



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

Office of the Chair

November 15, 2006

Federal Aviation Administration  
Docket Management Facility  
U.S. Department of Transportation  
400 Seventh Street, S.W.  
Nassif Building  
Room PL-401  
Washington, D.C. 20590-0001

Re: Docket Number FAA-2006-26139

To Whom It May Concern:

As Chair of the U.S. Equal Employment Opportunity Commission (Commission or EEOC), I am writing in response to the Federal Aviation Administration's (FAA) request for comments concerning its regulation commonly referred to as the Age 60 Rule. 14 C.F.R. § 121.383(c). The Age 60 Rule bars individuals who have reached their sixtieth birthday from serving as pilots or copilots in flight operations governed by Part 121 of the FAA's rules, typically commercial flights. On October 25, 2006, the FAA published a request in the Federal Register for comments about whether the United States should adopt an amendment that the International Civil Aviation Organization (ICAO) will adopt in November 2006 to increase the "upper age limit" of airline pilots to age 65 provided another crewmember pilot is under age 60. 71 Fed. Reg. 62399.

EEOC's Position on the Age 60 Rule

The Commission has long been concerned about the impact of the Age 60 Rule on pilots and copilots.<sup>1</sup> The Commission enforces the Age Discrimination in Employment Act of 1967, as

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<sup>1</sup> The Commission's longstanding interest in the Age 60 Rule is demonstrated in public comments, testimony and statements beginning as early as 1981, including: Testimony of Constance L. Dupre, Associate General Counsel, EEOC, Panel on the Experienced Pilots Study, National Institute on Aging, National Institutes of Health, May 27, 1981; EEOC's Final Interpretations of the Age Discrimination in Employment Act of 1967, 49 Fed. Reg. 47724 (1981); EEOC comments on the FAA's Advanced Notice of Proposed Rulemaking at 47 Fed. Reg. 14692 (1982); Testimony of former EEOC Chair Clarence Thomas before the House Select Committee on Aging, October 1985; August 12, 1986 letter from former Chair Clarence Thomas to former FAA Administrator Donald Engen urging the FAA to grant a petition by 39 pilots for exemptions from the Age 60 Rule so that they could participate in a controlled study envisioned by the National Institute of Aging panel; EEOC comments in response to the FAA's request for comments at 58 Fed. Reg. 21336 and 33316 (1993); and EEOC comments on the FAA's Notice of Proposed Rulemaking at 60 Fed. Reg. 16230 (1995). As recently as 2005, in response to the Office of Management and Budget's request for comments concerning the planned testimony of John L. Jordan, Federal Air Surgeon, before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Aviation, on the Age 60 Rule, the EEOC reiterated its longstanding opposition to any rule on pilots or co-pilots that limits an individual's ability to operate aircraft due solely to age and without regard to ability to safely pilot aircraft.

amended, 29 U.S.C. § 621 *et seq.* (ADEA) and also has responsibility under Executive Order 12067 to coordinate the federal government's enforcement of laws, Executive orders, regulations, and policies that require equal employment opportunity without regard to race, color, religion, sex, national origin, age or disability. 43 Fed. Reg. 28967 (1978). The Executive Order requires FAA to coordinate with EEOC to ensure that its rules are consistent with the Commission's interpretation of the ADEA.

The ADEA prohibits employment discrimination against individuals at least 40 years of age. Under the ADEA, it is unlawful for an employer to have a maximum age limitation for its employees unless the employer can establish that the age limitation is a bona fide occupational qualification (BFOQ) "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). An EEOC regulation sets forth what an employer must prove to establish that age is a BFOQ:

That (1) the age limit is reasonably necessary to the essence of the business and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

