In the

Supreme Court of the United States

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UNITED AIR LINES, INC.,

PETITIONER,

V.

HARRIS S. MCMANN

RESPONDENT.

No. 76-906

Washington, D. C.
October 4, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED AIR LINES, INC., Petitioner,	:	
v.	:	No. 76-906
HARRIS S. McMANN, Respondent.	:	

Washington, D.C.
Tuesday, October 4, 1977

The above-entitled matter came on for argument at 11:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ARNOLD T. AIKENS, Esq., P.O. Box 66100, Chicago, Illinois 60666; for the Petitioner.

FRANCIS G. McBRIDE, Esq., 277 South Washington Street, Suite 212, Alexandria, Virginia 22314; for the Respondent.

C O N T E N T S

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The Afternoon Session begins on page 38.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-906, United Air Lines against McMann.

I think you may proceed whenever you are ready, Mr. Aikens.

ORAL ARGUMENT OF ARNOLD T. AIKENS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. AIKENS: Mr. Chief Justice, may it please the Court:

This matter is before the Court on petition of certiorari to the Fourth Circuit Court of Appeals. The case arises under the Age Discrimination Act, and presents a very narrow issue--that is, whether an involuntary retirement of a person under age 65, pursuant to a bona fide pension plan adopted many years before the act, is permissible without further justification.

A stipulation in this case has been entered into as to the facts, and they may be very briefly stated. The Respondent McMann began his employment with United Airlines in 1944. And during the course of his career he held several positions. He was retired at the age of 60 in 1973 and at that time held the position of technical specialist, aircraft systems, which is a flight management position.

At the time respondent began his employment with United, United had a pension plan in existence. Membership was

voluntary. Respondent did not elect to join that plan until several years later, in 1964. At the time he joined the plan, his application card indicated that the normal retirement age was 60 years. Thereafter, he received annual reports from the company describing the benefits he had accrued, and on the face of each of these reports the normal retirement age was stated as 60.

Prior to his retirement in 1973, respondent notified the Secretary of Labor that he intended to sue on the ground that his retirement violated the Age Discrimination Act. The Labor Department responded that United's plan was a bona fide plan and inasmuch as it had been adopted many, many years before the act, that it did not appear to be a subterfuge. Respondent then filed his action in the Eastern District of Virginia, the case was submitted on cross motions for summary judgment, and summary judgment was granted in favor of United.

He appealed to the Fourth Circuit, claiming that his retirement violated the Discrimination Act. United contended that an express exception, Section 4(f)(2), expressly provided that involuntary retirement was authorized pursuant to a bona fide plan that was not a subterfuge to evade the purposes of the act. United relied upon then the only appellate decision, Brennan v. Taft Broadcasting, and said that inasmuch as its plan had pre-existed the act by some 26 years that it therefore could not be a subterfuge, which was the holding in the Taft

case. The Fourth Circuit reversed. The substance of its holding was that any involuntary retirement is presumed to be a subterfuge to evade the purposes of the act. Looking to the legislative history of the act, the Court said that in order to avoid the condemnation of subterfuge, the employer must prove that the retirement related to either an economic or a business purpose and not simply age.

In this decision the Fourth Circuit stands alone. The Second, Third, Fifth, and Ninth are now in conflict.

Two sections of the act are pertinent to this case. Section 4(a) provides that it shall be unlawful for an employer to fail or to 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 the individual's age.

Q Mr. Aikens, I am curious about one fact. Does the record show that everybody under this plan was discharged at age 60 by United?

MR. AIKENS: Yes, the record does show. It is revealed in a system board decision Professor Cox wrote which indicates that the normal retirement plan is followed for everyone at United. The Fourth Circuit's decision recognizes the fact that United has uniformly applied the plan.

Q No exceptions whatsoever?

MR. AIKENS: No exceptions within United Air Lines,

Inc.

Q What happens if a person is retired under the section and then applies for reemployment?

MR. AIKENS: You mean if he were retired on one day and applied for reappointment the following day, Your Honor? We do not think that it is possible under the act, realizing that the act has two somewhat inconsistent phrases.

Q What do you mean "possible"? What would you say to him? What would United say to the person applying?

MR. AIKENS: United would have to say, Your Honor, that the act does not ban a retirement program, that he has been retired, and that the kind of employment the act speaks of is those persons who have not been retired and are receiving benefits.

Q Would not the company at least have to say, "We will reemploy you, but you will have to give up your pension"?

MR. AIKENS: I suspect that the company would although this would be inconsistent with its--

Q Are you suggesting the reason that they would refuse to reemploy him is that he is a retired pensioner, not that he is too old?

MR. AIKENS: That is correct.

Q So, this is a logical extension of his election to be in the pension plan.

MR. AIKEN: His election to be in the pension plan and the uniform practice of the company.

Q Did the cases in the other circuits involve pension plans where people had the option to elect in or out?

