2002 WL 32307759 (C.A.7) (Appellate Brief)
United States Court of Appeals,
Seventh Circuit.

Donald DRNEK, James D. Minch, Richard A. Graf and Richard Cosentino, Plaintiffs-Appellees,
v.
CITY OF CHICAGO, a Municipal Corporation, Defendant-Appellant.

Nos. 02-2587 & 02-2588 (consol.).
2002.

Appeal Pursuant to 28 U.S.C. §1292(b) from the Northern District of Illinois, Eastern Division Nos. 01 C 0840 & 01 C 2586 The Honorable Elaine E. Bucklo, Judge Presiding.

Response Brief of Plaintiffs-Appellees

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CASES

*1 JURISDICTIONAL STATEMENT

Defendant-appellant City of Chicago's ("the City" or "defendant") jurisdictional statement is neither complete nor correct, as it suggests that the issue originally proposed by defendant for interlocutor certification was the issue actually certified by the Distriet Court. That is not the case. The Distriet Court rejected the City's proposal and instead, *sua sponte,* certified its own question for interlocutor review.

Plaintiffs-appellees, Donald Dmek and Richard Cosentino (two former Chicago police officers) and James Minch and Richard Graf (two former Chicago firefighters) ("plaintiffs"), were retired under the City's mandatory retirement ordinance, Chicago Municipal Code §2-152-140 (rev. 2000) ("MRO"). In two separate complaints, plaintiffs sued the City, alleging that the MRO violates the Age Diserimination in Employtnent Act of 1967, as arnended, 29 U. S.C. § 621*et seq.* (1994 & Supp. V 1999) ("ADEA"), and their due process rights under the federal and Illinois Constitutions. Minch R. 1; Dmek R. 6. The Distriet Court (Bucklo, J.) considered the cases together because they arose from substantiallythe same set of facts and raised the same claims. A3, A43; Dmek R. 9. The District Court had jurisdiction over the federal cairns under 28 U.S.C. §1331 (2000) and supplemental jurisdiction over the state law cairns under 28 U. S.C. § 1367 (2000).

On June 8, 200 1, the City moved to dismiss the complaints. Minch R. 7; Dmek R. 10. On March 25, 2002, the Distriet Court denied that motion as to plaintiffs' ADEA claims.[1] A6-A27.[2] On April 4, 2002, the City moved for an order amending the March 25, 2002 order to include ***2** certification of the ADEA cairns for interlocutor appeal pursuant to 28 U.S.C. § 1292(b) (2000). Dmek R. 33.

The Distriet Court also treated the City's motion as a motion for reconsideration. Dmek R. 35. The Distriet Court denied the City's motion and rejected the issue proffered by the City for interlocutor review.[3] A52-A55. However, the Distriet Court sua sponte certified its own question for interlocutor review: "whether a plaintiff can demonstrate subterfuge under §623(j)(2) with any kind of evidence if there is no violation of §623(j)(1)." A54 (emphasis in original). Defendant did not dispute the Distriet Court's modification of the proposed question.

The City petitioned this Court for leave to appeal on May 31, 2002. Minch R. 56, Dmek R. 46. On June 11, 2002, this Court granted the City's petition, pursuant to 28 U.S.C. § 1292(b), and consolidated the cases for disposition and briefing.

***3** ISSUE PRESENTED FOR REVIEW

The issue certified for interlocutor review is "whether a plaintiff can demonstrate subterfuge under [section] 623(j)(2) [of the ADEA] with *any* kind of evidence if there is no violation of [section] 623(j)(1)." A54 (emphasis in original).

***4** STATEMENT OF THE CASE

On May 17, 2000, the Chicago City Council passed an ordinance, introduced by Mayor Richard M. Daley, establishing a mandatory retirement age of 63 for Chicago police officers and unifonned fire department personnel. The ordinance

("MRO") becarne effective on December 3 1, 2000. Plaintiffs for this consolidated appeal, two firefighters and two police officers, challenge their mandatory retirement and the mandatory retirement of other similarly-situated Chicago public safety employees undertaken pursuant to the MRO.

Plaintiffs have alleged that defendant, in passing and implementing the MRO, violated the ADEA in at least two ways: (1) it violated the substantive prohibitions against age discrimination listed in 29 U. S.C. § 623 (a), and (2) it failed to meet the "safe harbor" requirements for municipalities wishing to implement mandatory retirement for public safety employees because the MRO was passed and implemented in a manner that constituted an illegal "subterfuge" to evade the ADEA's purposes. 29 U.S.C. §623(j)(2). Minch R. 1; Drnek R. 6.[4]

On March 25, 2002, the Distriet Court denied dismissal of plaintiffs' ADEA cairns and of the firefighter plaintiffs' due process claims but grated dismissal of the police plaintiffs' due process claims. A6-A27.

The City subsequently moved for interlocutor review of the Distriet Court's decision on plaintiffs' ADEA claims. Dmek R. 33. On May 22, 2002, the Distriet Court rejected the City's proposed interlocutor question, electing instead *sua sponte* to certify its own question. A54. On ***5** May 31, 2002 the Citypetitioned this Court forpermission to appeal. This Court granted the petition on June 11, 2002, and consolidated the cases for briefing and disposition.

*6 STATEMENT OF FACTS

I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The ADEA prohibits discrimination on the basis of age in employtnent. The purposes of the ADEA are to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621(b). Section 623(a) of the ADEA provides that it is unlawful for any employer:
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or,

(3) to reduce the wage rate of any employee in order to comply with this chapter.

II. THE 29 U.S.C. §623(j) EXEMPTION

The "exemption" at issue in the instant case states:
(j) Employment as firefighter or law enforcement officer

lt shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken -

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Diserimination in Employment Amendments of 1996 if the individual was

discharged after the date described in such section, and the individual has attained-

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

***7** (B)

(I) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of-

(1) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. §623(j).

III. HISTORY OF THE EXEMPTION

The ADEA, when originally passed in 1967, excluded state and local governments from its purview. Pub. L. No. 90-102, 81 Stat. 602 (1967). In 1974, Congress extended the ADEA to cover state and local governments. Pub. L. No. 93-259, §28(a)(2), 88 Stat. 55, 74 (1974). With the extension of the ADEA to states and municipalities, those entities could enforce mandatory retirement laws for police and fire personnel. *Id.* However, like other employers, they had to demonstrate that age was a bona fide occupational qualification. *Id.*

In 1983, the Suprerne Court confirmed that the ADEA applies to state and municipal employers. *EEOC v. Wyornin,* 460 U.S. 226, 243 (1983). Subsequently, in 1986, Congress amended the ADEA to create an exemption to allow, under limited circumstances, states, and municipalities to mandatorily retire firefighters and police officers. Within the exemption, Congress included a "subterfuge" provision nearly identical to the current law.[5]Pub. L. No. 99-592, 100 Stat. ***8** 3342 (1986). The 1986 exemption included a "sunset" provision that required the exemption to end on December 31, 1993. 29 U.S.C. §623(1) (1986), later recodified as §623(j)(1990).

The 1986 amendments included a directive that the Sceretary of Labor and the Equal Employment Opportunity Commission ("EEOC") complete a study to determine whether physical and mental fitness tests were valid measurements of the ability of police and firefighters to perform theirjob requirements. 100 Stat. 3342, 3343. The study, when completed in 1992, recommended that Congress eliminate the "safe harbor" permitting mandatory retirement for public safety officers, as there was no scientific basis to equate age and fitness.[6] The 1986 amendments required that the EEOC, within 5 ycars of the enactment of the 1986 ADEA amendments, propose "guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs." *Id.*

***9** In 1996, Congress reinstated the exemption, making its application retroactive to its 1993 lapse. Pub. L. No. 104-208, §1, 110 Stat. 3009-23 to 3009-25 (1996) (codified at 29 U.S.C. §623(j)). The 1996 exemption again included an express "subterfuge" prong, excepting from the exemption those employment actions which were taken as a "subterfuge to evade the purposes of [the ADEA]." 29 U.S.C. §623(j)(2).

The 1996 exemption differed in a number of ways from its 1986 counterpart. The new exemption had no termination date. Furthermore, where the 1986 Amendments required that studies be conducted and guidelines be developed for fitness testing,

the 1996 Amendments required that the Sceretary of the Department of Health and Human Services ("HHS") actually promulgate regulations "identifying valid, nondiseriminatory job performance tests" and mandated their use for any state or municipality seeking to implement mandatory retirement. *See* 110 Stat. at 3009-24.[7] ***10** Included in the statute's language is the requirement that an employer "[comply] with section 3(d)(2)[8] of the [ADEA] Amendments of 1996 if the individual was discharged after the date described in such section ..... Despite Congress' September 30, 2000 deadline for testing guidelines to be developed, as yet no regulations have been issued.

***11 IV. CHICAGO'S MANDATORY RETIREMENT ORDINANCE**

The City has had mandatory retirement laws in place for public safety employees on and off since 1939. Appellant's brief ("Br.") at 9. In 1984, the mandatory retirement age for Chicago police and fire personnel was set at 70 when the ADEA became applicable to states and municipalities. Chicago Municipal Code §25-37 (1984).

