21 CLEARINGHOUSE REV. 1072, 1073 (1988).

\(^4\) 821 F.2d 81 (2d Cir.), replacing 813 F.2d 583 (2d Cir. 1987).

\(^5\) A 1985 survey of 100 companies performed by the management consulting firm of Towers, Perrin, Forster & Crosby (TPF&C), found that 64 of the 100 respondents offered early retirement plans to their employees.

[While the actual window periods varied, more than 60 percent were found to be in the range of one month to three months: 33 percent said they had a four- to seven-week window period, and 27 percent said they had an eight- to 11-week window period. Seven percent of the TPF&C respondents said their window period was less than four weeks; 13 percent reported having a 12 to 15 week window; 5 percent reported a 16 to 19 week window; 6 percent reported a 20 to 27 week window; 6 percent reported 28 or more weeks; and 3 percent said the win-]
of Paolillo presented the court with an extreme example of a short deadline. It was shown that two of the three employees bringing the suit were given only three days to decide whether to accept the offer; and the third, by her own account, less than one day. The court concluded that the structure of the plan may have placed undue pressure on the employees to accept, and therefore, found that it was error for the district court to hold that an age discrimination claim was precluded as a matter of law. The Second Circuit ultimately held that:

[T]he shortness of time given to appellants to make a decision, the reason for the compressed time period, the length of service of appellants with [the employer] and the apparent complexity of the options open to them certainly raise a material issue as to whether appellants were given sufficient time to make a considered choice.

While the court did not directly address the merits of the employees’ claim, it did conclude that the additional pressure may have caused the employees to make a decision that was not truly voluntary, thus raising factual issues of elemental concern under the ADEA.


6. 821 F.2d at 84-85.
7. Id. at 84.
8. Id. The employer in Paolillo had originally allocated 14 days for employees to decide, but the time was reduced due to administrative problems encountered by the employer in implementing the plan. Id. The employer’s desire to have final decisions made prior to the end of its fiscal year resulted in the shorter time frame actually offered to the employees. Id.

The length of service with the employer for the named plaintiffs in Paolillo were as follows: Lucy Wadsworth, 15 years (less than one day to make decision); Dominic Paolillo, 16 years (three days to decide); Robert Grady, 31 years (three days to decide). Id. at 82-83.
9. Id. at 84.
    It shall be unlawful for an employer—
    (1) 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 []
with 29 U.S.C. § 623(f)(2) (1986)(emphasis added) which provides:
    It shall not be unlawful for an employer, employment agency, or labor organization—
    (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such em-
Judge Frank Easterbrook, writing for the Seventh Circuit Court of Appeals in *Henn v. National Geographic Society* directly opposed *Paolillo.* The court held in *Henn* that older employees who have been given the opportunity to retire early are the beneficiaries of any distinction based upon their age; therefore, they cannot claim to be adversely affected by the design of the offer, since they are members of a favored group under such plans.

The *Henn* court, commenting upon the possibility that lack of time may equal lack of choice, took specific issue with the *Paolillo* court's "unusual definition of 'involuntary.'"

These two conflicting rulings bring to light a significant division of opinion within the federal circuits which the Supreme Court may ultimately be called upon to resolve.

The few courts that have addressed the topic of age discrimi-
nation in early voluntary retirement plans since the Paolillo and Henn decisions uniformly support the Henn decision, while Paolillo has been relegated to the position of a disfavored "cf." or "but see" case.\footnote{15}

It is disturbing that Paolillo has been viewed as an anomalous decision by other courts. The Second Circuit was merely pointing out that there may be situations where implementation of an early retirement plan is so poorly designed that a signed acceptance of the offer may not be conclusive evidence that the decision was voluntary.\footnote{16} Paolillo should not be read as a broad-brushed condemnation of early retirement plans. It is only a recognition that some plans may fail to allow the employee to make a reasoned choice. When this occurs, it can result in a valid claim of age discrimination raising material issues of fact worthy of getting past the hurdle of summary judgment when brought before a court.

A tempting "carrot" of an offer to retire early has previously been accused of being attached to the painful "stick" of age discrimination when the offer is tendered for the purpose of thinning out the older employees from the company's ranks.\footnote{17} Sometimes this offer is accompanied by subtle intimations that the older employees may be dismissed for "economic reasons" if they do not accept, in which case the choice can be compared to one of "volunteer or else."\footnote{18}

The former employees in Paolillo may not have retired pursuant to such an ill-meaning plan. Nevertheless, the Second Circuit seems justified in holding that a reasonable amount of time is necessary to make the important decision of whether to accept early retirement. The Paolillo opinion acknowledges that the amount of time could vary in relation to the complexity of the decision to be made and the financial considerations to be taken into account, yet it makes sure to acknowledge that a question of "reasonable time" does exist.\footnote{19}

Some employers may fear that the Second Circuit decision

\footnote{16. 821 F.2d at 84.}
\footnote{18. \textit{Id.} at 80-81.}
\footnote{19. 821 F.2d at 84.}
presents an opportunity for unwarranted judicial intrusion upon their right to structure their business affairs as they see fit. They may also fear that the decision will open the door to a rash of groundless age discrimination claims brought by dissatisfied former employees who now regret their decision to retire early. The actual holding of Paolillo, however, does not support such fears. The decision merely puts the employer on notice that if it chooses to offer early retirement to its employees, it must do so in a way that gives the employee an opportunity to make a reasoned choice. This is, in fact, just a logical extension of the voluntariness requirement that has been a part of the ADEA throughout most of its existence. Nothing in the opinion indicates that Paolillo will

20. This is a legitimate concern. The ADEA is not intended to usurp the function of business managers in structuring the employer-employee relationship. See Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980) ("The Age Discrimination in Employment Act, however, was not intended as a vehicle for judicial review of business decisions.... Beyond that the court will not inquire into the defendant's method of conducting its business."). cert. denied, 450 U.S. 959 (1981).

21. The general prohibition of involuntary retirement on account of age with respect to seniority systems or employee benefit plans was added to the ADEA as part of the 1978 Amendments. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978) [hereinafter ADEA Amendments of 1978].

A significant exception, albeit a temporary one, to the voluntariness requirement concerns tenured faculty at institutions of higher education:

(a) SPECIAL RULE.—Section 12 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631) is amended by adding at the end thereof the following new subsection:

"(d) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965)."

(b) TERMINATION PROVISION.—The amendment made by subsection (a) of this section is repealed December 31, 1993.


Another notable exception to the prohibition of involuntary retirement concerns bona fide executives or high policymakers:

Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

take away employers' ability to offer early retirement to their employees, or create rights that did not previously exist.\textsuperscript{22} The Second Circuit recognized in \textit{Paolillo} that if adequate time and opportunity to make a reasoned choice are denied, its "voluntariness" may be largely illusory. Thus the lack of time to make a reasoned choice may result in a violation of the employee's rights under the ADEA. However, \textit{Paolillo} currently stands alone.