MR. AIKEN: I believe that--

Q Did any of them involve situations where once you are employed you are under the plan willy-nilly and there is no way out of it?

MR. AIKEN: Your Honor, I believe each of the cases involves a plan in which the employer could retain the employee after the age 60 or whatever it happened to be under the plan.

Q I do not understand that.

MR. AIKEN: The other cases involved plans in which retirement was not mandatory at a certain age. The employee could be retained after 60 or whatever the age happened to be if the employer chose to do so.

Q This sounds like there was not mandatory retirement at all.

MR. AIKEN: That is correct. It is optional on the part of the company in most of those cases.

Q There is not much of a conflict then, is there?

MR. AIKEN: Not a conflict within the plans. There has been a conflict within the application of this statute.

Q You said that when he first became employed back

in the forties he did not go under the plan. By what process or steps did he move to get under the plan? Did he apply to get under it?

MR. AIKENS: Yes, Your Honor. In 1964 he apparently made the determination to join the plan and did so. It was a voluntary election on his part.

Q Do you argue that that was a contract? I do not observe in your brief anywhere that you argue that that constitutes a contractual undertaking between himself--a voluntary contractual undertaking--between himself and United.

MR. AIKENS: It is, Your Honor. We deem it to be a contract. The retirement plan is.

Q Does a contract clause enter into this in any way? In subsequent legislation the Court would appear to have invalidated the contract, if there was a contract.

MR. AIKENS: We do not think that the legislation, Your Honor, has invalidated.

Q That is the position of the Court, is it not?

MR. AIKENS: That was the position of the Fourth Circuit, yes, Your Honor.

Q Does that invoke, do you think, the contract clause?

MR. AIKENS: We do not believe so, Your Honor.

Q If it is a contract, the statute as construed has some tendency to parrot, does it not?

MR. AIKENS: According to the Fourth Circuit, according to all other circuits now.

Q That is all that is in review here, is it not?

MR. AIKENS: Yes.

Section 4(f)(2) of the statute provides that it shall not be unlawful for an employer 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 the act, except that no such employee benefit plan shall excuse the failure to hire any individual.

Three cases essentially have focused on this exception, the first of these being the Taft case from the Fifth Circuit. And it should be noted, I think, that while it is alleged that the language of this provision is not plain, both Brennan and McMann have stated that the language is unambiguous. The problem has been the difficulty with applying the term "subterfuge." In Taft the Court applied dictionary definitions, saying that a bona fide plan was a genuine, authentic, good-faith plan. It defined subterfuge as deception by artifice or strategem, thus applying a state of mind concept to the definition. The Court in Taft held that since the plan it was involved in there preceded the act by some six years, it obviously could not have been a subterfuge to evade the purposes of the act. United agreed with the holding of

that case and relied upon it in McMann inasmuch as its plan was conceded to be bona fide, paying reasonable benefits, and had existed some 26 years before the act.

The McMann case rejected that definition and presumed any early retirement or retirement before the age of 65 to be unlawful. It said that one must look to a reason unrelated to age to justify an involuntary retirement. And, accordingly, the Court said that that reason should be a business or an economic reason. The Court said that this conclusion was justified by its review of the history. And the history that it looked to was a single reference related to the 4(f)(2) exception. That history provided that this section of the act does apply to new and existing plans, that the exception emphasizes the primary purpose of the bill, which is hiring. And it said that Congress's purpose was to remove plans as a barrier to hiring persons within the protected age group.

The history that the Court relies upon is really limited to the last phrase of Section 4(f)(2). This has sometimes been referred to as the Javits Amendment. Senator Javits was extremely concerned that corporations would not hire persons within the protected age group simply because of the high cost of putting them into pension or benefit plans for a very limited number of years. He sought, therefore, to eliminate that as a barrier, which of course that exemption

has done. That exemption, however, addresses itself to another condition as well as this.

Nevertheless, it appears that what the Fourth Circuit has done is to say that if there is an economic factor to be considered in connection with the hiring of an individual, then there should be an economic factor considered with respect to involuntary retirement. And so the Court imposed that as a criterion. The distinction, however, is that the Congress imposed the economic factor with respect to that portion of the exemption covering hiring; it did not do so as to involuntary retirement.

Q Under the Fifth Circuit rule in Taft Broadcasting any good-faith retirement plan that was established prior to the enactment of this statute in 1967 would permit, in your submission, the involuntary retirement of any employee at whatever age that plan provided; is that correct?

MR. AIKENS: It would, Your Honor.

Q It could not be a subterfuge; that is your submission, is that right?

MR. AIKENS: The Court did not look beyond that. However, it is interesting that in its definition of bona fide, the Taft case did consider not just a plan but a plan which provides reasonable benefits.

Q I said a good-faith plan. Good faith is the English translation of bona fide.

MR. AIKENS: Yes, that is correct.

Q The Third Circuit took a different view on that point from the Fifth Circuit, did it not?

