Tenured Faculty and the "Uncapped" Age Discrimination in Employment Act

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After 1993, college and university professors will have an almost unlimited lease on the ivory tower. The Age Discrimination in Employment Act (ADEA or the Act)[1] has been "uncapped" to protect workers above 70 from discrimination based on age.[2] While an exception to this coverage now allows the mandatory retirement of tenured faculty at age 70, the Act will begin to prohibit such compulsory retirement of tenured faculty after 1993.[3] Older faculty members who do not retire may then create a logjam at the top of the faculty hierarchy, causing significant financial and structural problems for colleges and universities. Without mandatory retirement, a large group of minimally active, but highly compensated, older faculty may strain institutional resources, inhibit the prospects of women and minorities for employment and advancement, and even threaten academic quality if incompetent or nonperforming faculty members become too difficult to remove. Since any change in a tenure system takes years to reach its full effect, colleges and universities must plan now for the ADEA-induced retention of post-70-year-old tenured faculty.

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1. 29 U.S.C. §§ 621-634 (1982).

2. Since employers with 20 or more employees are affected, 29 U.S.C. § 630(b) (1982) (defining "employer"), most colleges and universities will be subject to the new uncapped ADEA. Five states already bar age-based mandatory retirement in public and private employment. Only Wisconsin, however, prevents such a practice from being applied to all workers older than 40 including tenured faculty members and fails to provide the traditional defenses to an age discrimination suit. Ruebhausen, Age as a Criterion for the Retirement of Tenured Faculty, 41 Rec. A.B. City N.Y. 16, 41 (1986).

3. Age Discrimination in Employment Amendments of 1986, §§ 6(a) and 6(b), Pub. L. No. 99-592, *reprinted in* 1986 U.S. Code Cong. & Ad. News (99 Stat.) (to be codified at 29 U.S.C. § 631). Section 6(a) now reads:

> 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].

Section 6(a) is terminated at the end of 1993 by section 6(b).

The definition of "institution of higher education" is codified at 20 U.S.C. § 1141(a) (1982). For the purposes of this Current Topic, the terms college and university are used interchangeably to denote institutions meeting this statutory definition.

Any changes in tenure systems will not be without costs, given the important functions tenure performs within the academic community. Tenure traditionally has been and will continue to be essential for academic freedom, particularly in this world of "McCarthyism, student revolts, racial and religious intolerance, intolerance toward alien ideologies, the rise of 'creationism,' the environmental movement, the controversies over nuclear power and nuclear weapons, and the increasing public control of colleges and universities."[4] Additionally, tenure systems provide the job security that helps compensate for low salaries in academia as compared with private industry and encourages academic freedom.[5] As the policies of both Congress and universities demonstrate, tenure is a complex and delicate institution meriting strong deference in formulating any alternative employment scheme.

The major concern motivating the ADEA is, of course, to protect all older workers from age discrimination.[6] The fundamental premise behind the decision to lift the upper age limit is that "[f]reedom from discrimination based on age is no more inherently defensible at age 70 than at age 65."[7] At the same time, concern about the effects of uncapping on higher educational institutions prompted Congress to phase in this provision for tenured faculty over seven years, enabling colleges and universities to plan for the new retirement trends that would result.[8] The phase-in provision was the result of a compromise; while some in Congress opposed special treatment for tenured faculty, others felt that even a seven-year exemption would not provide enough time for institutions to adapt.[9]

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4. H. Bowen & J. Schuster, American Professors: A National Resource Imperiled 236 (1986).

5. *Id.* at 236-37.

6. While the Act permits age to be used as a criterion of employment in some situations, 29 U.S.C. § 623(f) (1982), it cannot be used as the only criterion without proper justification, such as public safety. *See* Western Air Lines v. Criswell, 472 U.S. 400, 414 (1985) (age can be used as a bona fide occupational qualification if an overriding interest in public safety is involved and the employer is compelled to use age as a proxy for the relative safety of a worker). For legislative history on justifications for uncapping, *see* H.R. Rep. No. 756, 99th Cong., 2d Sess. 5 (1986).

7. H.R. Rep. No. 756, 99th Cong., 2d Sess. 5 (1986).

8. Hearings Before the Senate Special Comm. on Aging, 99th Cong., 2d Sess. 113-14 (1986) (staff report on mandatory retirement) [hereinafter Hearings on Aging]. Congress similarly adopted a phase-in period in 1978 when it raised the mandatory retirement age from 65 to 70; retirements of tenured faculty at 65 were allowed until July 1982. *See* Age Discrimination in Employment Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978) (codified as amended at 29 U.S.C.A. §§ 621-634) (West 1985 & Supp. 1987).

9. Senator Daniel Patrick Moynihan, arguing for a longer exemption for colleges and universities, expressed his reservations about having an exemption of only seven years:

As a result of the compromise, the phase-in period was enacted to give institutions a limited time "to reexamine the tenure system and to determine, in light of the elimination of mandatory retirement, whether structural changes might be appropriate or whether incentives should be offered for voluntary retirement."[10] This Current Topic examines the likely effects of the ADEA and explores various responses that colleges and universities should consider.

I. Effects of Uncapping in the College Setting

The full effects of the uncapped age limit are uncertain at this point, since they are clearly dependent on the number of professors who will choose to work past the age of 70.[11] This number will differ from institution to institution and will be affected by the age distribution within each work force, the difference in compensation for older and younger faculty, and the overall financial health of each particular institution.[12] As demographics and pay scales change over time, the effects of the new law will also vary within each institution. If, for example, a school has a large group of faculty members clustered around a certain age, the effects of the amendments will become evident only when that group reaches what had previously been the mandatory retirement age. As a result of the new law, colleges and universities must prepare for "significant and continuing changes in their faculty age distributions."[13]

Although it is impossible to predict the exact number of professors who will be affected, it is clear that the number of workers who remain in employment beyond the age of 70 is dependent on economic factors, particularly inflation and stock market performance. During periods of high inflation, the prospects of living on fixed-

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[T]here does appear to be a severe shortage of teaching positions available for today's scholars. . . . We should be very careful, I think, about eliminating the retirement age altogether, unless we can be sure that this Nation's education will not suffer as a result." 132 Cong. Rec. S16856 (daily ed. Oct. 16, 1986).

10. 132 Cong. Rec. H11283 (daily ed. Oct. 17, 1986) (statement of Rep. Jeffords).

11. Potential problems with uncapping will be studied by the Equal Employment Opportunity Commission and the National Academy of Sciences. The results of this study, to be completed by Oct. 31, 1991, are to be given to the President and to Congress. Age Discrimination in Employment Amendments of 1986, § 6(c). If this report emphasizes the problems of uncapping in the college setting, Congress could conceivably extend the life of the tenured faculty exemption. Given the general support for the ADEA, however, such an extension is highly unlikely.

12. The Impact of Federal Retirement-Age Legislation on Higher Education: A Report of the Special Committee on Age Discrimination and Retirement, AAUP Bull., Sept. 1978, at 181-82 [hereinafter Impact of Federal Legislation]. This report was written after the 1978 amendments raised the coverage of the Act to age 70.

13. *Id.* at 191.

income retirement benefits will convince many faculty members to remain active, in the hope that their salaries will increase to match any rise in prices.[14] In addition to inflation, stock market performance also influences the behavior of potential retirees because it affects the performance of retirement pension plans. The better these plans perform, the more attractive retirement becomes.[15]

While economic factors play a large role in the decision to retire, subjective factors influence the decision as well. Prospective retirees measure their current job satisfaction against potential satisfaction after retirement. In a comparison of faculty and staff workers at the University of Iowa, faculty members were the "most likely to continue working beyond the point at which post-retirement income would be larger than working income," due to the combined factors of high job satisfaction and high requirements for post-retirement income.[16] While tenured faculty work longer in order to maximize later financial benefits, they also continue to work simply because they enjoy their jobs. In the Iowa case, these subjective factors seemed to have trumped finances; the lure of money alone did not induce retirement.

Whatever a faculty member's rationale for foregoing retirement, the primary fear of college administrators is that uncapping will prevent colleges from ridding themselves of incompetent and/or nonperforming faculty and thus that academic quality will be impaired.[17] Advocates of mandatory retirement assert that the soon-to-be-outlawed mandatory retirement age is a simple and effective method of getting undesirable teachers out of the classroom.[18] To make their point, these advocates need not make a general claim that performance decreases with age in all cases; they do argue, however, that lifting the ceiling on the ADEA will simply serve to protect the decreased performance of certain individual older work-

14. Even in times of stable prices, faculty members fear future inflation and thus continue to work. Soldofsky, On Determining the Optimal Retirement Age, Academe, July-Aug. 1986, at 17, 23.

15. Impact of Federal Legislation, *supra* note 12, at 187.

16. Soldofsky, *supra* note 14, at 21.

17. Protected by a tough ADEA, tenured faculty members can use the threat of age discrimination claims to retain their positions indefinitely. *See infra* notes 35-55 and accompanying text on the difficulties of defending against an ADEA claim.

18. Matthew W. Finkin, Chairman of Committee A on Academic Freedom and Tenure of the American Association of University Professors (AAUP), while discounting the problems uncapping will cause, suggests that uncapping will lead to difficulties with some "slothful and somnolent" professors who under previous law could have been retired. Heller, Colleges Ponder the Effects on Tenure of End to Mandatory Retirement at 70, Chron. Higher Educ., Dec. 3, 1986, at 15, 18, col. 1.

ers.[19] The retention of an ineffective teacher can be particularly devastating in a small department within an institution, or in small institutions in general. Here, one inadequate teacher can retard the development of an entire program. In such a situation, the elimination of a mandatory retirement age clearly damages the educational process.

By retaining older faculty, colleges may also face a problem of imbalance in their academic programs. If, for example, a college finds itself with four tenured Renaissance Poetry professors when class enrollments require only one, the college may be forced to cut back in another area where teachers are desperately needed. Here, college administrators face a difficult dilemma. Because of an excess of Renaissance Poetry teachers, they are constrained by costs when trying to staff a second area.[20] If quality is to be maintained, the second area cannot be randomly staffed with available faculty who happen to know a little about the subject. When older teachers are retained, colleges may find it much harder to respond to changes in curricular demand; thus the reaction time of colleges is legally impeded by the new amendments to the ADEA.

An institution also may be impeded in the hiring and advancement of women and minorities. While Congress, through the phase-in exception to the ADEA, gave colleges and universities some time to adapt to the new system by hiring and advancing women and minorities now, it is fairly certain that many institutions will not be able to meet self-imposed affirmative action goals in the six years between 1987 and 1993.[21] After 1993, the logjam will begin. With older faculty choosing to keep teaching, fewer jobs will become vacant.[22] During consideration of similar amendments in 1978, when the retirement age was raised from 65 to 70, the Senate Committee on Human Resources noted this problem expressly:

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19. *See* Hearings on Aging, *supra* note 8, at 71 (statement of Mark A. deBernardo, counsel for the Chamber of Commerce, on the effects of the amendments: "Faced with the prospect of costly and protracted court battles and the handicap in such legal efforts of plaintiffs being able to obtain jury trials and liquidated damages, many employers simply may surrender.").

20. The institution may be protected by the doctrine of financial exigency or of bona fide change in academic program. *See infra* notes 41-47 and accompanying text.

21. Some states impose hiring guidelines. *See* Thornell, The Future of Affirmative Action in Higher Education, 29 How. L.J. 259, 264-68 (1986) for a discussion of affirmative action in education. Because of a greatly reduced number of entry-level positions as a result of the new ADEA, the 1990s will be bleak years for minorities and women who hope to enter the academic world. This phenomenon will last, of course, only until the logjam settles into a new long-run pattern of retirement at higher ages. It will probably recur, however, in every period when the economic outlook for retirees looks bleak.

22. *See* Hearings on Aging, *supra* note 8, at 70.

"Many colleges and universities maintain that for the foreseeable future the number of available faculty positions will be closely related to the number of retirements, thereby making it difficult to employ younger professors, particularly women and minorities."[23] In other words, under the 1986 ADEA amendments, white males hired before colleges became concerned about affirmative action can continue to work past 70, while fewer jobs open up for everyone else.[24]

Most institutions are likely to be similarly concerned about the direct financial impact of the ADEA amendments long before 1993. Older faculty members with tenure generally have higher academic rank and seniority than younger faculty members and thus are more highly compensated.[25] It follows that a school that retains many older faculty will have much higher costs. In an era when the costs of higher education are already straining student assets and college endowments,[26] institutions cannot ignore the potential financial impact of the 1986 amendments.

