

# The Burger Court Opinion Writing Database

*United Air Lines, Inc. v. McMann*  
434 U.S. 192 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

October 20, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-906 United Air Lines v. McMann

I enclose a "Wangdraft" in the above case.

There may be additional "honing" but with a free week  
it may be helpful to get this out of the way.

Regards,

WESB

Copies to the Conference

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: OCT 21 1977

Recirculated: \_\_\_\_\_

Re: 76-906 - United Air Lines v. McMann

MR. CHIEF JUSTICE BURGER, delivered the opinion of the Court:

The question presented in this case is whether, under the Age Discrimination in Employment Act of 1967, retirement of an employee over his objection and prior to reaching age 65 is permissible under the provisions of a bona fide retirement plan established by the employer in 1941 and joined by the employee in 1964. We granted certiorari to resolve a conflict between the holdings of the Fifth Circuit in Brennan v. Taft Broadcasting Company, 500 F.2d 252 (1975), and the Fourth Circuit now before us. See Zinger v. Blanchette, 549 F.2d 901 (3rd Cir. 1977).

I.

The operative facts were stipulated by the parties in the District Court and are not controverted here.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

October 27, 1977

MEMORANDUM TO THE CONFERENCE:

Re: 76-906 United Air Lines v. McMann

Enclosed is the slightly revised "Wangdraft" in the above case. The first print is now at the Print Shop. Since you have seen this, I informed the Print Shop to give priority to other chambers on printing.

Regards,

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: \_\_\_\_\_

Recirculated: OCT 27 1977

Changes as marked in margins

Re: 76-906 - United Air Lines v. McMann

MR. CHIEF JUSTICE BURGER, delivered the opinion of the Court:

The question presented in this case is whether, under the Age Discrimination in Employment Act of 1967, retirement of an employee over his objection and prior to reaching age 65 is permissible under the provisions of a bona fide retirement plan established by the employer in 1941 and joined by the employee in 1964. We granted certiorari to resolve a conflict between the holdings of the Fifth Circuit in Brennan v. Taft Broadcasting Co., 500 F.2d 252 (1975), and the Fourth Circuit now before us. See Zinger v. Blanchette, 549 F.2d 901 (3rd Cir. 1977).

(1)

The operative facts were stipulated by the parties in the District Court and are not controverted here. McMann joined

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: NOV 11 1977  
1st DRAFT Recirculated:

## SUPREME COURT OF THE UNITED STATES

No. 76-906

United Air Lines, Inc.,  
Petitioner,  
v.  
Harris S. McMann. } On Writ of Certiorari to the United  
States Court of Appeals for the  
Fourth Circuit.

[November —, 1977]

MR. CHIEF JUSTICE BURGER, delivered the opinion of the Court.

The question presented in this case is whether, under the Age Discrimination in Employment Act of 1967, retirement of an employee over his objection and prior to reaching age 65 is permissible under the provisions of a bona fide retirement plan established by the employer in 1941 and joined by the employee in 1964. We granted certiorari to resolve a conflict between the holdings of the Fifth Circuit in *Brennan v. Taft Broadcasting Co.*, 500 F. 2d 212 (1975), and the Fourth Circuit now before us. See *Zinger v. Blanchette*, 549 F. 2d 901 (CA3 1977), petition for cert. filed, April 7, 1977 (No. 76-1375).

### I

The operative facts were stipulated by the parties in the District Court and are not controverted here. McMann joined United Air Lines, Inc. in 1944, and continued as an employee until his retirement at age 60 in 1973. Over the years he held various positions with United and at retirement held that of technical specialist-aircraft systems. At the time McMann was first employed, United maintained a formal retirement income plan it had inaugurated in 1941, in which McMann was eligible to participate, but was not compelled to

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 14, 1977

MEMORANDUM TO THE CONFERENCE:

Re: 76-906 United Air Lines, Inc. v. McMann

A suggestion has been made, which I find acceptable, to insert the following under Part III, page 10.

"In this case, of course, our function is narrowly confined to discerning the meaning of the statutory language; we do not pass on the wisdom of fixed mandatory retirements at a particular age. So limited we find nothing to indicate Congress intended wholesale . . . ."

Regards,

WRB

Supreme Court of the United States  
Washington, D. C. 20543

76-906

CHAMBERS OF  
THE CHIEF JUSTICE

December 9, 1977

MEMORANDUM TO THE CONFERENCE:

As agreed at Conference, the following opinions will be announced next week:

Monday, December 12, 1977

76-5344 - Moore v. Illinois - LFP

Absent dissent, we will proceed.