MR. AIKENS: The Third Circuit did, Your Honor, in the Zinger case. And the Third Circuit said that it would not look at the term subterfuge in terms of a mental concept or a state-of-mind concept. It looked to the purposes of the act, and it said that the act is primarily aimed at prohibiting discrimination in hiring practices and in discharging, and that the act was intended to preserve the retirement plan. It did not ban them. It then made a distinction between a person who is retired and receiving reasonable benefits and the person who is totally discharged or who is retired but does not receive any benefits. And it said this is the subterfuge, that person who is harmed because he does not have benefits. And this is what the prohibition is aimed at. It therefore concluded that subterfuge as used in Section 4(f)(2) means a sham plan or one that does not provide reasonable benefits to the retiree.

Q A retirement plan without any benefits is no different from a discharge.

MR. AIKENS: That is precisely--the Court equated the two.

Q At what point would the amount of benefits distinguish between what is bona fide and what is not?

MR. AIKENS: No court, Your Honor, to our knowledge, has ever said what is reasonable and what is unreasonable.

Q The statute does not use the word "reasonable."

MR. AIKENS: And the statute does not use the term "reasonable," no. The statute addresses itself simply to--

Q To whether or not it is bona fide and whether or not it is a subterfuge.

MR. AIKENS: That is correct, Your Honor.

Q If it provided $10 a month, that might cast some doubt on its good faith or suggest that it was a subterfuge, would it not?

MR. AIKENS: It would, indeed, Your Honor.

Q I thought it was your submission, Mr. Aikens, that no plan that had been entered into prior to the enactment could possibly be a subterfuge.

MR. AIKENS: No plan that is a bona fide plan, Your Honor.

Q It might or might not be bona fide. The statute sets up two criteria, does it not? It has to be both bona fide and not a subterfuge.

MR. AIKENS: Correct.

Q Is that not right?

MR. AIKENS: That is correct.

Q And I thought it was your submission that no plan that antedated the enactment of this legislation could

possibly be a subterfuge; it might not be bona fide, but it could not be a subterfuge. Is that not your submission?

MR. AIKENS: United's position was consistent with the Taft position, that if it is a bona fide plan and did pre-exist the act, that it would not be a subterfuge.

Q That it could not be?

MR. AIKENS: That is correct.

Q Could a post-act bona fide plan be a subterfuge?

MR. AIKENS: A post-act plan could or could not be.

Q A post-act bona fide plan. How could that be a subterfuge? Are not those words mutually inconsistent?

MR. AIKENS: Some courts have held that something that is bona fide cannot be a subterfuge, Your Honor.

Q Is that not redundant?

MR. AIKENS: It could be said that it is. If one were to look at subterfuge and define it not as--or look to its application, could a plan be genuine but could it have been put into effect with the provocation of circumventing something, it might be a subterfuge.

Q Mr. Aikens, I suppose there is also a theory which is suggested, although not completely explicit, in the Third Circuit opinion that when there are adequate pension benefits, as opposed to a case in which there is a discharge with no pension, you really do not have a discharge within the

meaning of the act.

MR. AIKENS: That is correct, Your Honor.

Q Do you take that position, or do you rely exclusively on 4(f)(2)?

MR. AIKENS: No, Your Honor, we rely both upon Taft and say that Taft was correct as far as it went and we also rely upon the Zinger case, the Third Circuit decision. These two decisions are not that far apart. They do not really reach different results. The distinguishing difference, I think, between the two cases is that Taft concludes that a bona fide plan is one which provides reasonable benefits. The Zinger Third Circuit decision uses reasonable benefits to define the term "subterfuge," and really they arrive at the same result. But "reasonable benefits" is defined in two different words.

We believe that the Zinger case too supports the position of our case. In that case the Court looked to the legislative history.

Q What were in fact the benefits received by Mr. McMann under this plan? He did not elect to go under it until his 51st birthday.

MR. AIKENS: That is correct.

Q He had only nine years of employment before his retirement.

MR. AIKENS: That is correct.

Q What are his benefits in terms of a percentage of his average wages or highest three-year wages or whatever.

MR. AIKENS: There are two parts to the plan, Your Honor. There is a fixed and there is a variable part. The fixed part in this case derives from the contribution of the employee. However, because this was a pilot's plan, subject to negotiation and collective bargaining, Mr. McMann only paid one year under the fixed part. United pays the complete contribution for the fixed part of the portion. On the variable part he made contributions.

Q Part of this was part of the collective bargaining agreement with the ALPA, was it not?

MR. AIKENS: Yes, that is correct.

The sum that he received from the plan is reduced by two factors. Number one, the fact that he was a member for a very short time. And then secondly at the time of his retirement, he elected to accept a ten-year option--that is, a guaranteed payment for ten years--which further reduced it. This would have amounted in dollars and cents to something like $450, in that area.

Q A month?

MR. AIKENS: That is correct.

Q What his salary at the time of his retirement?

MR. AIKENS: I do not know, Your Honor.

Q You do not know what percentage this was of his

salary?

MR. AIKENS: No, I do not know. But United, in view of the fact that this sum was not a very high sum and certainly not equivalent to one who would have been a member of the plan for 20 or 30 years, made a voluntary contribution which exceeds what he gets. Actually the benefits that he now receives--they are approximately $850 a month. The contribution that he receives of course is not out of the pension plan. It is United's contribution to him.

Q Does United do that for everybody who has just been in a plan nine years?

MR. AIKENS: No, Your Honor. We believe that this is unique. There has been a change in circumstances. At the time that Mr. McMann joined the company--and he was a pilot--membership in the plan was by election. Now we do not have that problem because the pilots are automatically enrolled in the plan. So that I think Mr. McMann is unique in the company in receiving this additional contribution.

Q Did they decide to pay it after this lawsuit or before?

MR. AIKENS: No, it was at the time of his retirement.

Q To be sure I have got the arithmetic correct, the full answer to Justice Stewart's question is that he is getting $850 a month, $450 on the pension and $400 supplemented by the voluntary contributions of United?

MR. AIKENS: That is correct, Your Honor. And those figures are average figures. I do not mean to be specific about them.

Q Before his retirement he had been in touch with the Labor Department, indicating his intention to proceed under the statute?

MR. AIKENS: Yes, he had.

Q I suppose United knew about that.

MR. AIKENS: Yes, it did, and it received the response of the Labor Department, a copy of that.

In the Zinger case the Court went to a great deal of difficulty to trace the history of this act, the legislative history and to clearly demonstrate that Congress intended to protect the pension plan or the retirement plan in 4(f)(2), and that it did create an express exemption, allowing for involuntary retirements pursuant to that. That body of history the Fourth Circuit has for some reason chosen to ignore. But the history briefly stated is that this was an administration bill and that the President in submitting the bill to Congress expressly provided for an exception for those persons retiring under pension plans.

Senator Javits, who was most active before the committees in advocating the plan, recognized also that the administration's plan which permits involuntary retirement under a bona fide plan meets only part of the problem, he said.

Obviously then he recognized this as a valid part of 4(f)(2). He then went on to propose his amendment, which is now the last phrase of 4(f)(2).

Q Just so I have got it straight, in order for us to agree with you, would we have to reach this question and deal with it as to whether the statute, whether 4(f) or whatever the exemption is, covers a plan that is obligatory on the employee but optional on the employer? United could have, under the terms of the plan, retained any employee beyond 60.

MR. AIKENS: That is correct, Your Honor.

Q And you say they never have.

MR. AIKENS: In practice it never has. But it could.

Q Certainly there was a strong dissent in the Fifth Circuit with Judge Tuttle saying exemption was not even meant to cover a plan that was optional on the employer. The Fourth Circuit put that issue aside because it decided against you on another ground. What do we do about that question? Do we have to deal with it here? Assume we agreed with you otherwise--

MR. AIKENS: In the factual context of our case, it does not have to be dealt with since we have uniformly--United has uniformly applied this.

Q I know, but the argument is that the company still has the option, that the Congress only intended to permit

the company to exempt a plan that was obligatory both ways. That was the argument in the Fifth Circuit.

MR. AIKENS: Yes, but we think that the history belies this and that Congress did not--

Q That may be so, but do we have to reach to hold for you? Do we have to decide it?

MR. AIKENS: I do not believe the Court would have to decide it in this case, Your Honor.

Q I thought your submission was that while normal may not have the dictionary meaning of mandatory, that in fact it was equivalent to mandatory under your plan as it has been historically administered, and that is what Professor Cox found in the arbitration.

MR. AIKENS: That is what Professor Cox found, and that is what the Fourth Circuit conceded.

Q Normal means mandatory in fact.

MR. AIKENS: Normal in this case means mandatory.

Q As a matter of the historic administration of this plan.

MR. AIKENS: Yes.

Q And that was a unanimous decision of the arbitration panel, was it not?

MR. AIKENS: Yes, it was, Your Honor.

Q Mr. Aikens, am I correct, is there not some legislation pending in the Congress today that ties right into

this problem?

MR. AIKENS: There is. And it is my understanding, Your Honor, that the House has passed a bill and a bill is pending in the Senate.

Q Does it have any bearing on this case?

MR. AIKENS: It does not have any bearing on this case. Mr. McMann is of course affected by this, and any new bill will not be retroactive. Others who have been retired pursuant to--involuntarily retired pursuant to plans are also affected by the ruling of this case.

Q You realize of course that a large majority of this Court is beyond the age of 60. Do you think we should all recuse ourselves and let you go elsewhere?

MR. AIKENS: No, Your Honor. No, I do not.

Q Dual capacity.

MR. AIKENS: That is correct.

Your Honor, we respectfully submit that the Fourth Circuit's decision is in error and that it should be reversed and that the Court should follow the rulings of Taft and Zinger.

Mr. Chief Justice, may I reserve my--

Q Mr. Aikens, may I just ask one other question: On the question of the amount of benefits for your adversary, Stipulation Exhibit No. 3 does give some dollar figures, the $420 and the $840 was his first check. Is there anything else

in the record that gives the precise dollars?

MR. AIKENS: No, Your Honor, there is nothing in the record that gives those figures.

MR. CHIEF JUSTICE BURGER: Mr. McBride, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANCIS G. McBRIDE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. McBRIDE: Mr. Chief Justice, and may it please the Court:

This is a case of first impression. It is the very first case which this Court has ever considered under the Age Discrimination Employment Act of 1967. The kind of determination that the Court will have to make has been made many times before by this Court. Specifically this Court must decide what the import of the language used by Congress is, and it must also examine what Congress intended to do when it passed the legislation.

The language of the statute which is involved, particularly Section 4(f)(2), requires that in order to come under that exception, a pension plan must be both bona fide and not a subterfuge to evade the purposes of the act. The purposes of the act are set out in Section 2 of the act. Clearly Congress stated them as explicitly as possible. They are to allow older workers to obtain and to retain employment.

Q Do you distinguish between the purposes of the

act the language of the act in any way?

MR. McBRIDE: No. I think the language of the act is clear. Section 4(f)(2) incorporates by reference basically the provisions of Section 2, which state the purposes. The purposes I think are essential to this Court's consideration of the question. Also Section 4(a) of the act, where the actual prohibitions of age discrimination are enumerated, provides that there can be no discrimination in employment when the sole criterion for that, whatever action, is the age of the person involved.

Q Do you accept the Fourth Circuit's characterization of the plan as being a bona fide plan?

MR. McBRIDE: The question down there was presented to me, and I said I agreed with them that it was bona fide in the sense that it does pay substantial benefits. I agree generally that the plan is bona fide. United's plan is bona fide, yes. However, the question before the Court primarily is whether or not the plan is a subterfuge to evade the purposes of the act. I think it is very important for the Court to be aware that the purposes are as I stated, to let older workers be employed.

Q Or younger workers. It is equally in violation of the act to discriminate against somebody because of his youth, is it not?

MR. McBRIDE: The act itself only applies between the

ages of 40 and 65, Your Honor.

Q Or discriminate against somebody because he is only 40.

MR. McBRIDE: That is correct, or because he has turned 40. I do not think that was discriminating because of youth.

Q Maybe not in the mind of Congress, but that is what the language of the statute says.

MR. McBRIDE: The language does in fact have that import, yes.

Q Would you violate the act, in your view, if the company refused to permit a man 41 years old to begin pilot training and apply for a pilot's job if he had no previous flying experience?

MR. McBRIDE: That would be a very difficult question, Your Honor, primarily because of the necessary extent and expense of training someone to become a pilot. But in that case, if that kind of discriminatory result was allowed, it would not be allowed because a man was 41; it would be allowed because of a business reason. In other words, the company would not be able to realistically finance that kind of training necessary for a person to become a pilot. So, that would fit in with what the Fourth Circuit had in mind when it said a business or economic reason.

Q That is covered by the BFOQ language of the

statute, is it not?

MR. McBRIDE: No, that would not be the BFOQ language.

Q It might, I also should add, be covered by the FAA regulations and perhaps also by the agreement between the company and the ALPA.

MR. McBRIDE: Even if it was, the FAA regulation has no minimum entry age. But if it was within the scope of the contract--for example, if the contract said, "We will not hire anyone over the age of 40 to become a pilot"--that would be similar to the present case. And whether that provision would be allowed to stand in the contract would become a question of whether it was permissible under the act. The act would have clear priority over that kind of question.

Q Since I have already interrupted you, am I correct in my understanding that in your answer to the Chief Justice's questions you made clear that in your view at least whether something is bona fide is quite a different question from whether or not it is a subterfuge? And by something I mean a pension plan.

MR. McBRIDE: Definitely.

Q That they are two separate and quite distinct tests?

MR. McBRIDE: Yes. Congress used both terms.

Q Right. And we have to assume that they meant

different things when they use both--

MR. McBRIDE: They meant different things. That is correct.

Q --that they were not indulging in tautology. And your understanding of the meaning of bona fide is that the plan provides reasonable benefits?

MR. McBRIDE: That is the working definition that every court which has considered the question has used. Whether or not that is precise--

Q Or complete.

MR. McBRIDE: --or complete has not really been an issue.

Q But at least that is one criterion--

MR. McBRIDE: That is one criterion.

Q --of whether or not the plan provides reasonable benefits?

MR. McBRIDE: Yes, that is correct.

Q Retirement benefits. And then what is the test in your submission--what is the meaning in your submission of whether or not the plan is a subterfuge?

MR. McBRIDE: The primary test--

Q It has nothing to do with reasonable benefits?

MR. McBRIDE: No, it has nothing to do with reasonable benefits. The primary test becomes a question of whether or not the criterion used is a criterion which is

prohibited by the act. In other words, if age is the sole reason for an action, a discriminatory action, then that becomes--

Q Let us not, if we can help it, use polar words. If it is the sole reason for manadatory retirement under 65; is that what you mean?

MR. McBRIDE: Yes. It becomes a subterfuge because the purpose of the act and the prohibitions of the act are against the terminations based solely upon age.

Q Then any pension plan, even though it provided reasonable benefits and was therefore bona fide, would nonetheless be a subterfuge and not covered by this exception to the general provisions of the act if it in fact provided for mandatory retirement under 65, unless there were some what?--other reason.

MR. McBRIDE: Unless there were some other reason, yse.

Q And would that other reason have to be some economic or occupational or--

MR. McBRIDE: It could be economic or business reason, or it could be an outside ruling by the federal government such as if a person was a firefighter and the Congress decides that firefighters should be exempt from--or that involuntary retirement of firefighters should be allowed, even though--

Q Motorcycle policemen or something like that.

MR. McBRIDE: --it may not be a bona fide occupational qualification, if there is this type of ruling, that would allow the involuntary retirement.

Q Mr. McBride, I would think the dictionary definition of a subterfuge is something that says one thing and means another, something that purports to be okay but really is not. And by your interpretation of it, a contract that says in so many words, "We are going to retire you at 65 or 60 and give you these pension benefits," makes it perfectly clear and does not dissemble at all, is nonetheless a subterfuge.

MR. McBRIDE: Yes, Your Honor. I think that the--what shall we say?--sinister action type of definition of subterfuge is not applicable in this case.

Q It has to be a subterfuge to evade the purposes of this act.

MR. McBRIDE: That is true.

Q But in order to be a subterfuge to evade the purposes of the act it has to be a subterfuge to start out with.

MR. McBRIDE: But I do not think that the term "subterfuge" implies any malicious intent or any deliberate going around the act. In fact, the result may be a subterfuge although the intent may not necessarily be that to get around

the act. And also it is again the purposes of the act which are important in this case.

Q Prior to the passage of the act, was it in any sense a subterfuge?

MR. McBRIDE: I do not think I can really answer the question because prior to the passage of the act there was no legislative purpose that would be avoided by the subterfuge. Before the act was passed, the plan would have been bona fide, but as far as the question of whether it was a subterfuge or not, I do not believe it would really have any relevance because there was nothing to relate it to.

Q In order for you to prevail, do you think that you have to show that this plan was a subterfuge as that term is used in the act?

MR. McBRIDE: No. I think the--

Q What other grounds could you prevail on?

MR. McBRIDE: I think that we could prevail upon the terms of the pension plan itself. The pension plan states that the normal retirement date shall be the 60th birthday of the participant. The United Air Lines plan which is involved here did have a provision for superannuated employment of someone beyond that normal retirement date. The Fourth Circuit did not reach the question then; it was not necessary to reach that question under the grounds for the decision of the Fourth Circuit. They took a rather broader approach to the problem

and therefore did not get involved in the question of whether or not the plan itself would have been adequate, presuming they had agreed with United's interpretation of the statute to involuntarily retire Mr. McMann.

Q Mr. McBride, to what extent does collective bargaining have to do with this?

MR. McBRIDE: With the retirement age? Nothing.

Q But it was a part of collective bargaining, was it not?

MR. McBRIDE: The retirement age was never a part of the--

Q Retirement plan.

MR. McBRIDE: The retirement plan--it is an unusual situation. As I understand it, only portions of the pension plan have been bargained for. The original United Air Lines pension plan was established in 1941. At that time the retirement date for pilots was 60. That date has maintained itself throughout all of the alterations to the plan, including the current edition.

Q You mean each change in the plan was negotiated with the union?

MR. McBRIDE: It was partially negotiated with the union. The relevant portions of the plan which we are concerned with were never a subject of collective bargaining.

Q Could they have been?

MR. McBRIDE: I believe they probably could have been. But, as a practical matter, I do not believe that any result would have come of that, for several reasons. Primarily the company has always maintained the age 60 date was necessary, and the Air Line Pilots Association has never agreed with that. And I would think it highly unlikely that any meaningful result would have come of putting it on the bargaining table.

Q Would it have made any difference, had it been the result of collective bargaining?

MR. McBRIDE: I do not think so, no. I think it would be the same situation that we have here now.

Q The statute regardless of--

MR. McBRIDE: The statute regardless of the contract. I do not think there is any problem with the pre-existing plan question. The legislative history made it quite clear that Congress intended the act to apply to both existing and new plans. And there are many decisions primarily in Circuit Courts--

Q I have great difficulty in how you can say that this was meant to apply to plans previously adopted, the following language: "A subterfuge to evade the purpose of this chapter." I do not see how that could apply to a plan that was adopted before unless they had a crystal ball.

MR. McBRIDE: Again, it is a question of subterfuge

to evade the purposes of the act. The subterfuge can come into being when a plan is operated so that age is a basis for the decision.

Q After the act.

MR. McBRIDE: After the act. Then it becomes a subterfuge to evade the purposes of the act.

Q That is what the Fourth Circuit in effect held.

MR. McBRIDE: That is what the Fourth Circuit in effect held, right.

Q So, the day before the act became effective, it was not a subterfuge, you say, because there was no yardstick by which to measure. But the effective date of the act it automatically became a subterfuge?

MR. McBRIDE: Yes.

Q To evade the act.

MR. McBRIDE: The purposes of the act, yes.

Q I thought you said there is no difference between the purposes of the act and the act.

MR. McBRIDE: The statute speaks in terms of the purposes of the act.

Q Could you not indicate that the words "the purposes of" are redundant and the result would be the same if it said "the act" or "the chapter"?

MR. McBRIDE: I think the phrase "purposes of the act" makes it much clearer, especially in light of the way the act

has been interpreted by some courts. Some courts--Zinger and Taft--have obviously considered the act rather than the purposes. I do not think there is any difference. But, as I said, there appears to be some question about it.

Q Mr. McBride, did I correctly understand you a few moments ago to say that you do not have to urge affirmance on the subterfuge argument but may do so on the basis that the plan indeed does not mandate retirement at age 60--

MR. McBRIDE: That is correct.

Q --even though the Fourth Circuit expressly said it concludes, for purposes of this decision, that the plan should be required as one mandating retirement. You did not cross petition but you nevertheless argue, I gather, that you are at liberty to ask affirmance on the basis that the Court of Appeals was wrong in that respect?

MR. McBRIDE: That is correct, Your Honor, yes.

Q Mr. McBride, do you have any comment on the pending legislation in Congress?

MR. McBRIDE: Yes, I do, Your Honor. I have several comments on the pending legislation. The pending legislation, which has been approved by the House of Representatives by a vote of 359 to 4 specifically pertains to Section 4(f)(2). The language of one particular portion of the language which is being added is that it adds to Section 4(f)(2) the phrase "and except the involuntary retirement of any employee shall

not be required or permitted by any such seniority system or any such employee benefit plan because of the age of the employee." There has been considerable legislative history so far on these amendments. The House report, No. 95-527, speaks of this particular amendment as being one to clarify the act because of the varying judicial interpretations.

Q If that is enacted, what is left of the exception?

MR. McBRIDE: If this is enacted, you still have the problem of whether or not there can be a discrimination not so much on involuntary retirement grounds but, as we submit the purpose of the act is now, whether you can discriminate, for example, with regard to a health insurance program because of the prohibitive cost.

Q Would you read that language again.

MR. McBRIDE: Yes.

Q This is an addition to (2), is it?

MR. McBRIDE: This is an addition to Section 4(f)(2).

Q It is the only addition to (2)?

MR. McBRIDE: Yes, Your Honor. "And except that the involuntary retirement of any employee shall not be required or permitted by any such seniority system or any such employee benefit plan because of the age of the employee."

Q Has the discussion over there made clear whether or not that would apply to previously negotiated plans

which operate in future though?

MR. McBRIDE: I think the discussion during the original act made that clear, Your Honor, that it was intended to apply to present plans and also that this would apply to present plans as well.

Q There have been amendments to that, have there not, in some committee exempting teachers and professors? We really do not know what shape the thing might come out as a law.

MR. McBRIDE: That is the Senate committee, Your Honor. This is a bill that was passed by the House.

Q Passed by one House, by the House of Representatives.

MR. McBRIDE: Right. The Senate did add various and sundry exceptions, and it came out of committee I believe last Friday.

Q And your client is seeking damages as well as reinstatement?

MR. McBRIDE: Yes, he is.

Q So, the case would not be mooted.

MR. McBRIDE: No. Also, Your Honor, there has been considerable legislative history in the House and in the Senate regarding this, and they make it quite clear that the Fourth Circuit decision is in line with what the original intent of Congress was.

Q This is 1967?

MR. McBRIDE: Well, the--

Q That is when the act was passed.

MR. McBRIDE: I realize that. There is language both in 1967 and in 1977. When dealing with the 1977 amendments which have been proposed, Congress has been aware of the varying interpretations of the provision by the different circuits, and they have specifically mentioned in some instances this particular case.

Senator Javits, for example, when he was introducing the amendment in the Senate, stated that the purpose of this amendment was to facilitate the hiring of older employees by permitting their employment without necessarily providing equal benefits under employee benefit plans.

Q Now you are back in 1967?

MR. McBRIDE: No, this is 1977.

Q He said a similar thing back in 1967.

MR. McBRIDE: He said similar things in 1967, but he also added, before the Supreme Court considers the arguments about what the Congress has intended by Section 4(f)(2), I think it is incumbent that the Congress make clear that this provision was never intended to permit the wholesale evasion of the ADEA's protections.