For a better perspective on the issues presented by the \textit{Paolillo} and \textit{Henn} decisions, an examination of the ADEA's history and statutory purpose is provided below. The two conflicting circuit court opinions will then be discussed in greater detail in Section II.

I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. An Introduction to the Meaning of Age Discrimination

Age discrimination, or "ageism,"\textsuperscript{23} is the term used to describe the practice of treating two persons or groups of people differently solely on the basis of their ages, especially when there is no reasonable basis for making the age distinctions.\textsuperscript{24} Some obvious examples are help-wanted advertisements seeking to find applicants who are "age 25 to 35," "young," or even "over age 50."\textsuperscript{25} More subtle examples occur when advertisements are directed toward "recent college graduates" or toward certain age groups with the phrase "supplement your pension."\textsuperscript{26} Such distinctions often are influenced by popular assumptions about the effect

\begin{itemize}
\item[22.] The \textit{Paolillo} court stated in its first opinion that it was only pointing out the existence of rights that were implicit in the statute: "We have not found any cases discussing how the shortness of time allowed for a decision may affect the voluntariness of the decision. Nevertheless, implicit in the exception under section 623(f)(2) is the employer's duty to give employees sufficient time to make a decision." \textit{Paolillo} v. Dresser Indus., 813 F.2d 583, 586 (2d Cir.), withdrawn, 821 F.2d 81 (2d Cir. 1987).
\item[23.] The term "ageism" was coined by Dr. Robert N. Butler to describe the prejudice that many people have toward older individuals in society. R.N. BUTLER, \textit{WHY SURVIVE?: BEING OLD IN AMERICA} 11-12 (1975).
\item[26.] \textit{Edelman & Siegler, supra note 25, at 91-97; Schlei & Grossman, supra note 25, at 394.}
\end{itemize}
that age has on ability.27 These assumptions operate to the detri-
ment of older people.

[I]t is a sad day indeed when a man realizes that the world has
begun to pass him by; that happens to all of us sooner or later.
But it is surely a much greater tragedy for a man to be told,
arbitrarily, that the world has passed him by, merely because
he was born in a certain year or earlier, when he still has the
mental and physical capacity to participate in it as energeti-
cally and vigorously as anyone else.28

Of course, not all distinctions based upon age are unjustified.
Few would argue that it is irrational to set minimum ages for cer-
tain activities such as entering school, voting, drinking, or driving.
Some notable examples of accepted "age discrimination" are
found in the United States Constitution, which includes a number
of distinctions based upon age.29 However, when age is used to
close off employment opportunities for older people, or to preclude
someone from being allowed to remain in a position that he or she
should be entitled to keep, then a remedy through legislative and
judicial protection is warranted.30

27. An article describing the misconceptions that many employers have toward older
employees outlines some of the most common reasons for not hiring or promoting them as:
1. Older workers are often afflicted with physical and mental affirmitis.
2. Young people must be hired who can be trained, motivated and promoted.
3. Young people are willing to work for less money than older people.
4. Pension, health and life insurance costs increase as the worker ages.
5. Many older workers lack skill, experience or education.
6. According to mortality tables, the older worker will work less time for the
firm than a younger worker.
7. Older workers are more costly to train and are less productive.
8. Older workers are less adaptable and more difficult to train than younger
workers.
9. Balance in age is needed in every work force. Because seniority clauses in
collective bargaining agreements determine retention and promotion, employers
need to hire young persons whenever possible.
10. Young executives feel uncomfortable directing older employees.

Kovarsky & Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination


2. U.S. Senators must be at least 30 years of age. U.S. CONST. art. I, § 3, cl. 3. The
President and Vice-President must each be at least 35 years of age. U.S. CONST. art. II, §
1, cl. 5 and U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office
of President shall be eligible to that of Vice-President of the United States."). See also
Note, supra note 24, at 132-33 & n.170 (indicating that "use of age as a proxy is prevalent
in the United States Constitution itself").

30. The need for legislative protection against age discrimination was recognized by
the states long before Congress took action on the subject. Notice of this was taken during
B. A Look at the History, Legislative Purpose, and Administration of the Act

Senator Jacob K. Javits of New York, perhaps one of the most dedicated and outspoken advocates of the older American worker, eloquently summed up the problem of age discrimination in employment when he stated:

*Age discrimination in employment is a tragedy, not only from the standpoint of our older workers themselves, but also from the standpoint of the nation as a whole. For it represents a great waste of one of our more precious resources— in this case the talent and experience accumulated by our older workers over many years. We must also remember, too, that youth itself has a stake in guarding against age discrimination in employment, for nothing but time stands between the “younger worker” and the “older worker.”*

Among the provisions included in the Civil Rights Act of 1964 was a directive to the Secretary of Labor to prepare a study of age discrimination in employment. The resulting report, entitled *The Older American Worker: Age Discrimination in Employment,* was issued in June of 1965 and presented two months

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The admonition of Senator Javits, highlighting the fact that the younger workers of today are the older workers of tomorrow, becomes especially urgent in light of future population trends. Persons aged 65 and above are expected to comprise 13.9 percent of the American population in the year 2010 — 39.3 million people, and will account for more than 20 percent of the population 20 years later — 64.3 million people. *Challenges and Solutions,* supra note 5, at 15.

If these population trends are projected a few steps further, with a focus upon the possible effect that widespread discriminatory employment practices could have on persons over 55, the warning becomes even more compelling. By the year 2020 the entire “baby boom” generation will be of age 55 or above — almost 76 million people would be affected. *Id.* at 18.


33. *Id.* § 715, 78 Stat. 241, 265.

34. *U.S. Dept. of Labor, The Older American Worker-Age Discrimination in*
later to a subcommittee of the House Committee on Education and Labor. In the report, the Secretary recommended that Congress take action to eliminate arbitrary age discrimination found in the workplace. The Secretary stated that:

The possibility of new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren. The elimination of arbitrary age limits in employment will proceed more rapidly if the Federal Government declares, clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age.

The following year, the Secretary was directed by statute to submit his findings and recommendations to Congress. These findings, bolstered with evidence of executive concern over the problem, resulted in the tandem message transmitted to Congress by the Secretary in February of the same year.

Hundreds of thousands not yet old . . . find themselves jobless because of arbitrary age discrimination.

In economic terms, this is a serious, and senseless, loss to the nation on the move. But the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families.