When the 1986 ADEA exemption expired in 1993, the City's mandatory retirement ordinance ended as well. On September 30, 1996, the 1996 "safe harbor" provision of the ADEA was enacted. Almost four years later, in May 2000, the City passed and implemented the MRO. Chicago Municipal Code 2-152-140.[9] No mandatory retirement ordinance existed in Chicago between December 31, 1993 and May 17, 2000, when the current MRO was enacted.

FN

(d) All persons to whom this ordinance applies shall be retired upon attainment of age 63. Any person to whom this ordinance applies whose age is 63 or more on December 31, 2000 shall be retired upon that date.

Chicago Municipal Code §2-152-140 (2000).

***12** Following enactment of the MRO, plaintiffs were involuntarily retired by the City because they met or exceeded the Ordinance's mandatory retirement age. Additional individuals have been and will continue to be involuntarily retired pursuant to the MRO.

V. PLAINTIFFS' COMPLAINTS

On February 6, 2002, Plaintiff Dmek filed his original complaint (Dmek R. 1), which he arnended on May 6, 200 I. Dmek R. 6. On April 12, 2001, plaintiffs Minch, Cosentino, and Graf filed a class action complaint. Minch R. I. Both complaints, allege that: (1) the MRO violated the ADEA's substantive provisions by discriminating against plaintiffs in "compensation, terms, conditions, or privileges of employment" and depriving them "of employment opportunities" adversely affecting their "status as an employee" because of their age (Minch R. 1 at 11-12; Drnek R. 6 at 5); (2) the MRO violated §623(j) of the ADEA because it is a subterfuge to evade the ADEA's purposes (Minch R. 1 at 8-9; Dmek R. 6 at 5); (3) the MRO was a subterfuge, because among other reasons, it was passed for the purpose of hiring and promoting younger police officers and firefighters (Minch R. 1 at 9; Dmek R. 6 at 5); (4) the MRO violated the ADEA because the City provided no fitness tests to allow plaintiffs to demonstrate continued ability to perform their jobs. (Minch R. 1 at 10-11; Drnek R. 6 at 6-7); and, (5) the MRO violated plaintiffs' due process rights under the Illinois and federal Constitutions (Minch R. 1 at 12-13; Drnek R. 6 at 8-9).

VI. THE CITY'S MOTION TO DISMISS

On June 8, 2001, the City moved to dismiss plaintiffs' complaints, stating that: (1) plaintiffs could not state a claim that the City had failed to provide tests to assess continuing fitness for duty when the federal agency charged with developing such tests had failed to do so (Minch R. 7 at 6-7; Drnek R. 10 at 6-7); (2) the "reinstitution" of the MRO could not be a subterfuge of the ADEA ***13** because the age criterion predated the ADEA (Minch R. 7 at 8-12; Dmek R. 10 at 8-12); (3) no inquiry into legislative motivation was required or permissible (Minch R. 7 at 11-12; Dmek R. 10 at 11-12); and, (4) plaintiffs had no property interest in their jobs which would implicate their due process rights under the Illinois and federal constitutions. (Minch R. 7 at 12-14; Drnek R. 10 at 12-14).

At a hearing scheduled *sua sponte* by the District Court, plaintiffs were directed to provide additional factual information to support their claim that the MRO was enacted as a subterfuge to evade the ADEA's purposes. Minch R. 33; Dmek R. 31, 41. When they appeared at this hearing, plaintiffs cited published reports and information that the MRO was enacted "as a way to create hiring and promotional opportunities in the fire department and police department for the benefit of younger employees," "for the benefit of creating some job openings for minorities in those departments," and for the purpose of getting rid of the "deadbeats" and "old-timers" in the departments. Drnek R. 41 at 6-7.

Plaintiffs cited newspaper reports containing public statements made by the sponsor of the MRO and other City officials. For example, the MRO sponsor stated that the ordinance would "make room for young people coming in," and that "[you get more work out of young upstarts than out of old-timers." Drnek R. 41 at 9, 12. Similarly, the Fire Commissioner stated that the ordinance 4 gives younger people a chance to move up, bringing fresh ideas and talent, and gives the older mernbers a chance to enjoy the retirement ycars that they worked so hard to carn;" and the Chicago Tribune reported that "retirementt of older supervisors who climbed through the ranks of what city consultants called an old boy network also would open positions for minorities." Drnek R. 41 at 11, 15. Plaintiffs also cited newspaper reports that the City waited four ycars after the 1996 exemption ***14** was passed to enaet the MRO, so that a friend of the Mayor's in the Police Department could retire voluntarily at age 68, suggesting that the City lacked a "legitimate public safety interest" in enacting the ordinance. Dmek R. 41 at 7, 13, 14.

VII. THE ORDER DENYING THE CITY'S MOTION TO DISMISS

On March 26, 2002, the Distriet Court denied the motion to dismiss with respect to plaintiffs' ADEA cairns as well as the firefighters' due process claims. A3-A40.[10] The Court held that (1) the 2000 MRO was a "new law" and satisfies the age limits test set forth in 29 U. S. C. § 623(j)(1)(B)(ii) (A 17-A18); (2) section 623 (J) permits the City to enaet a MRO without offering fitness tests since HHS has failed in its mandate to develop such tests (Al0-Al7); (3) plaintiffs have sufficiently alleged subterfuge with their allegations that the MRO was passed for reasons that violate the ADEA's purposes (AI8-A27); (4)even if the MRO specifically ineluded "publiesafety" as its stated purpose, the MRO, if it is to qualify for the §623(j) exemption, can be tainted by *no* impennissible purposes (A24-A25); and, (5) an analysis into the motivation of legislators and other City officials in passing the MRO is relevant to plaintiffs' subterfuge claim (A23).[11]

*15 VIII. THE CERTIFICATION ORDER

On April 4, 2002, the City moved for interlocutor appeal pursuant to 28 U.S.C. § 1292(b) (2000). Drnek R. 33. The City proposed the following question for certification: "whether alleged illicit motives on the part of individual legislators and municipal officials for enacting a retirement plan that mandatorily retires, police and fire personnel at age 63 and results in their replacement with younger workers can demonstrate subterfuge under section 623(j)(2) of the ADEA." Drnek R. 33 at 5; A43. The District Court elected to treat the City's motion in part as a motion for reconsideration. Drnek R. 35.

On May 24, 2002, the District Court denied the City's motion for reconsideration, noting that the City's theory regarding the "subterfuge" prong as set forth in its motion would render the subterfuge prong "if not dead, at least moribund." A50. Specifically, the Distriet Court noted that:

> Section 623(j) only applies if a mandatory retirement plan both meets the age requirements in §(j)(1) and is not a subterfuge under §(j)(2). The City's interpretation [...] that facial compliance with (j)(1) precludes me from looking elsewhere, for evidence of subterfuge, would eviscerate the requirement that the plan not be a subterfuge.

A52.

However, while rejecting the City's proffered question, the District Court *sua sponte* certified its own question for interlocutor review: "whether a plaintiff can demonstrate subterfuge under §623(j)(2) with any kind of evidence if there is no violation of §623(j)(1)." A53-54 (emphasis in original).

***16** SUMMARY OF ARGUMENT

Congress, in creating the 29 U.S.C. §623(j) safe harbor from the ADEA, did not intend to give states and municipalities *carte blanche* to fashion mandatory retirement schemes for any reason whatsoever. Instead, other provisions of the ADEA Amendments of 1996, as well as legislative history and settled precedent, indicate that the exemption was created for public safety purposes. Congress' inclusion of language precluding states and municipalities from creating mandatory retirement schemes that are a "subterfuge" to evade the purposes of the ADEA indicates that if a municipality implements a mandatory retirement scheme for reasons that violate the ADEA's stated purposes, that municipality cannot take advantage of the safe harbor.

A negative answer to the certified question, "whether a plaintiff can demonstrate subterfuge under §623(j)(2) with *any* kind of evidence if there is no violation of §62(j)(1)," would render §623(j)(2) a superfluous nullity, in violation of canons of statutory construction. This would be an especially improper result, given the remedial nature of the ADEA and the weighty precedent cautioning that exceptions to remedial statutes must be narrowly construed.

The City has raised several issues not immediately germane to the certified question, and plaintiffs address these issues in this brief. Despite the City's unfounded attempts to improperly shift the burden to plaintiffs and to read heightened pleading standards into 29 U.S.C. §623(j) where none exist, the Distriet Court properly held that plaintiffs have stated a cause of action under the ADEA. The City relies on irrelevant and misleading case law to suggest that plaintiffs must allege a "substantive allegation" of the ADEA, and proceeds to mischaracterize plaintiffs' complaints to say they have not done so, when a cursory examination of the pleadings indicates that they have. Finally, the City's suggestion that its mere invocation of the safe harbor should shield it from all scrutiny of ***17** its motivations in enacting and implementing the MRO has no basis in the law. Therefore, plaintiffs request that this Court uphold the judgment of the Distriet Court denying the City's motion to dismiss, and answer the certified question in the affirmative.

***18 ARGUMENT**

I. INTRODUCTION

This interlocutor appeal concerns a simple question of statutory interpretation addressed at the pleadings stage: whether a municipal employer can take advantage of a limited "safe harbor" exception to the ADEA to force public safety employees[12] to retire at age 63, where plaintiffs have alleged that the City has engaged in a subterfuge of the ADEA's purposes and has therefore failed to satisfy one of two distinct requirements set forth by Congress to take advantage of that exception. Following fundamentals of statutory construction, the question certified by the Distriet Court[13] must be answered in the affirmative.