Also Senator Williams on the Senate floor stated that the bill, the 1977 bill, makes it clear that the Fourth

Circuit correctly interpreted the will of Congress.

Q Are Senator Javits' remarks some sort of ex post facto legislative history of the earlier act?

MR. McBRIDE: Not really, Your Honor. To a degree they are, but they are very consistent with what he said in 1967. They are more reaffirmance than something completely new.

Q I think we have said on many occasions that we look rather askance at post--

MR. McBRIDE: I realize that, Your Honor.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock, and you have five minutes left.

[Whereupon, a luncheon recess was taken at 12:00 o'clock noon.]

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AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: You may continue, Mr. McBride.

MR. McBRIDE: There are a few more points I would like to clarify, Your Honor. First of all, I think the position of the department has been mentioned by Mr. Aikens--the Department of Labor. Although there was an initial determination by a person in the field, it has never been the official position of the Department of Labor. In fact, the Department did file an amicus brief in the Fourth Circuit, and they have assisted in the preparation of my case.

Q But they have not filed an amicus brief here.

MR. McBRIDE: No, they have not, Your Honor.

Q Is there any significance in that?

MR. McBRIDE: None. Their position has not changed. I believe at one time they were planning to file an amicus brief, and I am certain they would be happy to if the Court were to request the Solicitor General to file one.

Q They frequently do it on their own.

MR. McBRIDE: I realize that.

Q And I wondered whether there was some significance in there, the absence of such a brief.

MR. McBRIDE: No, there was no significance. Their position is the same.

Q I suppose you might suggest it is one of

benevolent neutrality?

MR. McBRIDE: No. I would suggest that they are actively in our behalf. In fact, to a large extent, the decision of the Fourth Circuit was based on their amicus brief.

Q Mr. McBride, I do not like to press this again, but I would like to be very clear. You are arguing to us that you are entitled to affirmance on one of two grounds, either that 4(f)(2) was not applicable at all because this is not a mandatory retirement, or even if 4(f)(2) is applicable, its conditions have not been satisfied by United; is that right?

MR. McBRIDE: That is correct.

Q On either ground?

MR. McBRIDE: On either ground, yes, sir.

Q Mr. McBride, did the department ever withdraw its earlier interpretive bulletins?

MR. McBRIDE: The published interpretive bulletins have never been withdrawn, no.

Q Are they not contrary to your present view?

MR. McBRIDE: No, they are not. What the interpretive bulletin does, it incorporates by reference the requirements of Section 4(f)(2).

Q Do you think the Department of Labor, if it was here and a representative was standing where you are, would suggest that their position in their amicus brief is not

different from their interpretive bulletin?

MR. McBRIDE: That is correct, Your Honor. Basically the position of the Department of Labor--

Q Does that brief argue that their position has always been the same?

MR. McBRIDE: With respect to the requirements--with respect to there being some other outside requirements, yes. As a matter of fact, during the original hearings on the 1967 bill, although United and the Chamber of Commerce quoted Secretary of Labor Wirtz, he also stated in the House hearings that the bill does recognize, on the one hand--specifically recognizes those plans that are worked out for rational reasons so long as they do not result in differentiation just on the basis of age itself where there is no justification in fact, which is precisely the situation which we have here.

The legislative history which has been presented to the Court is not complete, and I would urge that the Court study the legislative history in its entirety.

The position of the department, as indicated by the remark I just quoted by Secretary Wirtz, has always been that there must be something other than just age, and they have not changed this position.

One other factual thing which I think I should clear up--

Q Does the department agree with you on your alternate suggestion that the exemption does not apply at all if the company may itself permit a person to stay beyond the retirement age?

MR. McBRIDE: I am not certain of that.

Q Let me read you the interpretive bulletin. "The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not in and of itself render an otherwise bona fide plan invalid." Is that vague?

MR. McBRIDE: No, I do not believe that is vague.

Q At least the interpretive bulletin seems contrary to your alternate position.

MR. McBRIDE: That may be.

Q Do you think the department stands by its interpretive bulletin in that respect?

MR. McBRIDE: I really could not say. I believe that they would urge that the decision be affirmed on the alternate ground. I really cannot speak with certainty about the position of the department on that particular aspect of the case, Your Honor.

Q So, you think that they would have abandoned their interpretive bulletin?

MR. McBRIDE: I do not think that they necessarily would have abandoned it. I think they probably would take the

position that it was--

Q Wrong?

MR. McBRIDE: Not wrong--not artfully done the first time around, and if they had another chance at it, they would perhaps use different language.

Q Of course, the Department of Labor had no barriers to presenting its views to this Court, and departments of the government frequently do.

MR. McBRIDE: I am aware of that, Your Honor. I think they did in fact plan to do it, but there was, I understand, a time problem in the Solicitor General's office which was the reason for it not being filed.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

[Whereupon, the case was submitted at 1:07 p.m.]

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