WFB

Regards,

P.S. Some small problems arose  
making it impossible to clear  
United Airlines for Monday

76-906

WFB

cc: Mr. Cornio

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 10, 1977

Re: 76-906 - United Air Lines v. McMann

MEMORANDUM TO THE CONFERENCE:

The problems on this case were worked out  
and it will come down Monday, December 12.

Regards,

WRB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 15, 1977

Re: Cases held for 76-906 - United Airlines, Inc. v. McMann

MEMORANDUM TO THE CONFERENCE:

(1) 76-1375 - Zinger v. Blanchette

Petitioner was involuntarily retired seven and one-half months before he reached 65, pursuant to a pension plan adopted in 1962 which permitted respondent, his employer, to retire management personnel between the ages of 55 and 65. Petitioner claimed this action violated the Age Discrimination in Employment Act of 1967 and was a subterfuge within the contemplation of § 4(f)(2). CA 3 agreed with CA 4's view in McMann that the mere fact a bona fide retirement plan predated the Act was not dispositive of whether it was a subterfuge to evade its purposes. But it went further and held that on this record the plan was not a subterfuge. The court also held the Act does not prohibit involuntary retirements before age 65, nor does it matter whether retirement is mandatory, or permissive, that is, optional with the employer.

Other issues raised in the petition concern interpretation of terms in a job protection agreement covering Pennsylvania Railroad union employees after merger with New York Central; and interpretation of the ICC order governing the merger. In light of their fact specificity and limited applicability and the fact that the Regional Rail Reorganization Act now covers most of the former Penn Central employees, these questions do not appear certworthy.

We, of course, said it did make a difference when a bona fide pension plan was adopted. And we did not have occasion to resolve the question of whether retirement before age 65 at the option of the employer was equally as permissible as mandatory retirement. See Slip Opinion, at 5 n. 4. But there appears no circuit conflict on this latter issue.

Since the result reached by CA 3 appears correct in light of our McMann decision, I will vote to deny cert. *OK*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

November 17, 1977

RE: No. 76-906 United Air Lines v. McMann

Dear Thurgood:

Please join me in your dissenting opinion in the  
above.

Sincerely,



Mr. Justice Marshall

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: OGI 25 1977

1st DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 76-906

United Air Lines, Inc.,  
Petitioner,  
v.  
Harris S. McMann. } On Writ of Certiorari to the United  
States Court of Appeals for the  
Fourth Circuit.

[October —, 1977]

MR. JUSTICE STEWART, concurring in the judgment.

The Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.*, forbids any employer to discharge or otherwise discriminate against any employee between the ages of 40 and 65 because of his age. 29 U. S. C. § 623 (a)(1). But the Act also expressly provides that it is not unlawful for an employer to observe the terms of a bona fide employee benefit plan, such as a retirement plan, so long as the plan is not a "subterfuge to evade the purposes" of the Act. 29 U. S. C. § 623 (f)(1).

It is conceded that United's retirement plan is bona fide. The only issue, then, is whether it is a "subterfuge to evade the purposes" of the Act. I think it is simply not possible for a bona fide retirement plan adopted long before the Act was even contemplated to be a "subterfuge" to "evade" either its terms or its purposes.

Since § 623 (f)(1) on its face makes United's action under the retirement plan lawful, it is unnecessary to address any of the other questions discussed in the Court's opinion.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

October 28, 1977

Re: No. 76-906 - United Air Lines v. McMann

Dear Chief:

Your suggested opinion in this case, relying as it does--to some extent--on the Third Circuit's opinion in Zinger, as well as taking the chronological approach, has led me to restudy the case and the legislative history. I now believe that the Third Circuit has the better view and shall file a concurrence on that basis.

Sincerely,



The Chief Justice

Copies to Conference

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice White

2nd DRAFT

Circulated: 11-14-77

**SUPREME COURT OF THE UNITED STATES**

Recirculated: \_\_\_\_\_

No. 76-906

United Air Lines, Inc.,  
 Petitioner,  
 v.  
 Harris S. McMann. } On Writ of Certiorari to the United  
 States Court of Appeals for the  
 Fourth Circuit.

[November —, 1977]

MR. JUSTICE WHITE, concurring in the judgment.

I

While I agree with the Court and with MR. JUSTICE STEWART that McMann's forced retirement at age 60 pursuant to United's retirement income plan does not violate the Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.*, I disagree with the proposition that this bona fide plan necessarily is made lawful under § 623 (f)(2) merely because it was adopted long before the Act's passage. Even conceding that the retirement plan could not have been a subterfuge to evade the purposes of the Act when it was adopted by United in 1941, I believe that the decision by United to continue the mandatory aspects of the plan after the Act became effective in 1968 must be separately examined to determine whether it is proscribed by the Act.