In sum, the effect of the uncapped Act will be to increase pressure from all sides—the institution, older faculty, and younger faculty. Under the new law, the respective interests of these three groups will inevitably clash, unless some preventive measures are taken by institutions today.

II. Potential Institutional Responses

The ADEA-generated pressures demand prompt response from colleges and universities. Since probationary periods before a tenure award usually last several years, the policies institutions adopt today will not come into full effect until uncapping is implemented.[27]

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23. S. Rep. No. 493, 95th Cong., 1st Sess. 8, 9 (1977).

24. A Department of Labor study, while claiming that the elimination of mandatory retirement would have little overall effect on women and minorities, also noted that uncapping would result in the retention of 195,100 older men in the workforce by the year 2000. House Subcomm. on Health and Longterm Care of the Select Comm. on Aging, Eliminating Mandatory Retirement, H.R. Doc. No. 561, 99th Cong., 2d Sess. 10 (1986).

25. "[O]lder faculty members approaching retirement age receive annual compensation that is approximately double that of newly hired assistant professors." Impact of Federal Legislation, *supra* note 12, at 184.

26. Average charges for tuition, room, and board in 1984 at private colleges increased 67% over the charges in 1978; charges rose approximately 53.5% for public colleges in the same period. U.S. Dep't of Labor, National Center for Educ. Statistics, Digest of Education Statistics 1983-84 141 (1983).

27. A tenure-track appointment, or probationary period, lasts for as many as 12 years, after which time a tenure review is scheduled. Special Comm. on Education and

Before discussing specific institutional responses, it is important to understand the mechanics of an ADEA claim available to a faculty member. In an employment discrimination case such as an ADEA action, the plaintiff retains the ultimate burden of persuasion at all times.[28] Although the plaintiff retains this burden, once the plaintiff establishes a prima facie case of discrimination,[29] the defendant must establish some legitimate, nondiscriminatory reason for the action taken.[30] If such a reason is established, the plaintiff must show that the stated reason is pretextual and that age actually was the "determining factor" in the institution's action.[31] Then the burden returns to the defendant to prove that the reason for the action was genuine and not, in fact, pretextual.

In addition to being procedurally complicated and morale-damaging for the defendant, ADEA suits also can be expensive for the institution. Courts may award back pay, lost benefits, and liquidated damages in cases of willful violations of the Act; punitive and compensatory damages are not available.[32] Attorneys' fees may also be awarded.[33] In a situation where an employee reasonably refuses the

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the Law of the Association of the Bar of the City of New York, Due Process in Decisions Relating to Tenure in Higher Education, 39 Rec. A.B. City N.Y. 392, 413 n.12 (1984)[hereinafter Special Comm.]

28. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980) (defining burden of persuasion in a Title VII action).

29. A prima facie case may be established in two ways. In a discharge situation, a plaintiff makes out a prima facie case by establishing that: (1) plaintiff is within the protected class, (2) plaintiff met applicable job qualifications, (3) despite having met these qualifications, plaintiff was discharged, and (4) plaintiff was displaced by someone younger. *See* Grant v. Gannett Co., 538 F. Supp. 686, 688 (D. Del. 1982); Weeks, Age Discrimination in Employment and the 1986 Amendments, 10 Lex Collegii 1, 2 (1987) (discussion of prima facie case and burden of proof). As an alternative, a plaintiff may establish a prima facie case under a theory of disparate impact. Under this theory, plaintiff "need only demonstrate that a facially neutral employment practice actually operates to exclude from a job a disproportionate number of persons protected by the ADEA." Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983).

30. *See, e.g.*, Leftwich v. Harris-Stowe State College, 702 F.2d at 691, 692 (after plaintiff made out its prima facie case, defendant could not establish that its action was justified by business necessity). ADEA claims are similar to Title VII actions. *See* Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. § 2000e (1982). *See also Burdine*, 450 U.S. at 254 (defining defendant's burden in a Title VII action).

31. *See* EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984) (plaintiff challenged company's forced retirement policies).

32. *See generally* Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1318 (9th Cir. 1982) (state tort claims not precluded by awards of back pay, lost benefits, and liquidated damages under ADEA), *cert. denied*, 459 U.S. 859 (1982).

33. Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974).

employer's offer of reinstatement, the court also may award "front pay" as well.[34]

Administrators may choose among several responses to claims filed under the newly uncapped law. First, they may rely on the statutory defenses listed in the ADEA. Second, if they choose to take a more aggressive position, they may attempt to disconnect tenure from employment in order to put an older, tenured professor on nontenured status, thereby achieving a procedural advantage in an ADEA case. Third, they may institute a system of post-tenure review in order to strengthen their control over the quality of teaching in their institutions. Finally, they may create new and more enticing incentives to induce older faculty to leave their posts. This section examines the advantages and disadvantages of each of these alternatives.

A. Reliance on Statutory Defenses

Faced with an ADEA claim, four statutory defenses are available to an institution: "good cause," "reasonable factors other than age," "bona fide occupational qualification," or "bona fide seniority system."[35] Administrators who perceive no threat from the uncapping at their particular institution may decide to take no action until an ADEA claim is filed. Where few older persons remain on a faculty, the problems of uncapping will not be significant for that particular institution in the near future, and hence waiting to defend individual cases is appropriate. Other administrators, who perceive a threat from uncapping, still may choose not to react if they feel that the statutory defenses can adequately protect them from any potential claims. How much protection these defenses will actually provide, however, is questionable since the more-than-explicit intent of Congress was to protect older workers and to provide only narrowly tailored defenses. The degree of protection provided by each defense is examined below.

1. Good cause. The defense of good cause[36] has significant potential to protect the institution. In a clear case of incompetence or

34. O'Donnell v. Georgia Osteopathic Hospital, 748 F.2d 1543, 1551 (11th Cir. 1984). *Contra* Kolb v. Goldring, 694 F.2d 869, 874 n.4 (1st Cir. 1982) (ADEA plaintiff may not recover damages for future economic loss).

35. A fifth defense is that the employee was a "bona fide executive or high policy maker" who could be mandatorily retired at age 65. 29 U.S.C. § 631(c) (1982). This defense might apply in suits by college administrators or deans. Weeks, *supra* note 29, at 4. *See* EEOC v. Board of Trustees, 723 F.2d 509, 510 (6th Cir. 1983) (college president qualifies as a "policy maker").

36. 29 U.S.C. § 623(f)(3) (1982).

gross indiscretion by a dismissed faculty member, for example, the institition should prevail in a later ADEA action.[37]

The good cause defense, however, has severe drawbacks. Clearly any dismissal of a faculty member, including one for good cause, creates morale problems and conflicts of interest within the institution. The primary legal difficulty in using the good cause defense stems from the burden placed on the institution to establish those facts necessary to show that incompetence exists or that gross indiscretion has occurred.[38] While good cause dismissal has long been an integral part of the tenure system, colleges have rarely used it because of difficulties in proving the allegation involved.[39] The necessary inquiry can be embarrassing and difficult for academic institutions, where a collegial atmosphere is prized. For these reasons colleges rarely use this defense under the current system, and it is unlikely that they will rely on it heavily in the future.

2. *Reasonable factors other than age.* A second possible defense, known as the reasonable factors other than age defense (RFOA),[40] has similar advantages and drawbacks. Applied in situations where nothing is specifically wrong with the plaintiff, that is, no cause for termination exists, the institution may find some relief by asserting financial exigency as an RFOA to allow it to make cutbacks of even tenured personnel.[41] The financial exigency excuse, however, is strictly limited to situations in which the institution can prove a serious threat to its operation.[42] Thus it should not be claimed in cases where a financial problem is only temporary, but rather where a "continuing stringency" could "threaten the institution's sur-

37. *See, e.g.*, Agarwal v. Regents of the University of Minnesota, 788 F.2d 504, 509 (8th Cir. 1986) ("That he held his position for fifteen years before he was terminated for incompetence does not prove that he performed his duties competently."); Levitt v. University of Texas at El Paso, 759 F.2d 1224, 1226 (5th Cir. 1985) (tenured faculty member dismissed for sexual harassment), *cert. denied*, 106 S.Ct. 599, *reh'g denied*, 106 S.Ct. 1290 (1985).

38. *See supra* notes 28-31 and accompanying text discussing burden.

39. As Senator John Chafee of Rhode Island noted during the discussions on the ADEA, Harvard University, in the long years of its existence, has never dismissed a tenured faculty member for cause. Perhaps Harvard missed its chance when it failed to dismiss an apocryphal faculty member who "murdered his wife and went to the electric chair with his tenure still intact." Ford, Implications of the Age Discrimination in Employment Act Amendments of 1986 for Colleges and Universities, 5 J. Coll. & U. L., 161, 189 (1978-79).

40. 29 U.S.C. § 623(f)(1) (1982).

41. *See* Krotkoff v. Goucher College, 585 F.2d 675, 679 (4th Cir. 1978) (concept of tenure allows dismissal based on financial exigency).

42. *See* American Assoc. of Univ. Professors v. Bloomfield College, 322 A.2d 846, 856 (N.J. Super. Ch. Div. 1974), *aff'd*, 346 A.2d 615 (N.J. Super. App. Div. 1975) (claim of financial exigency was used impermissibly as an excuse to abolish tenure system).

vival."[43] To remedy financial problems, the institution cannot discriminate against older faculty members simply because they are more highly compensated; the comparatively higher cost of a *particular* older faculty member will not qualify as an RFOA.[44] Nor does a legitimate cost-related RFOA discriminate against older workers as a class; it must be based instead on general institutional cutbacks and program discontinuations.

Short of true financial exigency, the institution may also be able to make a bona fide change in its academic program and thus eliminate certain positions.[45] The loss of the positions, however, must be "unavoidable" because of the change in academic program.[46] While this standard limits the use of program change as an RFOA, it could still potentially solve the problem of the excess Renaissance Poetry professors. In a regime of uncapping, the RFOA defense may receive more attention; it has been labeled the "forgotten defense" among those listed in the ADEA.[47]

3. Bona fide occupational qualifications. Under the bona fide occupational qualifications defense (BFOQ),[48] the institution can defend against an ADEA claim by showing that, because of the nature of the job, age was a proper factor in the decision to terminate.[49] A BFOQ

43. Special Comm., *supra* note 27, at 402.

44. In *Harris-Stowe State College*, 702 F.2d at 692, the court rejected the defendant college's cost defense, finding instead that "economic savings derived from discharging older employees cannot serve as a legitimate justification under the ADEA for an employment selection criterion."

45. *See* Jimenez v. Almodovar, 650 F.2d 363, 368 (1st Cir. 1981) (institution has "implied contractual right" to terminate if position is being eliminated as "part of a change in academic program"); deLoraine v. MEBA Pension Trust, 499 F.2d 49, 50 (2d Cir.) (withdrawal of permission for retired engineers to return to work in response to increased demand was justified because demand had ceased), *cert. denied*, 419 U.S. 1009 (1974).

46. *Almodovar*, 650 F.2d at 368.

47. *See* Eglit, The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other than Age Exception, 66 B.U.L. Rev. 155 (1986). While the RFOA defense provides hope of success when related to finances, other applications have proven less effective. *See* EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 222-23 (3rd Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) ("mere eligibility for a pension is not a defense to a prima facie case of age discrimination"). Clearly this defense will succeed only if the *defendant* can demonstrate early retirement is not linked to age. *See* 725 F.2d at 222 ("Westinghouse bears the burden of going forward with evidence to demonstrate reasonable factors, other than age, justifying its action."); Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 592 (5th Cir. 1978) (defendant employer need not establish that RFOA criteria were applied to all other similarly situated employees, but rather that they were the reason for this particular employee's discharge).

48. 29 U.S.C. § 623(f)(1) (1982).

49. Regarding the BFOQ exception, the House Education and Labor Committee noted that "[t]he [BFOQ] provision recognizes that certain mental or physical capabilities may decline with age, so that in some jobs with unusually high demands, age can be

is difficult for any employer to establish. Congressional intent to limit this defense may be inferred by the conclusion in a 1986 House Committee on Education and Labor report that "[u]sing chronological age as a bona fide occupational qualification . . . is most likely a mistake from a legal, ethical and organizational effectiveness perspective."[50]

In addition to the barrier of legislative intent, the BFOQ seems to hold little promise in the academic context, since most uses to date have involved physical, rather than mental, qualifications. Courts recognize that in the teaching context, mental skills are decidedly more important than physical ability.[51] It is unlikely that an institution could prove a *general* pattern of mental deterioration in older workers sufficient to justify an arbitrary age cutoff.[52]

4. Bona fide seniority system. The fourth defense would allow the institution to establish and follow the terms of a bona fide seniority system or a "bona fide employee benefit plan,"[53] even though the plan may seem to have age-related effects. In creating a bona fide program, a college can reward employees with benefits as part of its seniority system or pension plan, as long as workers with the same seniority status are rewarded in a similar way regardless of age.[54] Penalties for seniority, however, are forbidden. Any system that penalizes senior, older employees will be viewed as a " 'subterfuge to evade the purposes' of the Act" and will not be considered bona fide.[55] Compulsory retirement would be just such a penalty. Under

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a factor considered in hiring and retaining employees." H.R. Rep. No. 756, 99th Cong., 2d Sess. 6 (1986).

50. *Id.*

51. *See* Gault v. Garrison, 569 F.2d 993, 996 (7th Cir. 1977) (because teaching is a profession in which mental skills are vastly more important than physical ability, the mandatory retirement of a teacher at age 65 is not rationally related to the presumed state interest in removing unfit teachers), *cert. denied,* 440 U.S. 945 (1979). *But see* Palmer v. Ticcione, 576 F.2d 459, 462 (2d Cir. 1978) (declining to follow *Gault*, the court refused to distinguish compulsory retirement cases based on whether mental or physical qualifications were involved).

52. Aggregate statistics of group performance can assist the employer in a safety context. If an ADEA defendant could prove that it could not consider employees on a case-by-case basis, for example, it could establish a BFOQ of age based on safety concerns. *See Criswell*, 472 U.S. at 414-15. Educational insititutions, however, cannot claim such a safety justification, thus drastically reducing the chances of success for an academic BFOQ defense.

53. 29 U.S.C. § 623(f)(2) (1982).

54. 29 C.F.R. § 860.105(c) (1986) (seniority system must be applied uniformly).

55. 29 C.F.R. § 860.105(b) (1986). *See* Alford v. City of Lubbock, 664 F.2d 1263, 1272 n.12 (5th Cir. 1982) (although defendant argued that a sick leave payment policy was tied to length of service, court held that defendant "may not deny an entire class of older employees—those hired after age fifty—*any* participation in a fringe benefit unrelated to a bona fide retirement, pension, or insurance' plan simply by artificially trying to tie the benefit to such a plan"), *cert. denied,* 456 U.S. 975 (1982).

this defense, an institution could not justify any form of compulsory retirement of faculty with seniority.

On the whole, the statutory defenses are effective only under very limited circumstances. Even when the circumstances seem conducive to using one of the four defenses, the problems entailed in establishing that defense may be difficult for the institution to overcome. Instead of relying solely on the defenses built in to the ADEA, institutions should consider affirmative policy changes discussed in more detail below to prevent ADEA suits.

B. Decoupling Tenure from Employment

A more aggressive alternative to relying on statutory defenses available to colleges and universities is the institution of reforms that would in essence blunt the effects of the new amendments. One such reform involves separating the institution of tenure from the notion of employment in the hope that undesirable faculty will then be easier to remove. Stemming from the premise that nontenured faculty are more readily removable than tenured faculty, at least from a procedural standpoint, this process of separation, called "decoupling," puts a tenured professor on nontenured status without affecting employment per se.

Decoupling can operate in two different ways. The first method terminates a teacher's tenure—but not necessarily employment—at a fixed, prearranged age, at age 70, for example. The second terminates tenure at the expiration of a term-of-years contract, and, again, employment is not necessarily terminated. In both cases, the institution is then left with a second decision concerning the continuance of employment.

Decoupling's value to the institution lies in its elimination of the strategic advantages a tenured faculty member has over a nontenured faculty member in removal proceedings. When faculty members with tenure are dismissed from a state university, they are entitled to due process, which includes a hearing.[56] Nontenured faculty at state universities, on the other hand, are not entitled to a due process hearing on nonretention unless they can show that "liberty" or "property" interests are at stake.[57] In private institutions, the right to a hearing for tenured and nontenured faculty alike will

56. Perry v. Sindermann, 408 U.S. 593, 603 (1972).
57. Board of Regents v. Roth, 408 U.S. 564, 575, 578 (1972).

be defined by individual contract,[58] although tenure agreements between private institutions and their faculty members are likely to require a hearing before dismissal. The dismissal hearing requirement provides an important strategic advantage to tenured professors.

In the institutional dismissal hearing, the university bears the ultimate burden of establishing the cause for which the tenured faculty member should be removed. The institution is thus forced at the outset to present a reason for dismissal before any ADEA claim is made. While tenured professors have no substantive advantage in an ADEA claim itself, they can, through the requisite preliminary hearing process, analyze the university's claim and develop a better case in the event that they decide to bring suit under the ADEA.

Nontenured professors, by contrast, are in a less advantageous position. Most dismissals of nontenured professors take the form of a nonrenewal of contract, where the employer generally need not show cause.[59] Without a specified contractual right to dismissal proceedings, when a nontenured faculty contract is not renewed, the nontenured professor will have only a letter or notice of dismissal on which to base an ADEA suit. In order to discover the reasons for nonrenewal, the nontenured plaintiff may be forced to hire a lawyer and file suit. A tenured professor, on the other hand, will receive a fuller report, prepared by the institution, describing those reasons for dismissal.

The nontenured plaintiff is at a further disadvantage because of the way in which cause is interpreted under the ADEA. As a general principle, cause in such cases is undefined and extremely fact-specific. It would be fair to assume, however, that for purposes of cause an institution is likely to allow tenured professors slightly more leeway than nontenured faculty and to judge them less regularly or less thoroughly on scholarship and teaching abilities. Nontenured faculty, on the other hand, are subject to closer scrutiny by the institution. In this fashion, cause for nontenured faculty members may not suffice as cause for tenured professors. By creating nontenured

58. Skehan v. Board of Trustees, 669 F.2d 142, 151 (3d Cir. 1982) (under terms of university employment statement, only tenured faculty possessed the contractual right to university procedures for dismissal for cause), *cert. denied*, 459 U.S. 1048 (1982).

59. In fact, as long as constitutional rights are not violated, "a nontenured teacher may be fired for any reason or for no reason at all." Hillis v. Stephen F. Austin State University, 665 F.2d 547, 553 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982); *Sindermann*, 408 U.S. at 597-98.

faculty through the decoupling process, an institution may give itself greater leeway in establishing the cause for dismissal.

Decoupling by institutions can be attempted either retroactively or prospectively. Of the two, retroactive decoupling presents far greater legal problems. The wording of the seven-year phase-in provision of the ADEA suggests that *only* "compulsory retirement" will be allowed during the phase-in period from now until the end of 1993. Any other change in employment status, including retroactive decoupling, apparently would violate the Act.[60] Thus while a college may retire a tenured faculty member who reaches age 70 before the end of 1993 under a previously established policy, the institution may take no other action based on age, such as decoupling, that negatively affects that faculty member's employment.

Retroactive decoupling of existing tenure rights also presents a number of contractual and constitutional problems. Tenure usually takes the form of a contract, and the termination of tenure without cause constitutes a breach.[61] The currently tenured professor is also protected from the arbitrary loss of tenure, at least at public institutions, because tenure is a property right protected by the fourteenth amendment.[62]

For the current phase-in period, in which planned compulsory retirement is allowed, institutions may attempt to avoid the problems of decoupling by playing a game of semantics. Some commentators describe decoupling as the first step in a "phase-out" retirement process, with later aspects of the process outside the scope of the ADEA.[63] Since a retirement is a matter of contract and is not defined in the ADEA, a university could decouple tenured employees during the current phase-in period and claim that they are "retired."[64] Then, by asserting that its subsequent relationship with this "retired" employee is outside the ADEA's coverage, it could reduce the employees from "nontenure to part time, and then to complete phase-out. From the inception of the status-reduction

60. Ford, *supra* note 39, at 202.

61. In the absence of cause for dismissal, courts will overturn university decisions to dismiss tenured employees. *See, e.g.*, Board of Regents v. Martine, 607 S.W.2d 638, 643 (Tex. Civ. App. 1980) ("moral turpitude" charge against faculty member was unsubstantiated, thus the dismissal was improper).

62. Board of Regents v. Roth, 408 U.S. at 576, 577.

63. *See* Barnes & Schlottman, After "Decoupling": Further Thoughts, 9 J. Coll. & U. L. 315, 316 (1982-83).

64. *See id.* at 317.

process, the employee is considered to be on retirement.' "[65] By defining decoupling as retirement, the institution could claim that its action falls within the limited exception for tenured faculty, which applies only to retirements and not to other changes in employment status.[66]

Such a definition of retirement would probably not be acceptable to a court, however, since it seems to be a clear "subterfuge to avoid the purposes of the Act."[67] All that decoupling can accomplish safely is to separate tenured faculty members from their tenure, not to separate them from their jobs. The university is then left with nontenured employees to eliminate—admittedly nontenured—but still employees.

If the institution then dismisses or changes the employment status of a decoupled faculty member because of age, the employee will still have recourse against the school through an ADEA action. The Third Circuit considered this issue in *Levine v. Fairleigh Dickinson University*,[68] where the institution decoupled Levine from his tenure at the age of 65. Levine had continued in employment as a nontenured, full-time employee until the institution failed to reappoint him to that position.[69] In finding that the reduction in Levine's employment status from full- to part-time was covered by the ADEA, the court's decision cast doubt on the idea that decoupling will be of much benefit to the institution.[70] Giving deference to the Equal Employment Opportunity Commission's interpretation of the statute, the court noted that the Act does not "permit discrimination on the basis of age against an employee who accepts [a nontenured position] from the institution."[71] The notion of tenure has nothing to do with the ability to bring suit; the Act applies to both tenured and nontenured employees alike.[72] Thus decoupling provides no particular advantage during phase-in periods; as Fairleigh Dickinson University discovered in *Levine*; the decoupling process still leaves the

65. *See id.* at 318.

66. *See supra* note 3.

67. 29 C.F.R. § 860.105(a) (1986) (concerning bona fide occupational qualifications).

68. 646 F.2d 825 (3d Cir. 1981).

69. 646 F.2d at 827.

70. 646 F.2d at 832.

71. 646 F.2d at 831 (quoting 44 Fed. Reg. 66793 (1979)).

72. *See* Bompey, Decoupling Tenure and Employment under 1978 Amendments to the Age Discrimination in Employment Act, 8 J. Coll. & U. L. 425 (1981-82) (a discussion of legislative intent regarding decoupling after the 1978 amendments, concluding that a faculty member who voluntarily accepts a nontenured position in lieu of retirement is protected by the ADEA from subsequent changes in employment status).

institution with nontenured employees who are covered by the ADEA.

For the next few years, the ADEA exception for tenured faculty may thus create perverse incentives. Faced with the all-or-nothing option of compulsory retirement as allowed until the end of 1993,[73] colleges may choose (while they can) to retire professors now instead of placing them on part-time status. Ironically, the ADEA may thus serve to promote discrimination against older workers in the short term. As the Third Circuit noted in *Levine*, the defendant institution, instead of putting the decoupled professor on a year-to-year contract, "could have chosen the practice followed by other universities of completely severing the employment relationship with its [sic] faculty members when they lose their tenured status."[74] Then, the institution would not have had to face a suit based on Levine's reduction in status; Levine would have already been retired. Since decoupling might lead to more of an ADEA threat to an institution than compulsory retirement, at least during the phase-in period, the institution may respond by opting for legal retirement now instead of facing an ADEA suit later.

In response to a well-developed ADEA suit similar to *Levine*, an institution could only win if it could present a convincing statutory defense.[75] As discussed earlier, this avenue is not promising. For example, consider a term tenure contract, in which a professor's tenure expires when he is 72. At age 73, he or she is dismissed—or, more accurately, the year-to-year appointment is not renewed. Given no other determinative circumstances, this situation looks like a clear violation of the ADEA: The institution is affecting the status of the employee by using age as a criterion. Even if no suit had followed from the retroactive decoupling itself, the subsequent nonrenewal could easily appear as a violation of the ADEA's standards.

A different analysis applies, however, to prospective decoupling. In view of the imminent uncapping after 1993, institutions should now re-examine and change policies that will affect future tenured faculty. One option is to decouple by creating expiring or term-tenure contracts that give the institution the opportunity at some future date to take away the tenure it had earlier bestowed. The school could establish, for example, term-tenure contracts of 20 or 30 years in order to maintain some amount of institutional flexibility in the

73. *See supra* note 3 and accompanying text.
74. *Levine*, 646 F.2d at 833.
75. *See supra* notes 35-55 and accompanying text.

face of changing needs. At the end of the term, the institution would have the option to renew or not to renew tenure. If eventual dismissal of the faculty member seemed appropriate to the institution, the institution presumably would choose not to renew.

Prospective decoupling does provide the institution with the procedural advantage of having placed faculty members into less advantageous positions from which to make ADEA claims. Like retroactive decoupling, however, it does not change their substantive legal rights under the ADEA. Given the legal constraints to the decoupling process, universities ought not to rely solely on this method to prevent any ADEA-related turmoil within the institution.

C. Changes in the Tenure System

As alternatives to the complicated decoupling procedure, a school could implement a system of post-tenure review or create a multi-tiered tenure process. The obvious object in either case would be to remove alleged "deadwood" from the school at periodic intervals.

Post-tenure review might operate much as current tenure review systems work, including the use of faculty committees to evaluate performance. This reform, however, raises numerous practical and legal difficulties. While practical problems are also evident under the present tenure review system, a more complex and lengthy tenure process only exacerbates them. Post-tenure review requires a demanding and time-consuming process of faculty self-assessment. Faculty members are colleagues and quite often friends, particularly after working together at an institution for a number of years, and thus they could have difficulty making impartial judgments about their peers. To some extent, this collegiality problem could be solved by using an outside reviewing team, similar to a department accreditation team, to assess faculty. While an outside board of review might have the advantage of objectivity, it might have the disadvantage of having less-than-adequate information to make the best possible recommendations. Only faculty members who are intimately familiar with the performance of an individual teacher and with the standards of their particular institution can make the most informed decisions concerning tenure.

In addition to these practical problems, fundamental legal difficulties are involved for an institution that interferes with tenure rights once they are created.[76] State law generally has followed one of two

76. *See supra* notes 61-62 and accompanying text.

paths concerning the legality of a post-tenure review system as applied to currently tenured faculty.[77] In the first, a retroactive change in tenure policy, applied uniformly, is permissible if found "reasonable" by the trier of fact.[78] Under the second line of authority, the "reasonable expectations" of the academic profession would be determinative of whether the change in tenure policy would be allowed.[79] The reasonable standard might permit some modifications in tenure policy, while the reasonable expectations standard could promote policy inertia by validating only predictable changes. Post-tenure review, while arguably a reasonable method for policing quality, might not meet the reasonable expectations of the academic profession, simply because it is a relatively untried idea in this profession. The retroactive change to implement post-tenure review would run those risks under this second standard.

While the prospective adoption of a post-tenure review system would avoid the risks of inadequate assessment and impermissibility, it nonetheless raises another serious policy question. The subtle yet frightening threat presented by a post-tenure review system, and indeed by any inroad on tenure rights, is the potential damage it could inflict on academic freedom. The principle justification for the present tenure system is to protect academic freedom.[80] Any changes that impose upon that system—or even changes that *seem* to threaten the job security of college professors—might have a chilling effect in academia. Professors who have to stand up to review every few years or, worse yet, are employed on a year-to-year basis because of an expired tenure contract, probably will be more constrained in their teaching, adopt more traditional methods, and find themselves perhaps unconsciously influenced by whatever meets current approval in the discipline. Describing the related plight of

77. M. Finkin, Uncapping the Age Discrimination in Employment Act and Alternatives to Tenure 19 (Nov. 21, 1985) (unpublished manuscript)[hereinafter Finkin, *Uncapping*]. *See generally* Finkin, Regulation by Agreement: The Case of Private Higher Education, 65 Iowa L. Rev. 1119 (1980) (on the use of contract in private higher education employment arrangements).

78. Finkin, *Uncapping*, *supra* note 77, at 19. *See* Rehor v. Case Western Reserve University, 331 N.E.2d 416, 421 (Ohio 1975) (change in institutional retirement age from 70 to 68, applied evenly, was reasonable, and thus earlier grant of tenure did not preempt it), *cert. denied*, 423 U.S. 1018 (1975).

79. Finkin, *Uncapping*, *supra* note 77, at 19. *See* Drans v. Providence College, 383 A.2d 1033, 1040 (R.I. 1978) (court examined the expectations of the profession in determining that changes in retirement policy were acceptable).

80. The AAUP 1940 Statement of Academic Principles strongly emphasizes the importance of tenure to academic freedom: "Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability." *Quoted in id.* at 1039.

temporary teachers, one analyst ably argued, "The teachers who must go, hat in hand, every year (or every two years, or every three years) indefinitely into the future, to ask if they may stay, are not teachers who can feel free to speak and write the truth as they see it."[81] These instructors may also feel constrained when criticizing their institution, even constructively. Such a situation is clearly to be avoided, and courts often recognize that fact.[82] For this reason, institutions contemplating changes in their tenure systems can also anticipate vehement protests from faculties and from the American Association of University Professors.

Less drastic alterations to the present tenure process have the same disadvantages as post-tenure review plans, although perhaps to a lesser degree. One possible option is to create a two-tiered tenure process. After completing the first tier, defined by a period of years, the instructor is subject to review. Once having passed this review, the instructor *then* enters a tenure-track appointment; after a specified period, tenure is either awarded or refused. Like the post-tenure review process, this option allows the institution more than one formal opportunity to analyze the performance of the faculty member. But like post-tenure review, multistage tenure policies may also threaten academic freedom to some degree. While the status quo tenure process admittedly muffles creativity during the faculty member's probationary period, under a multistage system this threat would last for a longer period of the faculty member's career.

Although altered tenure systems provide somewhat more flexibility for institutions than the systems currently in place, they also impose high costs. Before implementing any change, an institution must balance the advantages of flexibility in faculty retention against the disadvantages of the impairment of academic freedom and rigidity in academic programs. Given the traditional weight afforded to freedom in academia, the balance would have to tip toward the current system, unless additional safeguards for freedom can be guaranteed through some sort of institutional process.

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81. Townsend, Outsiders Inside Academe: The Plight of the Temporary Teachers, Chron. Higher Educ., May 28, 1986, at 72, col. 1.

82. Faculty criticism of the institution is largely protected under the first amendment. The Third Circuit found that a teacher's criticism of institutional academic standards is a matter of "public concern" and a matter "upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." Johnson v. Lincoln University, 776 F.2d 443, 452 (3d Cir. 1985) (quoting Connick v. Myers, 461 U.S. 138, 149 (1983)).

D. Increased Retirement Incentives

Rather than meddling with the tenure rights themselves, an institution might choose to sweeten the retirement offer in order to induce older faculty members to leave active employment. A school can make retirement more attractive in several ways. One incentive the school can use is financial reward. By offering a "golden handshake," a bonus for leaving employment, a school could persuade faculty members to retire.[83] As discussed earlier, financial incentives such as benefits and pensions clearly affect the decision of when to retire.[84]

For the institution, the size of the financial carrot will depend on the expected savings gained by an older professor's retirement. The greater the difference between entry level and full-professor pay, the more an institution should be willing to offer as a bonus. Such cost comparison can help an institution formulate appropriate bonus levels.

A less complicated policy is to increase retiree perquisites at the institution to make the honorary status of the professor emeritus more attractive. Simple but meaningful benefits, such as free parking and free admission to all campus events, can make life more enjoyable for the retiree. The school can also treat the retiree as an important part of the university community by granting access to laboratory and research facilities and even to office space, if available.[85] The California Conference of the American Association of University Professors has adopted an "Emeriti Bill of Rights" that lists privileges, some costly but most not, that would make retirement a more attractive option.[86] These suggestions include both substantive incentives such as access to campus facilities, events, and services, and more cosmetic suggestions such as recognition in catalog and directory listings and invitations to participate in traditional ceremonies and other events.[87]

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83. In Koman v. Sears, Roebuck, No. 84-C 5754 (N.D. Ill. Dec. 1, 1986) (LEXIS, Genfed Library, Dist. file), the district court endorsed the legality of the "golden handshake" as part of a "voluntary early retirement program."

84. *See supra* notes 14-15 and accompanying text. For taxable years beginning after December 31, 1988, tax sheltered pension plans must be nondiscriminatory as between employees receiving low and high compensation. I.R.C. § 403(b)(10) (West Supp. 1987). Any faculty plan must meet this nondiscrimination requirement. Sumberg, Faculty Pensions under the Tax Reform Act, Academe, Jan.-Feb. 1987, at 10.

85. *See* Albert, Retirement: From Rite to Rights, Academe, July-Aug. 1986, at 24-26 for an account of possible retiree perquisites.

86. *Id.* at 24.

87. *Id.* at 26.

Retirement need not be an alienating event in the career of a professor; with cooperation from the institution, a retiree can still contribute to the academic community without remaining on the active payroll.[88] For faculty members who have spent the better part of their lives at the institution, the reassurance that all ties will not be severed could be enough to induce them to retire. Inclusion in institutional activities, to the extent desired by the employee and acceptable to the employer, would reduce much of the friction caused by the abrupt separation of traditional retirement. For example, a newly retired faculty member could be asked to participate in the intellectual life of the institution both inside and outside the classroom as a resource for students or as a speaker or participant in discussions. The retiree could also be asked to assist in formulating institutional policy without necessarily being given administrative power or responsibility. These suggestions will not, of course, be of any value to faculty members who enjoy classroom teaching and little else about the position. For those who enjoyed some of the other aspects of the job, however, this solution could induce more voluntary retirements at an earlier age, as planned by the institution, particularly since nonfinancial considerations are often determinative in the decision to retire.[89]

Encouraging retirement will not be an effective solution if the financial and emeritus carrots are waved in front of certain faculty members only because of age. The ADEA cuts both ways, also protecting younger faculty from age-based discrimination. Suppose that a 65-year-old tenured professor who has worked 20 years is offered twice his normal salary to retire. A 50-year-old tenured professor who has worked the same period and has not been offered this same reward could be able to bring an ADEA claim against the employer.[90] The ADEA covers not only hiring and firing, but also

88. Matilda White Riley, of the National Institute on Aging, notes that older people have much to contribute:

> Added years can prolong the opportunity for accumulating experience in all domains of life; they can maximize the potential for the assumption of new roles; they can extend relationships to others—collegues, friends, kin—all of whose lives have also been extended; they can increase the complexity of both social networks and intellectual horizons.

Riley, On Future Demands for Older Professors, Academe, July-Aug. 1986, at 14, 15.

89. *See supra* note 16 and accompanying text concerning subjective considerations in retirement decisions.

90. One purpose of the ADEA is to protect older workers, but the Act is also designed "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b) (1982). It follows that all workers within the protected class would be covered, even against discrimination in favor of *older* workers.

other conditions related to employment.[91] The institution should take care to structure any retirement incentives in a non-age-discriminatory manner, while at the same time making them appeal to the persons it wishes to retire. The institution must offer the rewards on a "length of service," rather than age, basis, thus qualifying the incentives as part of a bona fide seniority system.[92]

Conclusion

In responding to the looming problems caused by the 1986 amendments to the ADEA, institutions that rely on ADEA defenses in any litigation that may arise may find these defenses difficult to establish and unlikely to help them reach financial, academic, and affirmative action goals. Institutions seeking active alternatives will also find decoupling and post-tenure review schemes of little assistance; both are likely to cause intractable legal problems and result in significant harm to academic freedom. The safest option from a legal standpoint is to create an improved system of retirement incentives within the bounds of the ADEA.

Improvements in the economic and psychological aspects of retirement will lead to more retirements, thus satisfying the retiree and keeping the institution out of court. The university's goal is to persuade tenured professors to give up their lease on the ivory tower. If educational institutions can induce the optimal number of retirements at the proper times, they will be able to avoid the harmful side effects of the ADEA's protection of the older worker.

91. "Section 4(a)(1) of the Act specifies that it is unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 C.F.R. § 860.50(a) (1986).

92. 29 C.F.R. § 860.105(a) (1986). For example, a "golden handshake" given after 30 years of service could be part of a BFSS.