The Age Discrimination in Employment Act (ADEA) was

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35. House REPORT, supra note 30, at 1.
38. See President Lyndon B. Johnson's Special Message to the Congress Proposing Programs for Older Americans, 1 1967 PUB. PAPERS OF LYNDON B. JOHNSON 32, 37 (1968)("[O]pportunity must be opened to the many Americans over 45 who are qualified and willing to work. We must end arbitrary age limits on hiring.").
39. Senate REPORT, supra note 30, at 2 (showing President Johnson's recommendation of The Age Discrimination in Employment Act of 1967); House REPORT, supra note 30, at 2 (same); House Hearings, supra note 36, at 9 (prepared statement of Secretary of Labor adverting to the President's message); Senate Hearings, supra note 31, at 37 (prepared statement of Secretary read into Senate record).
40. House Hearings, supra note 36, at 9 (prepared statement of Hon. W. Willard Wirtz, Secretary of Labor, quoting President Johnson's message to Congress); Senate Hearings, supra note 31, at 37 (same, as read into the Senate record).
41. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 1-
enacted by Congress in 1967 to protect older workers from employment discrimination based upon their age.\textsuperscript{42} From the outset, congressional attention was most keenly focused upon the hiring barriers and forced terminations of employment encountered by many older workers.\textsuperscript{43} The ambitious goals that some of the legislators sought to achieve were expressed in phrases such as: "[This bill] in fact is more than a bill to bar age discrimination. It is a bill to \textit{promote} employment of middle aged and older persons . . . ."\textsuperscript{44} These same legislators were pragmatic as well as enthusiastic. Realizing that they could not tackle the whole problem of age discrimination in one bill, they instead chose to first "strike at the heart" of the problem, limiting the bill's focus to the areas where discrimination was felt to be most prevalent.\textsuperscript{45}

Among the many considerations addressed by Congress in creating the ADEA was a concern for the rights of individuals,\textsuperscript{46} the effects that non-employment of older workers had on the economy, and the effects of ageism on all older people.\textsuperscript{47} A major impetus of the hearings was a desire to dispel the widely held notion that workers grow less competent as they grow older.\textsuperscript{48}

The ADEA, as originally enacted, limited its protection to employees between the ages of forty and sixty-five years.\textsuperscript{49} This

\begin{itemize}
\item \textsuperscript{42} Id. § 2(b), 81 Stat. 602, 602 (1967) (codified at 29 U.S.C. § 621(b) (1986)).
\item \textsuperscript{43} See 113 CONG. REC. 2467 (1967) (statement of Sen. Yarborough at introduction of the bill before Congress which later became the Act).
\item \textsuperscript{44} 113 CONG. REC. 34,740 (1967)(statement of Rep. Perkins)(emphasis added).
\item \textsuperscript{45} Id.
\item \textsuperscript{46} See The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7(c), 81 Stat. 602, 604 (1967)(codified at 29 U.S.C. § 626(c)(1) (1986) with the word "chapter" in the place of "Act") which created a general private cause of action under the Act:
\begin{quote}
Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: \textit{Provided}, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.
\end{quote}
\textit{Id. See also} 29 U.S.C. § 633a(c) (1986)(which specifically extends the private cause of action to employees of the federal government).
\item \textsuperscript{47} Kass, supra note 17, at 68; see also Senate Report, supra note 30, at 7; House Report, supra note 30, at 7-8.
\item \textsuperscript{48} See generally House Hearings, supra note 36 passim; Senate Hearings, supra note 31 passim (almost every person who testified at either the House or Senate hearings mentioned the desire to dispel such concepts of the older worker).
section has since been amended twice, so that coverage of the Act now extends to all employees over forty years of age.\(^5\) The provisions of the Act apply to persons employed by the federal government, all state and local governments, and most private employers.\(^5\)

Enforcement and administration of the ADEA currently falls within the domain of the Equal Employment Opportunity Commission\(^5\) (EEOC). In recent years, the ADEA has been both a prolific source of requests for administrative redress and of litigation.\(^5\) In fact, the EEOC reports that administrative complaints of age discrimination now constitute the fastest growing category of claims with which it deals.\(^5\)

Supp. 1988)).

50. Congress first expanded the general protection of the Act in 1978 to include individuals aged 40 to 70 who were employed in the private sector, and eliminated a maximum protected age for federal government employees altogether. ADEA Amendments of 1978, supra note 21, §§ 3(a), 5(a), at 189-90, 191.

In 1986, Congress further amended the Act by eliminating the age limitation of 70 years so that it now prohibits age discrimination against all employees 40 years of age and older. ADEA Amendments of 1986, supra note 21, § 2 (c), at 3342.

51. Specifically, the Act applies to employees of those "engaged in an industry affecting commerce [having] twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers." 29 U.S.C. § 630(b) (1986). Protection is also extended to those employed by "State[s] or political subdivision[s] of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency . . . ." Id.; but see 29 U.S.C. § 630(f) (1986)(excepting elected officials of state and local governments and their aides from coverage under the Act). Federal government employees are included through 29 U.S.C. § 633a(a) (1986).


54. Id. at 155-56 (citing Vihstadt, Congressional Update, 5 BIFOCAL 8 (1984)). More recent statistics confirm this finding. It was reported that:

In fiscal year 1986, nearly two and one-half times as many age bias charges were filed with the EEOC and state fair employment practice agencies as were filed in fiscal year 1980. A year-by-year breakdown [of these charges] is as fol-
As a preliminary matter, it should be pointed out that while the ADEA and Title VII of the Civil Rights Act of 1964 are similar statutes, some important differences exist. Most obviously, the ADEA is exclusively concerned with age discrimination, while Title VII is concerned with the prohibition of discrimination due to race, sex, religion, and national origin. Another difference is the availability of a jury trial in ADEA suits, but not in Title VII suits. The most important difference, however, is who bears the initial burden of persuasion and when, if ever, it shifts to the other party. Courts have been much more reluctant to shift this burden to defendants in ADEA suits, which would require them to show nondiscrimination, than in Title VII cases.

C. Focus upon Section 623(f)(2): The Bona Fide Employee Benefit Plan Exception

The ADEA precludes an employer from "discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individ-
Nevertheless, the Act also contains a special exception allowing for certain forms of age discrimination in employee benefit plans. An employer may legitimately draw age distinctions in providing employee benefits if it is done pursuant to a "bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]." Even though the exception seems contradictory to the intentions of the Act, this section of the statute is not meant to be a retreat from the general purposes of the ADEA. It is instead meant to emphasize the primary purpose of the Act: to promote the hiring of older workers. The precise meaning of the bona fide employee benefit plan exception was clarified during the Senate debates on passage of the Act:

The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act — and we understand that — in order to give that older employee employment on the same terms as others.

This exception was intended to encourage employers to hire older workers by preventing their hiring from becoming prohibitively expensive. By its terms, the bona fide employee benefit plan allows the employer "to offer lesser (or more expensive) medical insurance plans to older employees, since these plans cost much more to provide to such employees." It also enables employers to give smaller pensions to workers hired at an older age, because the employer will have less time to set aside money for the pensions provided to these workers.

A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in

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63. SENATE REPORT, supra note 30, at 4; HOUSE REPORT, supra note 30, at 4.
65. Kass, supra note 17, at 94.
66. Id.
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.\textsuperscript{67}

To qualify for this exception there must be some correlation between age and the cost of the benefit. If the benefit costs the employer more to provide to older people than to younger ones, then the employer can give less of that benefit to older employees. Otherwise, the older worker would be more expensive to employ than a similarly situated younger worker. On the other hand, if the benefit costs the same regardless of the age of the employee, such as a fixed lump-sum payment, "then it would be rank discrimination, and a subterfuge of the ADEA,"\textsuperscript{68} to give the lesser benefit to the older worker.\textsuperscript{69} The reduction in employee benefits must have "full economic justification"\textsuperscript{70} to be considered a bona fide plan under the Act.

The original drafts of the Senate bills leading up to the ADEA did not include this exception. At least one Senator felt that this was a serious defect since "in its absence employers might [be] discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them."\textsuperscript{71} As a result, the provision was added by amendment during the Senate proceedings,\textsuperscript{72} and was included in the final draft that later became the Act.

One of the first, and most important, cases to interpret this provision of the Act in relation to early retirement was \textit{United Air Lines, Inc. v. McMann.}\textsuperscript{73} The plaintiff, a former pilot, had been forcibly retired at age sixty pursuant to an elective early retirement plan that he had joined nine years earlier.\textsuperscript{74} Thereafter, Mc-
Mann brought suit in the United States District Court for the Eastern District of Virginia alleging that his forced retirement under the plan was solely due to his age, and thereby unlawful under the Act. United Air Lines responded that McMann's retirement was within the provisions of a bona fide retirement plan which he voluntarily accepted. At trial, the district court granted summary judgment in favor of United Air Lines.

On appeal, the Fourth Circuit reversed the decision of the district court, holding that pre-age-sixty-five retirement plans fall within the ADEA's definition of "subterfuge" unless the employer can show that the "early retirement provision . . . ha[s] some economic or business purpose other than arbitrary age discrimination." The court of appeals remanded the case to the district court with directions to allow United Air Lines the opportunity to show an economic or business purpose for their early retirement plan. United then sought review in the Supreme Court.

The Supreme Court, in an opinion written by Chief Justice Burger, reversed the appellate court, holding that United's plan could not possibly be a subterfuge to evade the purpose of the Act since it was established in 1941, a full twenty-six years before passage of the ADEA in 1967. The Court's opinion also rejected any per se rule requiring an employer to show a valid economic or business purpose to satisfy the subterfuge language of the Act.

As a direct response to the McMann decision, Congress amended the ADEA in 1978 to specifically reject the Supreme Court's interpretation of the Act. The amendment stated that: "Plan provisions in effect prior to the date of enactment are not exempt under [the bona fide retirement plan exception] by virtue of the fact that they antedate the act or these amendments." Congress also wished "to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to permit involuntary retirement of an em-

75. Id.
76. Id.
77. Id.
78. Id. (quoting McMann v. United Air Lines, Inc., 542 F.2d 217, 221 (4th Cir. 1976)).
79. Id.
80. Id.
81. Id. at 203.
82. Id.
83. H.R. REP. No. 95-950, 95th Cong., 2d Sess. 8 (1978) [hereinafter H.R. REPORT].
employee within the protected age group on account of age."\textsuperscript{84}

There has been a relative paucity of decisions dealing directly with voluntarily accepted plans.\textsuperscript{85} The few that have been reported have broadly held that such plans meet the requirements of the ADEA.\textsuperscript{86} None of the pre-Paolillo decisions, however, specifically address the meaning of the word "voluntary" under the Act. The Second Circuit, through its decision in \textit{Paolillo}, now provides added direction toward a clearer and more precise definition of this essential requirement in voluntary retirement plans under the ADEA.

\section*{II. "Paolillo v. Henn"}

Prior to 1987, no court had ever seriously questioned the \textit{meaning} of the word "voluntary" as it applied to early retirement plans, beyond a basic examination of whether the employee had joined the plan or was forced to retire.\textsuperscript{87} On the surface, it appears that no deeper analysis is necessary. Admittedly, the word "volun-

\begin{footnotesize}
\textsuperscript{84.} \textit{Id.}

\textsuperscript{85.} The original \textit{Paolillo} decision primarily relied on two cases to show that summary judgment on the issue of voluntariness was improper: Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 58-59 (2d Cir. 1986) ("[E]ven in the case of voluntary early retirement plans the employer . . . must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did."); EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982) (summary judgment is rarely appropriate when a party's state of mind or motive is at issue). Paolillo v. Dresser Indus., 813 F.2d 583, 585 (2d Cir.), \textit{withdrawn}, 821 F.2d 81 (2d Cir. 1987). The \textit{Henn} court, similar to \textit{Paolillo}, makes its essential argument with only two cases: Coburn v. Pan American World Airways, Inc., 711 F.2d 339, 344 (D.C. Cir.), \textit{cert. denied}, 464 U.S. 994 (1983) (early retirement "is a humane practice . . . [that] supports not a hint of age discrimination"); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 71 (6th Cir. 1982) (early retirement plan at issue was an "opportunity to retire with dignity"). Henn v. National Geographic Soc'y, 819 F.2d 824, 828 (7th Cir.), \textit{cert. denied}, 108 S. Ct. 454 (1987).

\textsuperscript{86.} See, e.g., Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986); Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 56 (2d Cir. 1986); Patterson v. Independent School Dist. # 709, 742 F.2d 465, 467 (8th Cir. 1984); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982) (all stating that the voluntary plans at issue were in compliance with the bona fide benefit plan exception to the ADEA).

\textsuperscript{87.} Prior case law utilizes rather conclusory language on the issue of voluntariness and early retirement without much examination into the design of the offer. See, e.g., Coburn v. Pan American World Airways, Inc., 711 F.2d 339, 344 (D.C. Cir.), \textit{cert. denied}, 464 U.S. 994 (1983) ("Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary."); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982) ("[T]he district judge granted the motion for summary judgment, primarily on the ground that Ackerman had signed the agreement voluntarily . . . .") (The 6th Circuit upheld the district court on this point).
"voluntary" is not subject to a very wide range of interpretation; a person either agrees to accept early retirement or he does not. On the other hand, "voluntariness" suggests a certain amount of rational choice, which in turn implies that an opportunity to make a rational choice is given. As simple as this may seem, the opportunity to make a considered choice, specifically the guarantee of a sufficient amount of time in order to make one, is a contested issue forming a split in authority between the Second Circuit's decision in Paolillo v. Dresser Industries88 and the Seventh Circuit's decision in Henn v. National Geographic Society.89 The primary disagreement concerns whether the lack of time given to employees to make their decision raises a material issue of fact meriting a trial to examine the design of the plan offered to them.

A. Paolillo v. Dresser Industries

As stated earlier, two Paolillo decisions were handed down by the Second Circuit. The first decision90 was withdrawn upon the defendant-appellee's petition for rehearing91 and a new opinion was filed by the court three months later.92 The two opinions are essentially the same, except that the second decision only addressed the lack of time given to the employees, whereas the first decision examined both the time issue and the appropriateness of the test applied to burden of proof.93 Since the contested issue in Paolillo regards the time frame given to the employees, it is important to establish the chronology of the case.

In October 1982, the Whitney Chain Division of Dresser Industries, Inc., in the midst of a significant business decline, offered an elective termination program to all of its employees aged sixty and over.94 The reason for instituting the program was to reduce costs. It consisted of an offer of severance pay and other benefits to employees who agreed to retire early.95 The program was first

88. 821 F.2d 81 (2d Cir.), replacing 813 F.2d 583 (2d Cir. 1987).
90. Paolillo v. Dresser Indus., 813 F.2d 583 (2d Cir.), withdrawn, 821 F.2d 81 (2d Cir. 1987).
92. 821 F.2d at 81.
94. 821 F.2d at 83.
95. Id.
announced on Tuesday, October 12, 1982, at a meeting called on
five minutes notice, between Whitney Chain's operations manager
and those employees eligible to participate in the program. Those
attending included two of the three employees who later brought
suit, Lucy Wadsworth and Robert Grady. The third plaintiff,
Dominic Paolillo, was not at work on the day of the meeting. He
met with the operations manager the next day and was then given
the same information provided to the other employees.

At the October 12 meeting, the employees were presented
with a letter stating that Whitney Chain was instituting an elec-
tive termination plan as part of an overall cost reduction program
precipitated by its recent economic problems. The letter stated
that participation in the program was "totally voluntary," but it
also emphasized to the employees that "you must return your
election form . . . by October 18," six days later. Important
information about the program regarding the amount of medical
insurance, retiree insurance, and pension benefits was not provided
at the meeting. The letter went on to state that "meetings will be
held to answer any questions and review pension options." On
the afternoon of Friday, October 15, Paolillo and Grady individu-
ally met with company representatives to discuss how the plan
would affect each of them personally. Thereafter, both employ-
ees signed an election form on Monday, October 18, the last day
allowed for making a decision.

The sequence of events concerning Wadsworth was more
questionable. She claimed that she did not attend a meeting dur-
ing the week of October 11 to discuss the details of the program
with any company representative, and it was unclear whether she
had attended any meeting at all prior to accepting early retire-
ment. Wadsworth also claimed that she did not make her deci-
sion until the last day.

This sequence of events shows that from the time the employ-

96. Id.
97. Id.
98. Id.
99. Id. (emphasis in original).
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
ees were told the full details of the program, Paolillo and Grady had three days to decide whether to accept the plan. Acceptance would end their respective sixteen and thirty-one years of service with Whitney Chain. Wadsworth, by her own account, had less than a day to make the decision to terminate her fifteen years of employment with the company.\textsuperscript{106}

By accepting early retirement, Paolillo received severance pay of $608.88 per month for two years, Wadsworth $388.75 per month for two years, and Grady received a lump-sum payment of $13,390.\textsuperscript{107} At the time, their annual salaries were $29,226, $18,660 and $26,757 respectively.\textsuperscript{108}

The three former employees later brought an age discrimination suit in the United States District Court for the District of Connecticut\textsuperscript{109} against Whitney Chain claiming that they were coerced into accepting the early retirement plan by the method of its implementation. Specifically, they claimed that they were given insufficient time to make a rational choice whether to accept the plan, thus making their decision not truly voluntary.\textsuperscript{110} The district court rejected these claims, concluding that the employees had retired voluntarily as a matter of law.\textsuperscript{111} As a result, the court granted summary judgment for the employer, and the employees appealed.\textsuperscript{112} On appeal, the Second Circuit reversed the decision of the lower court, holding that voluntariness was not established as a matter of law, and therefore, a subsequent age discrimination claim was not precluded.\textsuperscript{113}

The original controversy between the Second and Seventh Circuits arose when the Seventh Circuit responded to the first \textit{Paolillo} decision. Although the initial Second Circuit opinion was replaced by the subsequent \textit{Paolillo} opinion upon a rehearing of the case, there remains disagreement between the two circuits concerning the effect of time constraints on voluntariness. To gain a better perspective on the evolution of the controversy, the two decisions of the \textit{Paolillo} appeals court will be addressed individually.

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 82.
\textsuperscript{110} Id. at 83.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 81.
\textsuperscript{113} Id. at 84-85.
The Second Circuit adopted a strong and somewhat absolutist position regarding age discrimination and early retirement plans in its first resolution of *Paolillo v. Dresser Industries*.\(^{114}\) The court held that employees who are retired under an early retirement plan targeting only older workers can establish a prima facie case of age discrimination by simply showing that they were between forty and seventy years old\(^{115}\) at the time of their retirement pursuant to such a plan.\(^{116}\) Once this was shown, the employer would bear the burden of proving that the employees voluntarily chose to accept the early retirement.\(^{117}\) The Second Circuit based its opinion upon a provision of the EEOC regulations which governs who should carry the burden of persuasion in suits claiming involuntary discharge under the ADEA: "Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed."\(^{118}\) The court believed that since Whitney Chain must have known that it was giving the employees extremely little time to come to a serious decision, the burden should be upon the employer to show that the employees retired voluntarily and were not unduly pressured by the short amount of time given to reach the decision.\(^{119}\)

The Second Circuit's opinion was contrary to the district court's holding that the employees voluntarily accepted the early retirement plan as a matter of law.\(^{120}\) The lower court relied upon the fact that none of the employees had requested extra time or expressed dissatisfaction with the short deadline, and that each signed an acknowledgment stating the choice to retire was freely

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114. 813 F.2d 583 (2d Cir.), withdrawn, 821 F.2d 81 (2d Cir. 1987).
115. The upper age limit of 70 years old was eliminated by the 1986 Amendments to the ADEA. ADEA Amendments of 1986, supra note 21, § 2(c), at 3342. In 1982, when Whitney Chain instituted their early retirement plan, the protected age group consisted of employees between the ages of 40 and 70. See ADEA Amendments of 1978, supra note 21, § 3(a), at 189.
116. 813 F.2d at 585.
117. Id.
118. 29 C.F.R. § 1625.10(a)(1) (1987). *Paolillo* cites to 29 C.F.R. § 860.120(a)(1), which was the interpretive regulation currently in force at the time of the decision. This regulation is now found at 29 C.F.R. § 1625.10(a)(1). See supra note 67.
119. 813 F.2d at 586-87.
120. Id. at 586.
Primarily, the Second Circuit believed that the district court had applied the wrong test for establishing a prima facie case of age discrimination under the ADEA. The trial judge applied a modified version of the requirements for a prima facie case under Title VII, as set forth in *McDonnell Douglas Corp. v. Green.* The lower court's application of this test required the employees to show that they left their employment involuntarily; in effect, that they were discharged by Whitney Chain. The court of appeals considered this application of the "wrong" test to be a sufficiently significant error of law to require reversal of the district court. The opinion went on to address what the appellate court considered to be a more fundamental error in the lower court's reasoning: that the plaintiffs acted voluntarily as a matter of law. Since a genuine question of fact existed as to whether the employees had acted voluntarily, or were coerced by the company into hastily making their decision, the Second Circuit held that granting summary judgment to the employer on the ground that the employees had acted voluntarily as a matter of law was a re-

121. *Id.*
122. *Id.* at 585.
124. 813 F.2d at 585 (applying McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). The modified *McDonnell Douglas* test applied to ADEA suits requires the plaintiff to "prove that he (1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of the discharge; (4) was replaced by someone outside the protected class; or (5) by someone younger, or (6) show otherwise that his discharge was because of his age." Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987); see also Elliot v. Group Medical & Surgical Serv., 714 F.2d 556, 565 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984).

The burden-shifting provisions of *McDonnell Douglas* require the plaintiff to carry the initial burden of establishing a prima facie case of discrimination. 411 U.S. at 802. Once the prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its allegedly discriminatory act. *Id.* If the employer can articulate such a reason, the burden is shifted back to the plaintiff to demonstrate that the employer's reason was a pretext, or discriminatory in its application. *Id.* at 804.

The Supreme Court later clarified the *McDonnell Douglas* test in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 249 (1981) by stating that the defendant need only articulate a legitimate, non-discriminatory reason, it need not have been motivated by it. 450 U.S. at 254.

It is perhaps more proper to refer to the resulting test as the "*McDonnell Douglas-Burdine*" test; however, for the purposes of this Note, it will be referred to as simply the *McDonnell Douglas* test.

125. 813 F.2d at 585.
126. *Id.* at 586.
127. *Id.*
versible error. 128

The first Paolillo opinion may have been extreme in flatly rejecting the McDonnell Douglas test as inapplicable to early retirement ADEA suits. 129 The Second Circuit had previously endorsed adapting the McDonnell Douglas test for use in early retirement plans. 130 One author notes that every court of appeals, except the Sixth Circuit, has generally applied the test without reservation to circumstantial evidence ADEA cases, 131 such as Paolillo. Its acceptance is by no means uniform, however, and a number of decisions have expressed doubts about the test's broad applicability. 132 In any event, because the Second Circuit found that the plan was not voluntary as a matter of law, it was perhaps unnecessary to criticize the use of the McDonnell Douglas test. The existence of a material question of fact alone merited reversal of the summary judgment. 133 This is precisely the stand that the

128. Id. at 583.

129. Apparently, the Second Circuit agrees. The substituted opinion implies by its silence an acceptance of the district court's use of the McDonnell Douglas test, although it still rejected the lower court's application of it. See Paolillo v. Dresser Indus., 821 F.2d 81, 83-84 (2d Cir.), replacing 813 F.2d 583 (2d Cir. 1987).

130. See, e.g., Pena v. Brattleboro Retreat, 702 F.2d 322, 324 (2d Cir. 1983)(citing Burdine which is a modification of the McDonnell Douglas test); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981).

131. See Eglit, supra note 53, at 169-70 & n.63 (citing cases in each of the federal circuits that have embraced the McDonnell Douglas test wholeheartedly); see also Comment, Should McDonnell Douglas Apply in ADEA Cases? The Sixth Circuit's Answer, 15 U. Tol. L. Rev. 1201, 1202 (1984)(noting the federal courts' general acceptance of the McDonnell Douglas standard).

132. See, e.g., EEOC v. Borden's Inc., 724 F.2d 1390, 1394 (9th Cir. 1984); EEOC v. Western Elec. Co., 713 F.2d 1011, 1014 (4th Cir. 1983); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982); McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980); Laugeson v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975).

The Supreme Court has stated that the McDonnell Douglas test is not meant to be the exclusive test applied to establish a prima facie case of discrimination.

Our decision in [McDonnell Douglas], however, did not purport to create an inflexible formulation. We expressly noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.


133. Summary judgment is improper unless there is "no genuine issue as to any material fact," and the moving party is "entitled to judgment as a matter of law." Fed. R.
Paolillo court adopted in its rehearing of the case.

2. 821 F.2d 81

On rehearing, the Second Circuit abandoned their criticism of the test applied by the district court regarding burden of proof, choosing instead to focus on how inadequate time to decide whether to accept a plan affects the decision's voluntariness. The major significance of the decision was that an employee must be given a reasonable amount of time to decide whether to accept the employer's offer of early retirement if the plan is to be considered truly voluntary, and therefore consistent with the requirements of the ADEA.

[A]ccepting early retirement is a major decision with far-reaching impact on the lives of older workers and we emphasize that the decision must be voluntarily made. We believe that it is relevant to the determination of voluntariness whether the employees received sufficient time to make a decision. Because of the magnitude of the decision to accept early retirement, employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice. The amount of time will vary depending on the circumstances of each case.

This was the first time that a court directly addressed the issue of time pressure and its relationship to voluntariness. Nevertheless, this was not the first time that a court thought it proper to deny summary judgment to an employer on the grounds that the facts surrounding the design of the plan merited closer examination of the employer's intent.
Even though the Paolillo court took an unprecedented stand regarding the requisite amount of time needed to assure voluntariness, there is implied support for the position adopted by the Second Circuit. A number of studies examining retirement in general, and pre-retirement counseling in particular, have stressed the necessity of giving employees contemplating retirement an adequate explanation of the plan well in advance of the retirement date.\textsuperscript{138} One study reported that ninety-three percent of the companies that it surveyed offered their employees at least four weeks to make a decision, with well over half of these companies offering eight or more weeks.\textsuperscript{139} If these plans are structured with what are considered reasonable deadlines, then allowing only a few days to make a decision would appear to strain the bounds of reasonableness. Surprisingly, the best case support for the reasoning in Paolillo comes from dicta in the case that most heavily criticizes it: “A very short period to make a complex choice may show that the person could not digest the information necessary to the decision. This would show that the offer of information was illusory and there was no informed choice.”\textsuperscript{140}

Some commentators may argue that the Second Circuit was too lenient in criticizing the lack of time given to employees to accept the early retirement incentives offered by Whitney Chain.


\textsuperscript{139} See supra note 5 (results of a study showing the average length of “window periods” in surveyed employers’ early retirement plans).

\textsuperscript{140} Henn v. National Geographic Soc’y, 819 F.2d 824, 828-29 (7th Cir.), cert. denied, 108 S.Ct. 454 (1987) (court focused on availability of information about early retirement and the ability of a person to assimilate that information rather than actual length of time available for consideration; court found, among other things, that plaintiffs did not argue that they lacked information nor did they argue that lack of time limited their assimilation of the information.).
One author has taken the extreme view that *any* early retirement incentive limited to certain age groups is *per se* discriminatory. The reasons cited for this view include:

First, early retirement incentives arguably violate the ADEA because they harm older people as a group and society as a whole. Although they may benefit the individuals who receive them, they foster ageist stereotypes and reduce participation of older people in the workforce. Second, by making early retirement artificially attractive, the early retirement incentive is arguably a wolf in sheep's clothing — it may seem like a lovely fringe benefit at first, but ultimately it may harm the individuals who accept it by diminishing the length and quality of their lives. Third, early retirement incentives are arguably a mere disguise for mandatory retirement. No decision to accept an early retirement incentive is entirely voluntary and uncoerced, because of the power of the incentives and the contexts in which they arise.\(^{141}\)

The *Paolillo* court clearly did not adopt this broad-brushed condemnation of age-based early retirement programs. The court even held out the possibility that Whitney Chain could ultimately succeed in showing that the employees had acted voluntarily.\(^{142}\) Their primary concern, however, was assuring that the final determination of voluntariness is made by the trier of fact when the design of the plan is brought into question.\(^{143}\)

B. *Henn v. National Geographic Society* and its Criticism of the *Paolillo* Court

Two months after the first *Paolillo* decision was handed down, the United States Court of Appeals for the Seventh Circuit was presented with *Henn v. National Geographic Society*,\(^{144}\) which raised similar claims that a voluntarily accepted early retirement plan violated the ADEA. The court of appeals affirmed the lower court's grant of summary judgment for the employer concluding that early retirement plans violate the ADEA only if the alternative is "constructive discharge" where working conditions are so onerous that the employee has effectively been fired in

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\(^{141}\) *Kass*, supra note 17, at 66.

\(^{142}\) 821 F.2d 81, 84-85 (2d Cir. 1987).

\(^{143}\) *Id.* at 85.

\(^{144}\) 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).
place and compelled to leave.\textsuperscript{145} Although the facts show that the retired employees were given more time to decide than the plaintiffs in \textit{Paolillo},\textsuperscript{146} they also claimed that they were pressured into making a decision, thus rendering their choice involuntary.\textsuperscript{147}

The \textit{Henn} court's opinion focused on the employees' claim of constructive discharge; yet, the opinion also addressed the findings of the \textit{Paolillo} court, criticizing it for creating a split among the circuits\textsuperscript{148} and for its "unusual definition of 'involuntary.'"\textsuperscript{1149}

\[W\]hat does "voluntary" mean? We could ask, as the court did in \textit{Paolillo}, whether the employee had enough time to mull over the offer and whether the choice was free from "pressure." (In \textit{Paolillo} the employees had less than a week, which the court thought suspiciously short.) Yet the need to make a decision in a short time, under pressure, is an unusual definition of "involuntary." . . . [N]either the brevity of the time nor the difficulty of the choice makes the decision "involuntary."\textsuperscript{180}

The Seventh Circuit compared the short deadline to the "take-it-or-leave-it" option given to a plea bargaining criminal defendant, where the need to act in haste does not make the decision involuntary if the defendant knows and accepts the terms of the offer.\textsuperscript{151} In characterizing the employee's choice in this way, the court misconstrued the relationship between employer and employee. The criminal defendant who bargains with the court for a lesser sentence is usually admitting some measure of guilt for the crime with which he is charged.\textsuperscript{152} Drawing this analogy to the employer-employee context is paramount to saying that the employee is bargaining for the opportunity to "not be fired even though he legally could be."\textsuperscript{185} \textit{Paolillo} requires only that the employee be given a reasonable amount of time to make a considered

\textsuperscript{145} \textit{Id.} at 826.
\textsuperscript{146} \textit{Id.} (employees given two months as opposed to three days in \textit{Paolillo}).
\textsuperscript{147} \textit{Id.} at 826, 829.
\textsuperscript{148} \textit{Id.} at 827.
\textsuperscript{149} \textit{Id.} at 828.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}

\textsuperscript{152} By the very act of plea bargaining, the criminal defendant is admitting his guilt to the lesser offense regardless of whether he is in fact guilty of that offense.

\textsuperscript{153} If the employee is faced with a situation where he "properly could be fired," analogous to where the criminal defendant "properly could be charged with the crime committed," then he has no claim under the ADEA. Discharge for good cause is a lawful practice, by definition, and under the ADEA. \textit{See} 29 U.S.C. § 623(f)(3) (1986).
choice. For the criminal defendant, a reasonable amount of time is likely to be quite short. There is not much complexity to the choice: "Would you rather risk the chance of spending ten years in jail or two?" On the other hand, the decision whether to accept early retirement carries with it many financial and personal considerations that make the choice significantly more complex, warranting a greater amount of time to weigh the options.

The Henn court concluded that any employee to whom the offer of accepting early retirement is extended is the beneficiary of a distinction based on age. Therefore, he cannot later claim to be adversely affected by discrimination in the design of the offer. For this reason, employees who are included in the plan would be precluded from bringing suit under the ADEA since they are members of the favored group. The opinion also stated that employees who are excluded from such a plan would have a valid claim of discrimination. This approach suggests a superficial examination of "favoritism" in plans that only extend benefits to a "select" group. When taken to its extreme, this view allows for plans that are unquestionably and impermissibly discriminatory. Certainly, no court could uphold an employer's "early retirement" plan that offered substantial benefits to all of its black or female employees as an incentive to leave their jobs; yet such a plan would arguably be "beneficial" to members of the "select" group. Although it may be somewhat disingenuous to extend the Henn court's analysis this far, doing so illustrates that some plans which offer special benefits to a select group can at the same

154. 821 F.2d 81, 84 (2d Cir. 1987).
156. 819 F.2d at 827.
157. Id.
158. See Kass, supra note 17, at 67.
159. There is, of course, a difference in the degree of judicial examination applied to the two forms of discrimination described here. The latter, involving race and gender discrimination, triggers Title VII analysis with its corollary "strict scrutiny" and "intermediate scrutiny" standards of examination into the motives behind such a plan; whereas the former, concerning age-based distinctions, receives a lesser degree of critical analysis by the courts. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 311, 313-14 (1976).
time be harmfully discriminatory toward that same group by their design.

The Seventh Circuit further claimed that the Paolillo court had apparently "overlooked" the regulation governing early retirement plans, 29 C.F.R. § 1625.9(f). This regulation provides that: "Neither section 4(f)(2) [the bona fide employee benefit plan exception codified at 29 U.S.C. § 623(f)(2)] nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option." Even if the Second Circuit had "overlooked" this regulation regarding the validity of bona fide plans that use age as a criterion, it has no real bearing on the voluntariness issue. To rely exclusively on 29 C.F.R. § 1625.9(f) is to look only at half of the statute. Section 623(f)(2) of the ADEA is a two-tiered statute. It begins by stating that it is not unlawful to observe the terms of a bona fide employee benefit plan as long as the plan is not a subterfuge to evade the purposes of the Act. This is the provision of the statute addressed by 29 C.F.R. § 1625.9(f). The statute contains a second requirement, however, which states that no plan shall permit the involuntary retirement of employees protected under the statute on account of their age. This part of the statute is governed by 29 C.F.R. § 1625.9(b)(1): "The amendment [referring to the 1978 amendments to the ADEA that added the voluntariness requirement] applies to all new and existing seniority systems and employee benefit plans. Accordingly, any system or plan provision requiring or permitting involuntary retirement is unlawful . . . ." Furthermore, if an employer wishes to

160. 819 F.2d at 827.
162. The term "bona fide employee benefit plan" has been interpreted quite broadly as one that (1) exists, and (2) pays benefits. United Air Lines Inc. v. McMann, 434 U.S. 192, 194 (1977); Potenze v. New York Shipping Ass'n, 804 F.2d 235, 237 (2d Cir. 1986), cert. denied, 107 S.Ct. 1455 (1987); Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 55 (2d Cir. 1986); Patterson v. Independent School Dist. # 709, 742 F.2d 465, 466 (8th Cir. 1984); EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982); see also Note, Age Discrimination in Employment and the Benefit Plan Defense: Trends in the Federal and Iowa Courts, 30 Drake L. Rev. 617, 622 n.38 (1980-81).
164. 29 U.S.C. § 623(f)(2) (1986). The early retirement plans in both the Paolillo and Henn cases were offered to the employees on account of their age. While this in itself is lawful under the ADEA, to permit the involuntary retirement of the employees pursuant to a plan that makes age distinctions is not. Id.
offer an early retirement program, and the plan is structured in such a way as to call into question its voluntariness, then 29 C.F.R. § 1625.10(a)(1) requires the employer to show that the element of voluntariness has been met.\textsuperscript{166} When Congress added the voluntariness requirement to the ADEA in 1978, it wanted "to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age."\textsuperscript{167} To decide a case where voluntariness is at issue solely on the provisions of 29 C.F.R. § 1625.9(f) is tantamount to reading the involuntariness clause out of the statute.

"The 'prima facie case' in the law of discrimination is a shorthand for the constellation of events that raises a suspicion of discrimination—enough so to require the employer to explain his conduct."\textsuperscript{168} In both the \textit{Paolillo} and \textit{Henn} decisions, the reason given by the employers for instituting their early retirement program was to reduce costs through a reduction in the number of employees.\textsuperscript{169} It is clear that the means serve the ends in such a plan; fewer employees means fewer salaries to pay and the result is a cost savings. In \textit{Henn}, the structure of the plan was consistent with the justification for offering it. The employer wished to cut costs by offering its employees the option of early retirement.\textsuperscript{170} By its terms the employees in \textit{Henn} were given over two months to consider the option.\textsuperscript{171} Therefore, the employer cannot be accused of forcing the employees into making an ill-considered and involuntary choice. On the other hand, the employer in \textit{Paolillo} would certainly be hard-pressed to come up with a cost justification for giving the employees less than a week to make a similar decision.\textsuperscript{172} The only conceivable reason for requiring such a spontane-

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\item \textsuperscript{166} 29 C.F.R. § 1625.10(a)(1) (1987). \textit{See supra} note 118 and accompanying text.
\item \textsuperscript{167} H.R. \textit{REPORT, supra} note 83, at 8.
\item \textsuperscript{168} 819 F.2d 824, 828 (7th Cir.), cert. denied, 108 S.Ct. 454 (1987); \textit{see also} Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
\item \textsuperscript{169} \textit{See supra} note 821 F.2d 81, 83 (2d Cir. 1987); 819 F.2d at 826; \textit{see also CHALLENGES AND SOLUTIONS, supra} note 5, at 61 (the reasons most often given for instituting an early retirement program are to avoid layoffs and as a response to "sluggish economic conditions").
\item \textsuperscript{170} 819 F.2d at 826.
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} Whitney Chain had originally planned to give the employees two weeks to decide, but the time was cut short due to administrative problems. 821 F.2d at 84. The dead-
\end{enumerate}
\end{footnotesize}
ous choice on the part of the employees would appear to be the employer's fear of imminent financial ruin. The proffered economic reason for structuring the plan with such a short deadline had little, if any, real business justification. An inference remains that the employees were left with a plan that impinged on the voluntariness requirement of the ADEA. It then follows that employees who can present evidence that the employer has neglected this requirement, with no valid reason for doing so, have made out their prima facie case.

Requiring the employer to assure that its employees are given a reasonable amount of time to make a decision will not have the effect of "opening up the floodgates" to a rash of unfounded claims brought by recent early retirees who now regret the choice that they have made. On the contrary, it will only affect those employers who have chosen to unreasonably curtail the time given to employees to make a considered choice. Frequently, the rationality of a decision is proportional to the amount of time given to make it. The requirement of sufficient time for consideration merely acknowledges that there is a bottom limit to this scale. If an employer wishes to go below this limit, it is risking the chance that it will have to justify its reasons in court with the threat of liability under the ADEA. All that the employer would have to do is offer a reasonable amount of time, which is surely not an overly burdensome requirement considering the importance of the decision to be made by the employees.

CONCLUSION

The decision to take early retirement is an important and far-reaching one. It can be a desirable alternative to continuing in a job that is no longer appealing or an opportunity to reap the benefits of a lifetime of work at an earlier age. In either event, it is important to ensure that the choice is voluntarily made by the retiring employee, and not forced upon him. The ADEA requires this. The Second Circuit has held that adequate time to decide is

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173. See Potenze v. New York Shipping Ass'n, 804 F.2d 235, 238 (2d Cir. 1986), cert. denied, 107 S. Ct. 1955 (1987)("The plan need not be the best available plan, though obviously if it's not, the proffered reasons for the structure of the plan will have less force.").
an indispensable element of voluntariness, and that employers must make sure that it is given or they risk a possible ADEA suit. In light of the importance of the decision to be made, a reasonable amount of time to make it is not too much to ask. The decision in Paolillo has set a precedent for recognizing this; the tenets of good faith dealing and fairness between employer and employee dictate that the other circuits should follow its lead.

"Will you still need me, will you still feed me, when I’m sixty-four?"\(^{174}\)

JAMES WILLIAM SATOLA

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