The City's insistence that the mere invocation of the "safe harbor" affords them protection from any scrutiny of its motivations as an employer is simply incorrect. Giving a municipal employer a pass from analyzing alleged discriminatory motivations for its employment decisions flies in the face of decades of ADEA and other civil rights jurisprudence. As detailed below, the mandatory retirement safe harbor does not give municipalities free rein to create any sort of mandatory retirement system they desire for police officers and firefighters. The exemption was created by Congress for a limited public safety purpose.

Answering the certified question in the negative, as the City is requesting, would run counter to established law in this Circuit and elsewhere, would deeplyprejudice plaintiffs, and would violate ***19** the express language of the ADEA. Plaintiffs assert that the Distriet Court was correct in holding that they have surpassed the low threshold requirements to sur-vive a motion to dismiss. Plaintiffs therefore request that this Court uphold the District Court's opinion denying the City's motion to dismiss plaintiffs' claims under the ADEA, and hold in response to the certified question that a plaintiff can demonstrate subterfuge under §623(j)(2) of the ADEA with any kind of evidence if there is no violation of §623(j)(1).

II. THE EXEMPTION SET FORTH AT 29 U.S.C. §6230) DOES NOT GIVE MUNICIPAL EMPLOYERS *CARTE BLANCHE* TO MANDATORILY RETIRE PUBLIC SAFETY EMPLOYEES.

In its brief, the City stretches the §623(j) exemption past any credible interpretation. It concludes that Congress intended to give municipalities nearly unfettered discretion to mandatorily retire public safety workers. This conclusion is incorrect. Other statutory language, the circumstances of the exemption's passage, related legislative history, and judicial interpretation all reveal that Congress constructed the exemption to provide states and municipalities *limited* flexibility to use mandatory retirement *for public safety purposes,* not for any purpose.

Plaintiffs agree with defendant that "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Ine.,* 484 U.S. 49, 56 (1987). Viewed in their entirety, the 1996 amendments to the ADEA -- both within the four corners of the exemption itself, and in the other provisions simultaneously passed by Congress - demonstrate that Congress did *not* intend for states and municipalities to have *carte blanche* to mandatorily retire public safety workers for any reason. This is clear from not only the 4 exception to the exemption" (the §623(j)(2) subterfuge clause.) It is also true because, in keeping with the purposes of the ADEA, the provisions passed by Congress simultaneously with the 1996 ***20** exemption were designed to ensure that the abilities of older public safety workers would be respected and their rights protected. These provisions,taken as a whole, suggest that Congress could not have intended the exemption to be an open invitation to municipal employers to implement arbitrary, discriminatory age restrictions in employment. Rather, the statute strongly suggests that the *only* legitimate reasons for the mandatory retirement of a public safety employee stem from public safety concerns.

When it amended the ADEA in 1996, Congress mandated that public employers would, in the future, be required to employ fitness tests for public safety employees. *See* 110 Stat. 3 009-24. This mandate was an explicit directive within the text of the 1996 exemption: Section 623(j)(1) specifically requires that an employer is entitled to safe harbor from the ADEA's prohibitions only if the "employer has complied with section 3(d)(2) of the [ADEA] Amendments of 1996 [....]"[14] Section 3(d)(2), in turn, requires that, effective on the date of issuance of the HHS regulations identifying "valid, nondiseriminatory job performance tests ..... an employer seeking [to mandatorily retire a firefighter or law enforcement officer] *shall provide* [...] an annual opportunity to demonstrate physical and mental fitness by passing [such a test] *in order to continue employment.*" (Emphasis supplied.)

While the requirement that employers comply with section 3(d)(2) may still be a prospective one (HHS has not yet promulgated any regulations), this does not render the overarching there of Congress' amendments meaningless or superfluous. In mandating the development of fitness tests for public safety employees, Congress manifested its rejection of the notion that public employers should be indefinitely permitted to use age as a proxy for fitness to perform public safety jobs. By ***21** requiring public employers to provide Public safety officers an annual opportunity to demonstrate their fitness for the job through the use of a valid, nondiscriminatory test, Congress manifested its intent that public safety employees

should be able to *continue to work* -- regardless of age -- if they are flt to do so.[15]

In the interim between the passage of the 1996 amendments and the date upon which HHS finally issues valid fitness testing regulations, Congress therefore merely intended to give public employers a "grace period" in which they would be permitted to use age as a proxy for fitness to perform public safety jobs, and avoid the necessity of demonstrating that age is a bona fide occupational qualification ("BFOQ") for ernployment as a public safety employee.[16] This does *not* translate into an invitation forpublic employers to mandatorilyretire public safety employees for *any* reason (as defendant suggests), particularly a reason that has nothing to do with public safety.[17]

***22** Courts have consistently viewed 623(j) as a public safety exemption, created to serve public safety interests. As this Court noted in *Kopec,* "[a]s there was yet no consensus as to the propriety of such [mandatory retirement] age limits *in Me public safety context,* Congress believed that a national standard presumptively barring them (that is, unless they met the narrow criteria for a BFOQ) was inappropriate .... 193 F.3d at 900 (emphasis supplied). *See also Glennon v. Village of South Barrington,* 2000 WL 1230494 at *3 (N.D. Ill. 2000) ("Section 623(j) is a *public safety exemption* to the ADEA." (emphasis supplied; *Knight,* 992 F.2d at 1546 ("mandatory retirement policies [...] in the case of firefighters and law enforcement officers, are understood to be motivated by concerns of safety, not cost.")

Indeed, courts in this circuit have been hostile to municipalities' attempts to use the §623(j) exemption for non-public safety purposes. *Quinones,* 829 F. Supp. at 242-43. In *Quinones,* the plaintiff (a newly-hired 34-year-old paramedic) sued the cityof Evanston and its Firefighters Pension Fund for failure to admit plaintiff to the pension fund based on age restrictions. *Id.* In moving to dismiss, Evanston argued that the §623(j) exemption meant that "it may discriminate against Plaintiff with regard to pension benefits on the basis ofage because the ADEA [specifically §623(j)] excludes firefighters from its protection." *Id.* at 242. The court flatly rejected this argument, holding that "[t]he firefighter provision was passed to case the burden on local governments, but only to ensure public safety." *Id.* at 243. The court went on to note that Evanston, in attempting to use the §623(j) exemption for non-public safety purposes misconstruess congressional intent in passing the ADEA." *Id.* at 243. "It could not be the goal of an age discrimination law to create two classes of firefighters ***23** on the basis of age, and then to sanctify discrimination against the group of older mernbers without justification merely because they are firefighters." *Id.*

Plaintiffs concur with the City that nothing in the statute itself describes the exception as a public safety" exception. As indicated by the legislative and judicial history provided herein and in the City's brief, however, the plain purpose of the exception was and is forpublie safetypurposes. To preclude other, illegal purposes, Congress placed an explicit exception within the exemption itself, by including the "subterfuge" language of 29 U.S.C. §623(j)(2).

Plaintiffs here allege that defendant engaged in subterfuge because it used mandatory retirement not for legitimate public safety purposes, but to accomplish a political objective. As plaintiffs explained in a hearing held below,[18] citing published reports and statements by the key sponsors of the MRO, the City wanted to create large scale employment opportunities for younger workers, minorities, and wornen in these Departments and accomplished this objective on the backs of older workers. Dmek R. 41, 5-17. Plaintiffs cited discriminatory statements made by the Ordinance's sponsors and contained in published reports, that suggested that mandatory retirement was necessary to rernove "deadbeats" and "old-timers" from the departments, to rout out the "old boy network," and to "give [...] younger people a chance to move up, bring fresh ideas and talent, and give [...] the older members a chance to enjoy the retirement ycars that they worked so hard to eam." Drnek R. 41, 12-14. These facts, which were obtained through pre-filing investigation and ***24** not with the benefit of any discovery in this litigation, support plaintiffs' allegation that the City used mandatory retirement as a subterfuge to evade the ADEA's prohibition against arbitrary age discrimination.

III. THE DISTRICT COURT PROPERLY FOUND THAT PLAINTIFFS ALLEGED A VIABLE THEORY OF LIABILITY UNDER THE ADEA

A. Plaintiffs' Subterfuge Claims Are Valid and Sufficiently Pled

Plaintiffs' allegations of subterfuge easily satisfy the liberal pleading standard for employment discrimination cases. As the Suprerne Court recently made clear, a discrimination complaint must include only "a short and plain statement of the claim showing that the leader is entitled to relief." *Swierkiewiez v. Sorerna,* 534 U.S. 506, 512 (2002). As the *Swierkiewiez* Court explained, "This simplified notice pleading standard relies on liberal discovery rules, and summary judgrnent motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* In their complaints, plaintiffs summarized their subterfuge allegations in a manner which, as the *Swierkiewiez* Court required, "give[s] the defendant fair notice of what the plaintiff s clairn is and the grounds upon which it rests." *Id, citing Conley v. Gibson,* 355 U.S. 41, 47 (1957).[19] These allegations are more than sufficient to satisfy liberal notice pleading standards.

On a motion to dismiss, the Court must take all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiffs. *Szumy v. American Gen. Fin. Inc.,* 246 F.3d 1065, 1067 (7th Cir. 2001). A motion to dismiss should be denied unless ***25** it is impossible for a plaintiff to prevail under any set of facts consistent with its allegations; defendant bears the burden of demonstrating such an impossibility. *Albiero v. Kankakee,* 122 F3d 417, 419 (7th Cir. 1997). The task of the Court is to "look to sce whether there is any possible interpretation of the complaint under which it can state a claim." *Martinez v. Hooper,* 148 F.M 856, 858 (7 Ih Cir. 1998). Applying these standards, the Distriet Court properly found that plaintiffs have stated a claim for a violation of the ADEA under the subterfuge provision of 29 U.S.C. §623(j)). A27.

The City, however, makes, two arguments that suggest an improper "heightened pleading standard" applies to ADEA subterfuge claims. First, defendant argues, that plaintiffs have not properly pled subterfuge because plaintiffs fail to allege that the City's MRO evades "a substantive prohibition of the ADEA." Br. at 24. Secondly, the City misconstrues plaintiffs' case as simply an allegation that the MRO was intended to replace older workers with younger workers, and argues that this cannot constitute subterfuge as a matter of law. Br. at 24. Both arguments should be rejected.

B. The City Misinterprets "Subterfuge"

The City, relying on *Public Ernployces Retirement System of Ohio v. Betts,* 492 U.S. 158 (1989), and *Bell v. Purdue University,* 975 F.2d 422 (7th Cir. 1992), asserts that in order to trigger the §623(j)(2) subterfuge restrictions, plaintiffs must allege that the MRO violated a "substantive prohibition" of the ADEA. Br. at 24-25. Nothing in the language of §623(j)(2), however, supports this assertion. Furthermore, the subterfuge analysis contained in *Betts* and *Bell* has been ***26** conclusivelyre jected; onlythe definition of subterfuge proffered by the *Betts* court lives on.[20]*Solon v. Gary Community Sch. Corp.,* 180 F3d 844, 849 n.2 (7th Cir. 1999) ("Congress overruled Betts [...] when it enacted the Older Workers Benefit Proteetion Act of 1990," *citing*Pub. L. No. 101-433, 104 Stat. 978 (1990).) Therefore, the City's tortured, unsuccessful attempts to distill a coherent "subterfuge" analysis from *Betts* and *Bell,* an analysis which ultimately corresponds to neither legislative history nor any relevant precedent, must be rejected.[21] Br. at 27.

Even if the *Betts* subterfuge analysis still survives in any form, however, it is not relevant to theinstant case. The *Betts* decision involved a retirce rceciving "age-and-service" retirement benefits who had sought to retire under a more lucrative disability retirement but was kept from doing so because she did not meet maximum age requirements. 492 U.S. at 163-64. The plaintiff asserted that the age requirements constituted an improper subterfuge. *Id.* at 164. The *Betts* court disagreed, holding that because all age-based retirement plans facially violate the provisions set forth in 29 U.S.C. §623(a), *in terms of fringe benefits,* Congress could not have intended the "subterfuge" ***27** prohibition to preclude age-based differentials. *Id.* at 177-78. However, *for "non-fringe" aspects of the employment relationsliip,* including "hiring and firing, wages and salaries [...]," the Court made elear that "[a]ny attempt to avoid the prohibitions of the Act by cloaking forbidden discrimination in the guise of age-based differentials in benefits will fall outside the [...] exemption." *Id.* at 177, 180.

The City misreads *Betts* to hold that "subterfuge" should be cireumseribed in the same manner for both "fringe" and "nonfringe" benefits. This is ineorreet. Forced termination, as wc have here, is clearly a "non-fringe" aspect of the employment relationship. *Betts* and *Bell,* even if still valid, are therefore inapposite. Nevertheless, the City builds upon the weak foundation of these two questionable cases to read into the statute a nonexistent requirement that an allegation of

subterfuge requires an allegation of a substantive allegation of the ADEA. Br. at 27-31.

1. Nothing in the Subterfuge Prong Requires "Substantive Allegations"

Section 623(j)(2) requires that in order for a mandatory retirement plan to qualify for the ADEA exemption, it must be made "pursuant to a bona fide hiring or retirement plan that is not a *subterfuge to evade Mepurposes of this chapter.*" 29 U.S.C. §623(j)(2) (emphasis supplied). There is nothing in §623(j) to suggest that plaintiffs must allege a "substantive allegation" of the ADEA in order to allege subterfuge. If Congress had intended to require that subterfuge could only be an illicit scheme or plan to violate a narrow range of substantive provisions of the ADEA, it would have written this explicitly into the exception. It did not; instead, Congress gave subterfuge the broadest possible application. A subterfuge claim can be prernised on the evasion of any of the "purposes" of the ADEA, defined at 29 U.S.C. §621 (b): "[i]t is therefore *the purpose of this chapter* to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age ***28** discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." Plaintiffs have alleged that the City's MRO was passed as a subterfuge, for reasons that violated the Act's stated purposes. Minch R. 1, Drnek R. 6. Therefore, plaintiffs have sufficiently alleged subterfuge.

2. Even Assuming, Arguendo, That The "Substantive Allegation" Argument Is Valid, Plaintiffs Have Met This Burden

The City repeatedly alleges that plaintiffs "fail to identify any prohibition of the ADEA that the City's Ordinance allegedly 'evades."' Br. at 35. This is simply untrue. Plaintiffs' complaints specifically allege that the passage of the MRO violates the "substantive provisions" of 29 U.S.C. §623(a) forbidding diserimination "withrespeetto [...] compensation, terms, conditions, or privileges of employment, because of age." 29 U.S.C. §623(a). Minch R. 1, ¶32; Drnek R. 6, ¶¶19. They also specifically allege that plaintiffs "suffered loss [...] of employMent, wages, benefits, and Compensation" Minch R. 1, ¶¶36; Drnek R. 6, ¶¶28. The City's insistence that plaintiffs have not alleged a "substantive violation" of the ADEA should be discounted entirely.[22]

C. Plaintiffs Have Not Solely Alleged That the MRO Replaces Older Workers with Younger Workers.

Defendant attempts to pigeonhole plaintiffs' subterfuge allegations as consisting entirely of assertions that the MRO replaced older workers with younger workers. Br. at 43. lt is a threshold requirement of an ADEA complaint that plaintiffs allege that an older worker was replaced with a younger worker. *Futrell v. J.I. Case,* 38 F.M 342, 346 (7th Cir. 1994). Plaintiffs therefore, based ***29** upon their profiling investigation, made such an allegation. Minch R. 1-1 at 8-9; Dmek R. 6 at 5. But what has been alleged with respect to the City's improper motivations does not represent every faet upon which plaintiffs' cairns are based. There is no requirement that plaintiffs allege every faet which supports their claims. *Swierkiewicz,* 534 U.S. at 512.

IV. THE CITY BEARS THE BURDEN OF PROVING THAT IT IS ENTITLED TO THE EXEMPTION UNDER 623(j)

A. The City Bears the Burden of Proof that it did not Engage in Subterfuge

While there is no case which identifies who bears the burden of proving that an employment action taken pursuant to §623(j) is not "a subterfuge to evade the purposes of [the ADEA]" under §623(j)(2), Congress has answered the question as it relates

to a different, nearly identical, provision of the ADEA which prohibits the use of benefit plans which are "*intended to evade* the purposes of [the ADEA]", §4(f)(2) (now 29 U.S.C. 623(f)(2)). In overruling *Betts* through the passage of the OWBPA, Congress explicitly rejected, inter alia, the erroneous conclusion that the plaintiff bears the burden of "proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation," 492 U. S. at 181.[23] Congress clarified that the exemption afforded by §4(f)(2) is an "affirmative defense" and wrote into the Act itself the requirement that the burden of proof would rest with the *employer* to demonstrate its actions are lawful, rather than on the employee to demonstrate that they are not. OWBPA, §103(1), *amending*29 U.S.C. 623(f)(2). *See e.g., EEOC v. Westinghouse Elect. Corp.,* 925 F.2d 619, 622 n.2 (3d Cir. 1991).[24]

***30** Significantly, the Committee on Labor and Human Resources, which was referred and recommended the Bill (S 1511), explained that this change was intended to make the assignment of burden of proof consistent with other provisions of the ADEA, so that the assignment of the burden of proof to employers "to plead and prove the defenses and exceptions established in [section 4(f)]." was "reestablished" Senate Report No. 101-263, 1990 U.S.C.C.A.N. 1509, 1510, 1535. As the Committee wrote:

> The Court in *Betts* erroneously held that section 4(f)(2) is not an affirmative defense and, therefore, that the employee bears the burden of proof under the exception for employee benefit plans. [...] The Committee wishes to make clear, by adding the last sentence to section 4(f), that the employer bears the burden to plead and prove the defenses and exceptions established in that section. The Committee intends that the amendments made by the bill to section 4(f)(2) - should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defense, section 4(f)(1).

Id.

Having "reestablished" that the burden rests with *employers* to prove under 29 U.S.C. §623(f)(2)(a) that a benefit plan "is not intended to evade the purposes of this chapter," so as to bring this provision into line with other provisions of the ADEA, Congress eliminated any doubt that an employer also bears the burden to prove that employment action taken pursuant to a closely related provision of the ADEA, 29 U.S.C. §623(j), is "not a subterfuge to evade the purposes of [the ADEA]." 29 U. S. C. §623(j)(2). To conclude otherwise would result in the very same inconsistent assignment of burdens which Congress souglit to eliminate.

***31 B. While the Exemption Relieves the City from Making a BFOQ Showing, it Does Not Immunize the MRO from Scrutiny**

The City attempts to use the legislative history of the exemption to reach two unsupportable conclusions. First, it asserts that if it is required to justify its use of mandatory retirement on public safety grounds, that such a requirement reinstitutes the "age-as-BFOQ" requirement from which the exemption was meant to provide relief. Br. at 40. Second, and somewhat contradictorily, it also suggests that because the public safety motivation of Congress in passing the exemption is apparent from the legislative history, the City, by merely *invoking* the exemption, should be given the benefit of the doubt when it states that the exemption is being used for public safety purposes. Br. at 42. Neither argument can withstand serutiny.[25]

At the same time that defendant cites public safety as the "stated purpose" of the MRO, it asserts that there is no rcquirement under the ADEA that publie safety be its true purpose. The City argues that because the exemption provides relief from making a BFOQ showing, it bears no burden regarding justification of the exemption on public safety grounds. Br. at 40. But this is putting the cart before the horse. In order to qualify for the exemption in the first instance, the City must satisfy cach of the requirements of the exemption; for relevant purposes, here, it must satisfy its burden to demonstrate that it did not enaet the MRO as a subterfuge to evade the ADEA's purposes. While the safe harbor provision of §623(j) may relieve the City of the obligation to make a BFOQ showing, it does not permit the City to lise mandatory retirement, in the first instance, as a subterfuge to evade ***32** the purposes of [the ADEA]." 29 U.S.C. §623(j). Nor does being relieved of the obligation to make a BFOQ showing mean that the City is relieved of its burden to prove, in this case, that its Mandatory Retirement Ordinance

was not intended to serve a discriminatory purpose. This burden still falls squarely on defendant.[26]

The City argues that a public safety purpose *must be presumed* from its attempted invocation of the exemption, because the Congressional history strongly indicates that public safety was the reason for the exemption.[27] Br. at 41. This supposed presumption, if it exists, however, does not and cannot inoculate every improper motive for creating a mandatory retirement scherne from allegations of subterfuge.

Defendant suggests that if public employers were required to use mandatory retirement only for public safety purposes, this would place the burden on public employers "to prove that relationship." Br. at 4 I. But this argument does somersaults around the issue. First, while defendant may not be required to prove the *connection* between age and public safety in order to meet its burden of demonstrating that mandatory retirement was not used as a subterfuge, this does not mean that no such connection needs to exist for its conduct to be inoffensive to §623(j)(2). The question ***33** of whether the City had a *public safety purpose* for passing the MRO is directly relevant to the issue of whetherit engaged in subterfuge. Plaintiffs assert that the only purposes which are consis tent with the exemption, and which do not offend the prohibition against subterfuge, are those which are solidly grounded in public safety interests. lt is those purposes which should have guided the City's conduct in the *first instance.* As the subterfuge clause makes clear, the prohibition on the misuse of the exemption, like the ADEA itself, has a prohibitory as well as remedial purpose, that is designed to curb arbitrary discrimination. 29 U.S.C. §623(j)(2). The City's complaint that ascertaining the relationship between age and public safety is somehow "too difficult" (Br. at 37) therefore addresses only the BFOQ question, and is simply not relevant to what the statute *does demand,* that a municipal employer's use of age limits for firefighters and police officers may not be a subterfuge to evade the ADEA's anti-discimination purposes. The City's assertion that requiringjustification of mandatory retirement on public safety grounds would subject it to a BFOQ requirement is similarly inapposite. Br. at 40. As indicated by the City's own legislative history analysis, the exemption was passed for public safety purposes. Br. at 4 I. Otherwise there would be no justification for allowing blatant age discrimination in the form of mandatory retirement.[28]

V. UNDER BASIC PRINCIPLES OF STATUTORY CONSTRUCTION, THE CERTIFIED QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE

The language of the §623(j) "safe harbor" contains *two* requirements that the City must satisfy to receive the safe harbor's benefit: (1) a requirement concerning minimum retirement age (29 U.S.C. §623(1)), *and* (2) a requirement that mandatoryretirernent not be a "subterfuge to evade ***34** the purposes" of the ADEA (29 U.S.C. §623(2)). Congress intended that *both* elements be fulfilled for a municipality to qualify for the exemption from the ADEA. The question certified by the District Court - "whether a plaintiff can demonstrate subterfuge under §623(j)(2) with *any* kind of evidence if there is no violation of §623(j)(1)" A54 (emphasis in original) - must, therefore, be answered affirmatively. To do otherwise would frustrate Congressional intent, rendering the "subterfuge" prong meaningless and superfluous. Furthermore, remedial statutes such as the ADEA must be construed broadly (*Oscar Mayer & Co. v. Evans,* 441 U. S. 750, 765 (1979) (Blackmun, J., coneurring)), and exceptions to such statutes must be construed narrowly. *Piedmont & Northern Railway Co. v. Interstate Commerce Commission,* 286 U.S. 299, 311-12 (1932). Answering the certified question in the negative would not meet these requirements.

This Court has held that among the most important elements of statutory construction is reading the statute in its entirety. *Kopec,* 193 F.3d at 902 (Courts "are loathe to adopt constructions that render a statutory provision superfluous, *citing Hohn v. United States,* 524 U.S. 236, 249 (1998)); *Matter of Lifschultz Fast Freight Corp.,* 63 F.3d 621, 628 (7th Cir. 1995) (Courts have a "deep reluctance to interpret a statutory provision so as to render superfluous other provisions of same enactment." (internal citations omitted.

The Distriet Court appropriately rejected the City's interpretation of §623(j) because it would, in effect, collapse §623(j)(1) and §623(j)(2) into one inquiry rendering the "not a subterfuge" language in §623(j)(2) "empty language." A50-A51. If the certified question were definitively answered in the negative, it would foreelose a plaintiff from attacking any mandatory retirement plan passed after 1996, so long as it imposed a retirement age at or over age 55, no matter how much subterfuge

played a role in the passage or implementation of the plan, and no matter how ***35** discriminatory the municipality's motives might have been. As noted by the Distriet Court, such a reading would render the subterfuge prong of the exemption meaningless.

To counter this argument, the City sets forth potential scenarios where it admits subterfuge could be proven. Br. at 52. Unfortunately for the City, plaintiffs' allegations correspond to these scenarios. These scenarios include a claim of an age-based reduction in compensation, which the City characterizes as a properly-alleged violation of 29 U.S.C. §623(a).[29] Br. at 52-53. As stated above, plaintiffs *have* alleged that passing the mandatory retirement ordinance represents a violation of 29 U.S.C. §623(a). Minch R. 1, ¶¶32; Drnek R. 6, ¶¶19. Therefore, *by the City's own reasoning,* plaintiffs have successfully alleged a claim of subterfuge.

Much of the City's argument rests on the foundation that plaintiffs have not alleged a substantive violation of the ADEA, and that such an allegation is required for a claim of subterfuge to stand:

> By its plain terms, the subterfuge provision does not provide separate substantive protection; it is a reminder that the other substantive prohibitions of the ADEA cannot be evaded. *As such, the subterfuge provision does provide significant protection -- it ensures that mandatory retirement will not be used as a means of discriminating against older workers in other aspects of their employment.*

***36** Br. at 54 (emphasis supplied). Plaintiffs have conclusively demonstrated that the "substantive violation" requirement does not exist; however, it is critical to note that *even tlie City's* arguments run counter to the result that would take place if thecertified question were answered in the negative. If plaintiffs can proffer no evidence of subterfuge provided that 29 U.S.C. §623(1) is met, the subterfuge claim would be obliterated, providing none of the "significant protection" the City seeks to reassure the Court it does indeed provide.

The City's reassurance to this Court that the subterfuge prong would still provide protection (even though the City's preferred answer to the certified question would wipe it out completely) is disingenuous. Answering the certified question in the negative, as the City urges, would eliminate any protection under the ADEA for older public safety workers who are retired at or above the age of 55 (or where the retirement age in effect is the same as was in effect in 1983). This would eviscerate the subterfuge prong entirely.

This result is clearly inconsistent with the broad rernedial purposes of the ADEA and the narrow purpose of the §623(j) exemption. The ADEA is a remedial statute, and as such, must be liberally construed in order to effect its purposes. *Oscar Mayer,* 441 U.S. at 765 (Blackmun, J., concurring). *See e.g., Anderson v. Montgomery Ward & Co., Inc.,* 852 F.2d 1008, 1012 (7th Cir. 1988) ("ADEA must be interpreted liberally to further its remedial purposes [....]"); *Kephart v. Institute of Gas Technology,* 581 F.2d 1287, 1288 (7th Cir. 1978).

The 623(j) safe harbor, on the other hand, is an exception to remedial social legislation and must be narrowly construed. *Sexton v. Beatrice Foods Co.,* 630 F.2d 478, 486 (7th Cir. 1980) (ADEA exemption must be narrowly construed), *citing A.H. Phillips, lnc. v. Walling,* 324 U.S. 490, 493 (1945). Congress has determined that arbitrary age limits are, in general, repugnant to the ***37** ADEA's purposes. *See* 132 Cong. Rec. 32658 (1986). Therefore, the mandate to interpret exceptions to the Act's protections narrowly is especially significant when, as here, individuals are being mandatorily retired. *Western Air Lines, Ine. v. Criswell,* 472 U.S. 400,410 (1985). The City's proffered limitation of "subterfuge" to a vestigial redundancy can in no way be considered a narrow interpretation of the 623(j) exemption, and was therefore properly rejected by the Distriet Court.

VI. ASAMATTEROFLAW, THE CITYCANNOT QUALIFY FOR THE 623(j) "SAFE HARBOR" WITHOUT SATISFYING BOTH OF ITS DISTINCT REQUIREMENTS.

The *Kopec* court regularly referred to the mandatory retirement exemption as a "safe harbor," a term with specific legal

connotations. 193 F.3d at 900. To qualify for a "safe harbor" a defendant must meet *all* of the safe harbor's stated requirements. *See e.g., Stuart v. Unum Life Insurance Co. of America,* 217 F.3d 1145 (9th Cir. 1999). For example, in order to satisfy a safe harbor provision to be excerpted from the Employee Retirement Income Security Act (ERISA), several circuits have held that an employer must satisfy all four requirements of the safe harbor provision. *Id.* at 1153 (internat citations omitted).

Settled precedent in this Circuit indicates that the two prongs of the public safety exemption are separate and distinct requirements, and both must be met for a municipality to qualify for the safe harbor. *Kopec,* 193 F.3d at 902 n.5;*Glennon,* 2000 WL 1230494 at *3. As the Seventh Circuit found in *Kopec,* there is no ambiguity in the statute concerning whether the two prongs of 623(j) are *distinct.* 193 F.3d at 902 n.5 ("[T]he statute conditions the exemption from ADEA coverage on two distinct criteria..." (Emphasis supplied.)) After the *Kopec* court concluded that the defendant's retirement scheme was lawful under the first prong of the ADEA's public safety exemption, the Seventh Circuit did not stop its analysis (as the City requests the court do here, and as a negative ***38** answer to the certified question would require). 193 F.3d at 899. Rather, the Seventh Circuit faithfully adhered to the statutory requirements, completing the analysis required by the statutory language in §623(j) by also addressing the second prong (finding "no evidence that [defendant's] plan amounted to a subterfuge.")[30]*Id.*

The Seventh Circuit also took care to analyze both prongs of a "subterfuge" exception to the ADEA in *Karlen,* 837 F.2d at 319-20.[31] In that case, the Court analyzed a claim under an earlier iteration of the ADEA concerning early retirement plans in general. *Id.* at 318, *citing*29 U.S.C. §623(f)(2). The specific requirements of the "safe harbor" at issue in that case were "that the features of the Early Retirement Program of which the plaintiffs complain are (1) part of a bona fide employee benefit plan, and (2) not a subterfuge." *Id.* at 318, 319. Finding that the plan was indeed bona fide, the Court went on to analyze whether it constituted subterfuge. Weighing evidence presented by both parties, the Court held that the jury could find the plan to be a subterfuge of the ADEA, and denied summary judgment to defendant. *Id.* at 320.

Plaintiffs have alleged that the City has failed to meet both requirements set forth in 29 U.S.C. §623. Specifically, plaintiffs have alleged the City cannot meet the second requirement set ***39** forth at §623(j)(2) because the MRO was passed as a subterfuge to evade the purposes of the ADEA. Minch R. 1 at 8-9; Drnek R. 6 at 5. The City insists that plaintiffs' allegations that the MRO was motivated by considerations other than public safety do not state a claim of subterfuge. Br. at 36-42. But the City misapprehends plaintiffs' allegations - the City's actions in passing the MRO do not constitute subterfuge simply because reasons other than public safety motivated its passage. *The Citv 's actions constitute subterfuge because those other reasons vilate the ADEA,* thereby irrevocably tainting the MRO and preventing it from qualifying for the safe harbor exemption. As Judge Bucklo noted in her opinion denying the City's motion to dismiss, "it is not enough that a permissible motive is conceivable; under §623(j), the wrong motive is fatal, even if a permissible motive can be imagined." A24-A25.

The Distriet Court held that the current MRO satisfies §623(j)(A)(2). Al7-Al8. As detailed above, plaintiffs have successfully alleged that the MRO cannot meet 29 U.S.C. §623(j)(2) because, as the Distriet Court appropriately held, at the motion to dismiss stage and with discovery stayed, plaintiffs had stated a cause of action alleging "subterfuge." A18-A27. Therefore, guided by principles of statutory construction, the language of the statute itself, and prior Seventh Circuit precedent, the Distriet Court correctly upheld plaintiffs' "subterfuge" caims and denied the City's motion to dismiss.

VII. THE CITY'S ATTEMPTS TO CURTAIL INQUIRY INTO LEGISLATIVE MOTIVATION ARE MISPLACED.

Defendant insists that the creation of job openings andpromotional opportunities, foryounger workers is nothing more than the "inevitable result" of any mandatory retirement policy. Br. at 43. But this argument ignores the faet that an ernployer's misuse of mandatory retirement as a subterfuge ***40** will also yield the same "inevitable result," even though the employer's subterfuge is clearly prohibited. After all, it is the motive of the employer that makes, the conduct lawful or unlawful, not simply its "result."

The City spends a substantial portion of its brief rehashing the settled issue of whether legislative motivation is a topie

plaintiffs have the right to examine. Br. at 46-52. The City asserts that plaintiffs are foreclosed from any analysis of its motivation in this case, even though it functioned as an employer. Br. at 46-52. Both the precedential history of "subterfuge" as described above, as well as other precedent, belie the City's assertion. By alleging subterfuge, plaintiffs have placed at issue defendant's true motivation in passing and implementing the MRO. If plaintiffs succeed in proving that defendant engaged in subterfuge, the Citywill find no safe harbor protection under 29 U.S.C. §623(j).

The City's fervent reliance on *Pacific Gas & Electrie Co. v. State Energy Resources Conservation & Development Comm'n.,* 461 U.S. 190, 216 (1983) is misplaced. Br. at 48. As the District Court noted the second time it rejected this same argument:

> I rejected the City's reliance on *Pacific Gas,* for the proposition that inquiry into the motives of the legislators' state of mind was never permissible. I held that Pacific Gas was distinguishable on two grounds: (1) that subterfuge is a factual question, whereas preemption, the issue in *Pacific Gas,* is a matter of law; and (2) that the legal standards in *Pacific Gas* and under the ADEA were different, and that the "true motive" of the legislators does matter for the purposes of §623(j)(2) of the ADEA.

A45.

Nothing in the City's Appellate brief counters the Distriet Court's analysis of *Pacific Gas.* The Seventh Circuit has considered "subterfuge" under the ADEA and has repeatedly utilized a faetbased ***41** inquiry in both the cases upon which the City itself relies, *Kopec* and *Bell,* as well as in several other cases.[32]

The City insists on misrepresenting plaintiffs' arguments regarding legislative motivation as entirely consisting of arguments concerning "individual" legislator motivation. Br. at 46 During the evidentiary hearing before the Distriet Court, plaintiffs made reference, among other things, to statements of individual legislators and municipal officials which suggested illicit intent in passing the MRO Drnek R. 41. Those statements, however, do not represent the universe of subterfuge evidence potentially available to plaintiffs. The full scope of that evidence is simply unknown at this pre-discovery stage of the case.

Nevertheless, even if all plaintiffs can present is evidence of discriminatory intent on the part of individual legislators and municipal officials, such evidence *could* still be sufficient for a trier of faet to find subterfuge for ADEA purposes. In *Hunt v. Markham Ill.,* 219 F.3d 649 (7th Cir. 2000), the Seventh Circuit held that repeated "racist" and "ageist" comments made by African-American city officials about older white police officers constituted sufficient evidence to survive summary ***42** judgment when those police officers sued under, among other statutes, the ADEA. The Court distinguished between cases where "stray remarks" were made in a work environment and cases where similar remarks were made by employment decisionmakers:

> The defendant does not argue, however - which would also be frivolous - that the City of Markham is not legally responsible for the discriminatory actions of the mayor, city council, and board of fire and police commissioners; for they are the city government. [...] It is different when the decision makers themselves, or those who provide input into the decision, express such feelings (1) around the time of, and (2) in reference to, the adverse employment action complained of. For then it may be possible to infer that the decision makers were influenced by those feelings in making their decision. This is such a case. Although the mayor does not vote at meetings of the city council, he recommends actions to them, including the denial of the raises sought by these two plaintiffs. Emanating from a source that influenced the personnel action (or nonaction) of which these plaintiffs complain, the derogatory comments became evidence of discrimination [....]

Id. at 652-53 (citations omitted; emphasis in the original).

The City continues to insist, however, that because courts are "ordinarily reluctant" to look into legislative motives, no such analysis is warranted here.[33] Br. at 47. As the Distriet Court ***43** emphatically noted, motivation *does* matter in this case. A2***I***-A27. When statutory or Constitutional requirements render the motives of legislators relevant to the disposition of the case,

courts do not shrink from examining those motives. Rather, the practical difficulties, are dealt with as they comer. As the Seventh Circuit stated recently in a First Amendment case:

In short, the relevance of motive to constitutional adjudication varies by context. No automatie cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue.

Grossbaum v. Indianapolis-Marion County Bldg. Authority, 100 F.M 1287, 1294 (7th Cir. 1996). *See e.g., Wallace v. Jaffree,* 472 U.S. 38,56-60 (1985); *Washington v. Davis,* 426 U.S.229 (1976); *Arlinzton Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 141 (3rd Cir. 1977). Where, as here, motivation is necessarily implicated, plaintiffs *must* be allowed to examine such motivations. *See e.g., Fraternal Order of Police v. Hobart,* 864 F.2d 551, 554 (7th Cir. 1988) (In a First Amendment case, where evidence of legislative motivation is required to prove a claim, such evidence must be admissible.)

The City, however, has argued below, and has argued less vigorously before this Court, that since its MRO has stated a legitimate public safety purpose within the prearnble of the Ordinance,[34]***44** any inquiry into the motivation for its passage must end there.[35] This argument is illogical in a case where allegations of subterfuge have been made.[36] No one could reasonably expect that the Ordinance's "stated purpose" would be anything other than a legitimate one. Indeed, if all that was necessary to insulate an ill-motivated law from a subterfuge claim was the insertion of a legitimate stated purpose in the text of the law, it would be the rare legislative body which would not take this step as protection against allegations of discriminatory motive. Courts have long recognized that plaintiffs in discrimination cases face particular evidentiary obstacles because few employers will admit that their conduct was discriminatory. "Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one." *Oxman v. WLS TV,* 846 F.2d 448, 453 (7th Cir. 1988).

Where, as in the instant litigation, plaintiffs allege that City officials and legislators, acting in their role as employers, created a mandatory retirement scheme that is a subterfuge meant to evade the ADEA's purposes, the motivation behind such a decision must be scrutinized. The City's attempt to utilize *Pacific Gas* as a shield from such scrutiny is incorrect, and this Court should so hold.

*45 VIII. CONCLUSION

For the foregoing reasons, the judgment of the District Court denying the City's motion to dismiss plaintiffs' ADEA claims should be upheld, and the certified question should be answered inn the affirmative.

Footnotes

1 The Distriet Court also denied the City's motion as to the due process cairns of the firefighter plaintiffs, but granted the motion as to the due process cairns of the police officer plaintiffs. A27-A40. The firefighters' due process cairns rernain before the Distriet Court and are not at issue in this appeal.

2 Citations beginning with "A" refer to the appellate appendix.

3 The City's proffered issue was whetherhr allegedly illicit motives on the part of individual legislators and municipal officials for enacting a retirement plan that mandatorily retires police and fire personnel at age 63 and results in their replacement with younger workers can demonstrate subterfuge under section 623(j) of the ADEA." A54.

4 Plaintiffs also made other allegations concerning the lack of fitness testing for public safety employees facing mandatory retirement, as well as violation of their due process rights under the federal and Illinois constitutions. Minch R. 1; Drnek R. 6.

[5] The 1986 exemption read:
(j) Employment as firefighter or law enforcement officer:
It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken:
(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.
29 U.S.C. §623(j)(1990).

[6] *Gately v. Massachusetts,* 1998 WL 518179 at * 2 (D. Mass. 1998), *citing* Landy, F.J., et al., *Alternatives to Chronological Age in Determining Standards of Suitability for Public SLfety Jobs,* Executive Summary, Pennsylvania State University, 17-18 (1992).

[7] STUDY AND GUIDELINES FOR PERFORMANCE TEST
(a) STUDY. - Not later than 3 years after the date of enactment of this Act, the Secretary of Health and Human Services, [...] shall conduct [...] a study, and shall submit to the appropriate committees of Congress a report based on the results of the study that shall include -
(1) A list and description of all tests available for the assessment of abilities important for the completion of public safety tasks performed by law enforcement officers and firefighters;
(2) A list of the public safety tasks for which adequate tests described in paragraph (1) do not exist;
(3) A description of the technical characteristics that the tests shall meet to be in compliance with applicable Federal civil rights law and policies;
(4) A description of the alternative methods that are available for determining minimally acceptable performance standards on the tests;
(5) A description of the administrative standards that should be met in the administration, scoring and score interpretation of the tests; and,
(6) An examination of the extent to which the tests are cost-effective, are safe, and comply with the Federal civil rights law and policies.
[...]
(c) ADVISORY GUIDELINES.--Not later than 4 ycars after the date of enactment of this Act, the Sceretary shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters.
(d) JOB PERFORMANCE TESTS. - -
(1) IDENTIFICATION OF TESTS.--After issuance of the advisory guidelines described in subsection (c), the Sceretary shall issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4(J) of the [ADEA] with respect to firefighters or law enforcement officers who have attained an age of retirement described in such section 4(j).
(2) USE OF TESTS.--Effective on the date of issuance of the regulations described in paragraph (I), any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in paragraph (I), in order to contirme employment.
[...]

[8] "Section 3(d)(2) of the ADEA Amendments of 1996, referred to in subsec. (j)(1), probably means Pub.L. 104-208, Div. A., Title I, § 101(a)[Title I, §119, subsec. 2(d)(2)], Sept. 30, 1996, 110 Stat. 3009-25, which is set out as a note under this section." 29 U.S.C. §623(j), Historical and Statutory Notes, "Reference in Text."

[9] The May 17, 2000 Ordinance amended Chapter 2-152-140 of the Municipal Code to read, in relevant part, as follows:
(a) Effective December 31, 2000, the age of 63 shall be the maximum age for employment of sworn members of the police department, including a sworn member who is transferred or appointed to a supervisory or administrative position.
(b) Effective December 31, 2000, the age of sixty-three shall be the maximum age for employment of any member of the uniformed service of the Fire Department, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred or appointed to a supervisory or administrative position.

[10] The Court dismissed the police officers' due process claims based on analysis of the specific language contained in their collective

bargaining agreements. A27-A40. As only the ADEA issue was certified for interlocutor appeal, the firefighters' due process caims remain before Judge Bucklo. Minch R.77; Drnek R. 53.

11 The Court reasoned:
[T]he intent or desire of alderman or other City officials is both relevant and material. A subterfuge analysis, like a pretext analysis under a traditional *MeDonnell Douglas*-style analysis, necessarily requires the trier of faet to look beyond the defendant's statement of purpose or intent to sce whether it is just an excuse or an "artifice of evasion" to cover up otherwise prohibited conduct.
A23.

12 Throughout this brief, plaintiffs use the term "public safety employees" to refer to police officers and firefighters forced to retire by the City of Chicago. Plaintiffs note that for reasons that are unclear (but seem inconsistent with the purported public safety justification suggested by the City), paramedics were not covered in the City's mandatory retirement plan.

13 "Whether a plaintiff can demonstrate subterfuge under §623(j)(2) with any kind of evidence if there is no violation of §623(j)(1)." A54 (emphasis in original)

14 *See* n. 8, *supra.*

15 The presence of this testing requirement mitigated the concerns of some members of Congress worried that permitting age-based mandatory retirement of public safety employees was overly restrictive and inflexible. *See* 141 Cong. Rec. H3822-01 (March 28, 1995) (comments of Congressman Fawell); 142 Cong. Rec. S11922-01 (September 30, 1996) (comments of Senator Moseley-Braun).

16 "This provision was meant to allow states to use age as a proxy for determining the physical and mental reliability of public safety employees. The concern was that local governments were so overwhelmed with the cost of defending age-based hiring and retirement decisions on the basis of the bona fide occupational qualification exception that Congress feared municipalities might completely abandon these policies, and thus risk public safety." *Quinones v. City of Evanston,* 829 F. Supp. 237, 242 (N.D. Ill. 1993), *citing* House Committee on Education and Labor, Age Diserimination Act of 1986, H.Rep. No. 756, 99th Cong., 2nd Sess. 16-17 (1986), reprinted in 1986 U.S.C.C.A.N. 5628, 5640-42. *See Kopec v. City of Elmhurst,* 193 F.3d 894, 897 (7th Cir. 1999) (specifically referring to the initial 1986 exemption as a "grace Period"); *Knight v. Georgia,* 992 F.2d 1541, 1544 (11th Cir. 1993) (describing 1986 exemption as relief from BFOQ-based litigation).

17 If HHS were to promulgate testing guidelines tomorrow, by the plain language of the statute, the City would be required to immediately implement their use *in lieu* of its mandatory retirement scheme. Plaintiffs note that other entities, have successfully created physical fitness tests designed to measure physical fitness rather than age. *Gately,* 1998 WL 518179 at *2 (test development process collaboratively undertaken by the parties).

18 The Distriet Court, exercising the utmost caution before ruling on defendant's motion to dismiss, required plaintiffs, *sua sponte,* to demonstrate that they had factual support for their subterfuge allegations. The Distriet Court considered plaintiffs' additional factual narration without converting defendant's motion to dismiss to one for summary judgrnent. A21, n.6, *citing Forseth v. Village of Sussex,* 199 F.3d 363, 368 (7th Cir. 2000). Plaintiffs agree with this conclusion, particularly in light of the faet that their factual presentation was made in response to the Court's directive. Drnek R. 41, 4-5.

19 Plaintiffs' complaints specifically alleged, inter alia, that by enacting and enforcing the [MRO] for improper purposes, and in terminating their employment, defendant and its agents have willfully and intentionally discriminated against plaintiffs and the class on the basis of their age in a manner that acts as a subterfuge of the ADEA. Minch R. 1 ¶¶22, 23, 27; Drnek R. 6 ¶¶15, 19.

20 The plain meaning of the term "subterfuge" is "a scherne, plan, stratagem, or artifice of evasion." *Betts,* 492 U.S. at 167.

21 Congress reacted to *Betts* by passing the Older Workers Benefit Proteetion Aet ("OWBPA"), Pub.L. No. 101-433, 104 Stat. 978 (1990) (codified as arnended at 29 U.S.C. §§ 626, 630 (2000)), and rescinding the portion of the ADEA including the term "subterfuge" that *Betts* (and *Bell*) construed. Some courts, interpreting residual "subterfuge" clauses in the ADEA (including §623(j)) and the Americans with Disabilities Act, 42 U.S.C. § 1213 1, have held that Congress' retention of the term "subterfuge" in these clauses indicates that Congress intended the Betts analysis to stand. See e.g., Knizht, 992 F.2d 1541 at 1545-46. Other courts, however, caution that Congressional inaction should not be relied upon in statutory interpretation. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994). The Seventh Circuit appears to have completely rejected

the *Betts* subterfuge analysis. *Solon,* 180 F3d at 849. The City's reliance on *Bell* seerns especially misplaced. *Bell* concerned the same invalidated provision of the ADEA as addressed in *Betts.* 975 F.2d at 424. Even though *Bell* was decided after the OWBPA was in place, the only reason it considered the invalidated provision was because the OWBPA was not retroactive. *Id.*

22 In their appellate brief, the City admits that plaintiffs made substantive allegations: "[T]he only substantive provision of the ADEA even remotely invoked by [plaintiffs'] caims was the prohibition on age-based discharge." Br. at 44. Defendant cannot have it both ways, first saying plaintiffs have never made a substantive allegation, and then dismissing the substantive allegation it admits plaintiffs have alleged.

23 *See*Senate Report No. 101-263, 1990 U.S.C.C.A.N. 1509, 1510, 1535.

24 Even before these amendments to the OWBPA, this Circuit held that defendant has the "burden of production and persuasion on both [elements of the defense]" that a benefit plan is "part of a bona fide employee benefit plan" and "is not a subterfuge to evade the purposes, of [the ADEA]." *Karlen v. City Colleges of Chicago,* 837 F.2d 314, 318 (7th Cir 1988).

25 The City also suggests that Congress intended the exemption to remain in place, rather than use fitness tests, in part due to concerns that fitness tests would give rise to discriminatory impacts on women and minorities. Br. at 41-42. This was raised during debate over an earlier version of the bill than what was eventually passed. However, this purported defect was cured when the bill that became law made fitness testing mandatory as soon as HHS developed *nondiscriminatory* tests.

26 *See e.g., Karlen,* 837 F.2d at 319 (In analyzing safe harbor protection under §4(f)(2)(now 29 U.S.C. §623(f)(2)), the Court explained "where, as in the present case, the employer uses age-not cost, or years of service, or salary - as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2).")

27 The City asserts that "legislative history makes clear that section 623(j) reflects Congress' willingness to *presume* that mandatory retirement of police and fire personnel benefits the public safety rather than require public employers to prove that relationship." Br. at 4 I. It is worth noting that the City's citations to legislative history on this point all relate to HR 849 and S 553, bills which were never enacted into law. Indeed, those bills did not include the fitness testing provisions which were referenced in the body of the exemption in the final bill that did pass, HR 3610.

28 Congress obviously did not create the exemption so that states and municipalities could create mandatory retirement schemes for all employees; it confined the exemption's application to employment action related to public safety employees. Had public safety not been the primary motivation, Congress might not have been as precise.

29 The City's example of an appropriate allegation of subterfuge is based upon a theoretical scenario where "a municipality enacted a mandatory retirement ordinance requiring police officers to retire at age 63, but at the same time created a new, lower-paying position and gave all mandatorily retired police officers preference for the newly created position." Br. at 52. The City refers to this as a claim that the ordinance was "designed to circumvent the ADEA's prohibitions on age-based discrimination in compensation." Br. at 52. The same statute that forbids age-based discrimination in compensation, 29 U.S.C. §623(a), also forbids discrimination in "terms and conditions of employmentt" including forced retirement. If an allegation that a violation of one element of §621 (a) is a properly-pled allegation of subterfuge according to the City, plaintiffs' allegation must logically be one as well.

30 Plaintiffs again note that most of the case law cited in this brief and in defendant's brief where subterfuge was not found was decided at the summary judgment stage, when the evidentiary record had been fully developed. Where, as here, the sufficiency of plaintiffs' complaint is at issue, there should be no dismissal where a claim of subterfuge has been sufficiently pled. *Glennon,* 2000 WL 1230494 at *3.

31 The *Karlen* case, 839 F.2d at 319-20, like *EEOC v. Home Insurance Co.,* 672 F.2d 252 (2nd Cir. 1982) (a case relied upon by the Distriet Court in denying the City's motion to dismiss) concerned "subterfuge" prongs that have been subsequently removed from the ADEA. The analysis of subterfuge in those cases is gennane to the instant litigation. Unlike *Betts* and *Bell,* the Seventh Circuit has not rejected the analysis of the term "subterfuge" in *Karlen* or *Home* Insurance. Therefore, contrary to the City's assertions, *Betts* and *Bell* have not rendered *Karlen* or *Home Insurance* "obsolete." Br. at 33.

32 *See Karlen,* 837 F.2d at 320.*See also Pitasi v. Gartner Group, Ine.,* 184 F.3d 709, 715 (7th Cir. 1999) (In a case examining subterfuge, as that term was used in an earlier iteration of the ADEA referring to all early retirement plans, the Seventh Circuit demanded a faet-based inquiry where subterfuge has been alleged. "Wc have made clear that neither retirement nor offers of early-

retirement incentives support an inference of age discrimination and *that it is the conditions slirrounding the offer, rather Man the offer of early retirement, Mat count in considering whether the ADEA is violated.* (Emphasis supplied.); *EEOC v. City Colleges of Chicago,* 944 F.2d 339, 342 (7th Cir 1991)(under same early retirement "subterfuge" prong, the Court noted "[J]ust as the illegality of the seniority system in *Lorance [v. AT&T Technologies, Inc.,* 490 U.S. 900 (1989)] depended on a finding that the employer adopted it with the intent to discriminate, the illegality of City Colleges' retir ement plan depended on City Colleges' intent at adoption that *the plan be a means of discriminating against older employees* regarding sore nonfringe-benefit aspect of the employment relationship." (Emphasis supplied.) (Although abrogated by statute, 42 U.S.C. §2000e-5 e-2, *Huels v. Exxon Co. USA, Ine.,* 121 F3d 1047, 1050 (7th Cir. 1997); holds reasoning remains persuasive outside of Title VII context.)

33 In addition, the City attempts to further complicate the issue by suggesting that plaintiffs must demonstrate that a *majority* of legislators share an improper motivation in order to expose a municipality to liability. Br. at 49. The City's argument rests on an unstable foundation. First of all, in contradiction to the City's professed reliance on *Pacific Gas,* the Eleventh Circuit cases the City cites in support of its "majority" proposition, contrary to the City's arguments, actually presume that it is permissible to look into legislative motivation. *Matthews v. Columbia Coun* 294 F.3d 1294, 1297 (11th Cir. 2002); *Mason v. El Portal,* 240 F.3d 1337, 1339 (11th Cir. 2001). Furthermore, these cases concern constitutional caims under § 1983, and thus implicate state action. The doctrine there involves the conditions under which a municipality can be held liable for the actions of its agents, and the doctrine asserts that only those with "final policy-making authority" are the actors who can put a municipality in j jeopardy of violating someone's constitutional rights. *See Church v. Huntsville,* 30 F.3d 1332, 1343 (11th Cir. 1994). ADEA cases, however, are distinguishable since the municipality, as employer, is subject to the law like any other employer. Hence the employer-municipality need not meet the requirements of state action doctrine to be found liable for violating the ADEA. Thus, the motives of important decision-makers of the employer are relevant to show suspect motives, without requiring that all, or a majority, of the people involved held improper motives. *Hunt,* 219 F.M at 652.

34 WHEREAS, The safety of the citizens of the City of Chicago is of the utmost concern to the City Council of the City of Chicago; and
WHEREAS, The citizens of the City of Chicago deserve the most effective police and fire protection possible; and
WHEREAS, The City Council finds that tliese goals are served by returning to the mandatory retirement age of sixty-three which had historically applied to sworn police and unifonned firefighters; and
WHEREAS, Both the Illinois legislature and United States Congress have recognized the necessity of allowing municipalities to institute mandatory retirement for police and fire personnel;
[...]
Journal of Proceedings in the Chicago City Council Journal, May 17, 2000, 32900-32901.

35 The City argued that because the prearnble to the MRO cites "Public safety" as its purpose, the inquiry stops there, and no probe may be made to test the City's true motivation in passing the Ordinance. Br. at 51; Minch R. 7; Dmek R. 10 at 11-12; Drnek R. 41, 10:13 -10:20.

36 Taking the City's argument to its logical extreme, with no inquiry into legislative motivation, the only possible way a mandatory retirement scherne could violate the "subterfuge" provision of 29 U.S.C. §623(j) is if it said on its face that it was being implemented as a subterfuge to evade the purposes of the ADEA - a disfavored result.