29 C.F.R. § 1625.6(b)(2006).<sup>2</sup>

The Age 60 Rule runs counter to the narrow scope of the BFOQ defense and the fact-specific, case-by-case analysis it requires. Pilot skills and health can be assessed accurately on an individual basis, regardless of age, thus eliminating the need for dependence on a maximum age limit. The FAA itself relies on individualized testing as a basis for issuing medical certificates to people of all ages, including those age 60 and above, who serve as pilots in non-Part 121 flight operations. Moreover, Part 121 pilots are currently required to undergo physical examinations and cockpit-performance tests every six months. These tests would allow airlines to monitor the health and reaction time of pilots 60 and over, just as they currently monitor the health of pilots under 60. In Commission litigation challenging pilot age limits imposed by employers whose flight operations are not governed exclusively by Part 121, the EEOC's experts have testified that Class I medical testing is fully sufficient to identify health or performance problems that may surface for pilots regardless of age.<sup>3</sup> These experts have also testified that, to the extent further testing may be desirable, cardiac stress tests, enhanced blood work-ups, and neurological screening could be added to the standard battery of Class I tests for all pilots.

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<sup>2</sup> The Supreme Court cited the EEOC's standard with approval in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416-17 (1985) (affirming a judgment that Western Airline's mandatory retirement rule for flight engineers did not qualify as a BFOQ).

<sup>3</sup> Different types of pilot certification require different levels of medical certification, with a Class I medical certification having the most rigorous requirements.

Furthermore, even as early as 1993, a report prepared for the Civil Aeromedical Institute of the FAA supported the conclusion that the Age 60 Rule for pilots was not defensible as a BFOQ under the ADEA.<sup>4</sup> The report concluded that there was “no hint of an increase in accident rate for pilots of scheduled air carriers as they neared their 60<sup>th</sup> birthday.”<sup>5</sup> Nor has the FAA produced any methodologically sound accident-rate studies showing a statistically significant difference in accident rates by age. In other words, the studies relied on by the FAA to justify the Age 60 Rule have never established a correlation between accident rates and the increased age of the pilots.

The Commission therefore strongly encourages the FAA to lift the Age 60 Rule. Medical and proficiency tests on an individual basis are effective and non-discriminatory ways to ensure that commercial pilots maintain the highest standards of safety at all ages. Moreover, far from being a liability, having older pilots in the cockpit may enhance aviation safety, as the practical experience of these pilots has great value in a profession calling for complex and split-second judgments.

#### EEOC Comments Concerning Adoption of ICAO Standard

The current request for comments solicits opinions on whether the FAA should adopt the new ICAO standard which increases the “upper age limit” for airline pilots up to age 65 provided another crewmember pilot is under age 60.

We support raising the age limit for Part 121 pilots to age 65 for a specific time period as a reasonable interim step in the process of eventually eliminating age as a determinative factor in the employment of airline commercial pilots. As with age 60, there is no credible medical, scientific or aviation evidence to suggest that concerns for safety require a mandatory retirement age for pilots of 65. Raising the age limit to 65, however, will serve as a useful transitional step, allowing commercial pilots to continue flying beyond age 60 while the FAA plans a full transition to individualized testing of the skills and health of all pilots, regardless of age.<sup>6</sup>

Although we support adoption of the new ICAO age limit of 65, we oppose the adoption of the requirement that pilots over age 60 be paired with pilots under age 60. Studies have shown that the risk to public safety of having two pilots over age 60 in the cockpit is extremely small. As discussed above, medical and proficiency tests are effective and non-discriminatory ways to assure that commercial pilots maintain the highest standards of safety at all ages.

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<sup>4</sup> Age 60 Project, Consolidated Database Experiments, Final Report, March 1993, Hilton Systems Technical Report at 8025-3C(R-2).

<sup>5</sup> Although this report cautiously recommended raising the age limit to age 63, the then available medical, scientific and aviation data did not support an age 63 limitation under the ADEA.

<sup>6</sup> The Commission’s position is that age cannot be a BFOQ for commercial or any other pilots because pilot skills and health can be accurately assessed on an individual basis, regardless of age. The Commission has, however, settled litigation after employers have agreed to increase the pilot age limitation to age 65 for the term of the consent decree.

If you would like to discuss these comments further, please contact Peggy Mastroianni, Associate Legal Counsel, at (202) 663-4640, or Carol Miaskoff, Assistant Legal Counsel, at (202) 663-4645.

Sincerely,

A handwritten signature in black ink that reads "Naomi C. Earp". The signature is written in a cursive style with a large, stylized 'N' and 'E'.

Naomi C. Earp  
Chair