The legislative history indicates that the exception contained within § 623 (f)(2) "applies to new and *existing* employee benefit plans, and to both the establishment and *maintenance* of such plans." H. R. Rep. No. 805, 90th Cong., 1st Sess., 4 (1967); S. Rep. No. 723, 90th Cong., 1st Sess., 4 (1967) (emphasis added). This statement in both the House and Senate reports demonstrates that there is no magic in the fact that United's retirement plan was adopted prior to the Act, for not only the plan's establishment but also its maintenance

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackman  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

## 1st DRAFT

From: Mr. Justice Marshall

## SUPREME COURT OF THE UNITED STATES

Circulated: Nov. 1, 1977

No. 76-906

Recirculated: \_\_\_\_\_

United Air Lines, Inc.,  
 Petitioner,  
 v.  
 Harris S. McMann. } On Writ of Certiorari to the United  
 States Court of Appeals for the  
 Fourth Circuit.

[November —, 1977]

MR. JUSTICE MARSHALL, dissenting.

Today the Court, in its first encounter with the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602, 29 U. S. C. § 621 *et seq.*, sharply limits the reach of that important law. In apparent disregard of settled principles of statutory construction, it gives an unduly narrow interpretation to a congressional enactment designed to remedy arbitrary discrimination in the workplace. Because I believe that the Court misinterprets the Act, I respectfully dissent.

But for § 4 (f)(2), 29 U. S. C. § 623 (f)(2), there would be no question that petitioner's decision to discharge respondent because he reached the age of 60 would violate § 4 (a) of the Act, 29 U. S. C. § 623 (a). Section 4 (a) makes it "unlawful for an employer . . . to discharge any individual [between the ages of 40 and 65] because of such individual's age." 29 U. S. C. §§ 623 (a), 631. In involuntarily retiring respondent when he turned 60, petitioner did just that. The relevant question for decision, then, is whether § 4 (f)(2) sanctions this otherwise unlawful act. That section provides:

"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]. . . ."

Substantial  
Revisions

NOV 16 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-906

United Air Lines, Inc.,  
Petitioner,  
v.  
Harris S. McMann. } On Writ of Certiorari to the United  
States Court of Appeals for the  
Fourth Circuit.

[November —, 1977]

MR. JUSTICE MARSHALL, dissenting.

Today the Court, in its first encounter with the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602, 29 U. S. C. § 621 *et seq.*, sharply limits the reach of that important law. In apparent disregard of settled principles of statutory construction, it gives an unduly narrow interpretation to a congressional enactment designed to remedy arbitrary discrimination in the workplace. Because I believe that the Court misinterprets the Act, I respectfully dissent.

But for § 4 (f)(2) of the Act, 29 U. S. C. § 623 (f)(2), petitioner's decision to discharge respondent because he reached the age of 60 would violate § 4 (a)(1), 29 U. S. C. § 623 (a)(1). This latter section makes it unlawful for an employer "to fail or refuse to hire or to discharge or otherwise discriminate against any individual [between 40 and 65] with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age." ✓

The language used in § 4 (a)(1) tracks the language of § 703 (a)(1) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (a)(1).<sup>1</sup> This section has been interpreted as for-

<sup>1</sup> Section 703 (a)(1) provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2 (a)(1).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 28, 1977

Re: No. 76-906 - United Airlines v. McMann

Dear Chief:

I shall await Byron's concurrence in this case. After I have seen that I may even write a paragraph or two myself.

Sincerely,

*HaB.*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota

December 9, 1977

Re: No. 76-906 - United Airlines v. McMann

Dear Chief:

Please join me.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

November 4, 1977

No. 76-906 United Air Lines v. McMann

Dear Chief:

Although I have joined your opinion in a separate note to you and to the Conference, I do think your opinion would be strengthened by a somewhat greater emphasis on the legislative history.

Thurgood's dissent addresses the legislative history, and some counterpresentation in the Court's opinion would seem appropriate. You could emphasize the nearly unanimous acquiescence in the legality - as well as social utility - of involuntary retirement under bona fide pension plans, as well as the absence of any indication that Senator Javits' amendment was intended to change, rather than expand the §4(f)(2) exemption.

Thurgood's dissent takes a rather limited view of the legislative history. This could be countered by emphasis on the entire course of §4(f)(2)'s evolution.

No doubt you have in mind a response to the dissent. The above thoughts are hardly original, and yet I was impressed by the support that our position derives from a broad view of the legislative history.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 4, 1977

No. 76-906 United Air Lines v. McMann

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 11, 1977

Re: No. 76-906 - United Air Lines v. McMann

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 26, 1977

Re: 76-906 - United Air Lines v. McMann

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference