2002 WL 32307760 (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.
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

Reply Brief of Defendant-Appellant City of Chicago

Mara S. Georges, Corporation Counsel, of the City of Chicago, Suite 800, 30 North LaSalle Street, Chicago, Illinois 60602, (312) 744-3564.

Lawrence Rosenthal, Deputy Corporation Counsel, Benna Ruth Solomon, Chief Assistant Corporation Counsel, Myriam Zreczny, Senior Counsel, Of Counsel.

***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

CASES

***1 ARGUMENT**

The plaintiffs urge affirmance by asserting that the ADEA permits mandatory retirement of police and firefighters "*for Public safety purposes,* not for any purpose." Response Brief of Plaintiffs-Appellants at 19 (emphasis in original) [hereafter cited as "Drnek Br."]. The ADEA does not, however, contain any requirement that state or local governments prove that public safety concerns motivated the adoption of a challenged mandatory retirement law. The legal theory on which this lawsuit rests -- as well as the construction of the ADEA on which the district court relied when it refused to dismiss the plaintiffs ADEA claim -- is without merit.

I. THE ADEA PERMITS A CHALLENGE TO MANDATORY RETIREMENT OF POLICE AND FIREFIGHTERS ONLY WHEN A CHALLENGED RETIREMENT LAW OR POLICY VIOLATES SOME PROVISION OF THE ADEA OTHER THAN ITS PROHIBITION ON MANDATORY RETIREMENT.

The ADEA's plain language exempts mandatory retirement of police and fire personnel from the ADEA's reach provided it is not a "subterfuge to evade the purposes of this [statute]." 29 U.S.C. § 623(j)(2) (2000). The Supreme Court has already construed this very phrase, holding that a retirement plan "cannot be a subterfuge ... unless it discriminates in a manner forbidden by the substantive provisions of the Act." *Public Employees Retirement System v. Betts,* 492 U.S. 158, 176 (1989). ***2** And this court has made clear, relying on *Betts,* that if a plan does not discriminate in a manner forbidden by the ADEA's substantive prohibitions, then even an employer's expressed preference for younger workers does not render the plan a subterfuge. *See Bell v. Purdue University,* 975 F.2d 422, 429 (7th Cir. 1992). Rather than confront these precedents directly, the plaintiffs weakly dismiss *Betts* and *Bell* as "invalid" and construe "subterfuge" in a manner that requires a departure from the ADEA's plain language.

A. Mandatory Retirement Of Police And Fire Personnel Is Permissible For Any Reason Except As A Subterfuge To Evade The ADEA's Purposes.

In response to our submission that section 623(j) authorizes mandatory retirement for any reason, so long as the plan is not a subterfuge to evade the ADEA's purposes, the plaintiffs assert that "Congress did *not* intend for states and municipalities to have *carte blanche* to mandatorily retire public safety workers for any reason." Drnek Br. at 19 (emphasis in original). We agree. Mandatory retirement is prohibited when it is a subterfuge to evade the purposes of the ADEA. But it is not one of the ADEA's purposes to prohibit mandatory retirement of police and firefighters. To the contrary, the ADEA permits mandatory retirement for these employees, and nothing in section 623(j)(2) provides that this exemption applies only when a ***3** retirement law or policy has a public safety justification. Just as the Supreme Court in *Betts* refused to construe the ADEA's exemption for retirement benefits to be limited to age classifications that have a cost justification, the "subterfuge" language in section 623(j)(2) does not require an employer to have any particular kind of justification in mind to qualify for the exemption; employers are merely forbidden to endeavor to evade a purpose of the statute. *See* Brief of DefendantsAppellants at 31-34 [hereafter cited as "Opening Br."]. And as section 623(j) makes evident, it is not among the "purposes" of the ADEA to forbid mandatory retirement for police and firefighters.

B. A Claim of Subterfuge Requires Allegations That A Mandatory Retirement Ordinance Is A Scheme To Evade A Substantive Prohibition Of The ADEA.

We explain in our opening brief and again above that *Betts* rejects the construction of the phrase "subterfuge to evade the purposes" of the A.DEA advanced by the plaintiffs and the district court. And because Betts construed a subterfuge provision identical to section 623(j)(2)'s, its framework should guide this case.

The plaintiffs assert -- and their amicus even more vehemently -- that *Betts* is "invalid" because its "analysis" was "conclusivley rejected" by Congress in the Older Workers Benefit ***4** Protection Act ("OWBPA") . *See* Drnek Br. at 25-26; Brief of Amicus Curiae AARP in Support of Plaintiffs-Appellees at 8-13 [hereafter "AARP Br."]. This assertion gets things exactly backwards. The OWBPA does not repudiate the construction of the phrase "subterfuge to evade the purposes of" the A.DEA adopted in *Betts;* instead, in the OWBPA Congress altogether rewrote section 623(f)(2) the exemption for retirement, pension and insurance benefits excising in the process the term "subterfuge." *See* Pub. L. No. 101-433, § 103, 104 Stat. 978, 978-89 (1990). To be sure, the effect of the OWBPA was to overturn the result in *Betts,* but the OWBPA did nothing to alter the construction of the phrase "subterfuge to evade the purposes" of the A.DEA adopted in *Betts.* When Congress changes the language of a statute to overturn the result in a prior case, that action does not render the prior cases construction of the now-repealed language erroneous. *See, e.g., United States v. Zucca,* 351 U.S. 91, 95 n.8 (1956); *Gorbach v. Reno,* 219 F.3d 1087, 1097 (9th Cir. 2000) (en banc); *Huels v. Exxon Coal USA, Inc.,* 121 F.3d 1047, 1050 n.l (7th Cir. 1997).[1] Had Congress enacted a definition of the ***5** phrase "subterfuge to evade the purposes of [the ADEA]" -- rather than removed it from the statute -- and also provided that the new definition would apply to the ADEA in its entirety, that new definition would apply here. It did not. Thus, *Betts,* because it construes language identical to that contained in section 623(j)(2)ls subterfuge

provision, remains fully applicable to section 623 (j) (2) .

Accordingly, *Betts* is properly consulted to interpret the phrase "subterfuge to evade the purposes" of the ADEA. Indeed, this court relied on *Betts* when construing section 623(j)(2) in *Kopec v. City of Elmhurst,* 193 F.3d 894 (7th Cir. 1999). In that case, this court cited *Betts* and *United Air Lines v. McMann,* 434 U.S. 192 (1977), for the proposition that a plan is not a subterfuge to evade the purposes of the ADEA "so long as the age criterion pre-dates the ADEA ...." 193 F.3d at 901. And as we explain in our opening brief, the Eleventh Circuit has ***6** squarely held that *Betts* and other cases construing section 623(f)(2) prior to the OWBPA "should properly be consulted to give meaning to the term 'subterfuge' as it appears" in section 623(j)(2). *See Knight v. Georgia,* 992 F.2d 1541, 1545-46 (11th Cir. 1993). Indeed, *Knight* flatly rejects the contention made here that the OWBPA rendered *Betts* irrelevant or invalid. Among other things, the court inferred from Congress's removal of the term subterfuge from section 623(f)(2), but not from 623(j)(2), that the OWBPA "was meant to modify only [section 623(f)]. Had Congress also intended to redefine the term subterfuge as it appears in [section 623(j)], we believe that it would have done so expressly." *Id.* at 1546. Numerous courts considering a subterfuge provision in the Americans with Disabilities Act ("ADA") have, likewise, followed *Betts. See, e.g., EEOC v. Aramark Corp.,* 208 F.3d 266, 269-70 (D.C. Cir. 2000); *Leonard F. v. Israel Discount Bank of New York,* 199 F.3d 99, 102-06 (2d Cir. 1999); *Ford v. Schering-Plough Corp.,* 145 F.3d 601, 611 (3d Cir. 1998), *cert. denied,* 525 U.S. 1093 (1999); *Krauel v. Iowa Methodist Medical Center,* 95 F.3d 674, 678-79 (8th Cir. 1996).

In fact, *Betts* is particularly important because when the current version of section 623(j)(2) was enacted in 1996, Congress chose to utilize the same statutory phrase that the Supreme Court had construed in Betts, rather than using different ***7** or modified language similar to that it had employed in the OWBPA. *See* Age Discrimination in Employment .Amendments of 1996, Pub. L. No. 104-208, § 119, 110 Stat. 3009, 3009-24 to 3009-25. Instead of using an approach to this ADEA exemption similar to that found in the OWBPA, Congress employed the exact subterfuge language that had been construed in *Betts.* Thus, the presence in section 623(j) (2) of that subterfuge language cannot be fairly characterized as a repudiation of *Betts.*[2] Indeed, this is precisely the reasoning of the ADA cases that have adopted *Betts'* interpretation of subterfuge. *See, e.g., Leonard F.,* 199 F.3d at 104-05 (nclusion of subterfuge language in the ADA in 1990 signaled congressional approval of *Betts* for purposes of pertinent ADA provision); *Aramark,* 209 F.3d at 270-73 (same). In short, *Betts* is soundly followed to interpret statutory language identical to the language analyzed in that case.[3]

***8** The plaintiffs also observe that *Betts* held that benefit plans that discriminate in fringe benefits fall within the exemption for pension, insurance, and retirement benefits, but benefit plans that discriminate in a non-fringe aspect of employment, such as hiring, firing, or wages, could be actionable. *See* Drnek Br. at 26-27; *see also* 492 U.S. at 177-78, 180. From this, the plaintiffs conclude that *Betts* is "inapposite" because "forced termination" is a "'non-fringe' aspect of the employment relationship." Drnek Br. at 27. This is nonsense. The provision construed in *Betts,* section 623(f)(2), was an exemption applicable only to retirement, pension, or insurance plans, and so the Court naturally observed that it was limited to these fringe benefits. Section 623(j)(2) involves mandatory retirement, and so it naturally reaches what ***9** the plaintiffs call "forced termination" or it would be meaningless. Indeed, under *Betts,* ADEA exemptions must not be construed in a manner that wipes them out completely, as we explain at length in our opening brief. *See* Opening Br. at 29-31, 42-45. If a mandatory retirement policy could not be utilized to terminate employees, it would not be a mandatory retirement policy at all. The plaintiffs' apparent view that section 623(j)(2) cannot be used to terminate retirees' employment is both nonsensical and eviscerates the exemption.

Finally, the plaintiffs and AARP assert that section 623(j)(2)'s plain language does not require allegations that a plan evades the ADEA's "purposes" rather than its substantive prohibitions, and criticize us for reading a "substantive prohibition" requirement into the statute. *See* Drnek Br. at 27-28; AARP Br. at 5-8. As we explain in our opening brief, the Supreme Court unambiguously rejected this exact proposition in *Betts,* a fact which the plaintiffs and AARP apparently wish to ignore. There, the Court observed that one "purpose" of the ADEA was to "eliminat[e] 'arbitrary age discrimination in employment."' 492 U.S. at 176. The presence of exemptions, the Court explained, signaled Congress's recognition that "not all age discrimination in employment is 'arbitraryy."' *Id.* In order to determine what age discrimination Congress believed was ***10** arbitrary, the Court concluded that it "must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate." *Id.* Accordingly, the court held that a plan "cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act." *Id.* Thus, the substantive prohibitions give meaning and effect to the Act's purposes.

Indeed, *Betts* was not the first time the Supreme Court had construed the concept of a "subterfuge" to evade the ADEA; *Betts* relied on the Court's prior decision in *McMann,* "which rejected the contention that the purposes of the Act can be distinguished from the Act itself." 492 U.S. at 176. In *McMann,* the Court characterized the very distinction the plaintiffs and AARP make here between the ADEA's purposes and its substantive prohibitions as "untenable." 434 U.S. at 198. That is because "the Act is the vehicle by which its purposes are expressed and carried out ...." *Id.* This reasoning makes common sense. If the test for subterfuge focused on the general "purpose" of eliminating "arbitrary age discrimination in employment," no local government could ever safely enact mandatory retirement laws. Juries would always feel free to find that by simply having a mandatory ***11** retirement ordinance, a local government had evaded the ADEA's "purposes."[4]

C. Evidence Of Allegedly Illicit Motives For Establishing A Retirement Plan Is Irrelevant Where A Plan Does Not Evade A Statutory Prohibition.

In *Bell v. Purdue University,* 975 F.2d 422 (7th Cir. 1992), this court, relying on Betts, made clear that an employer does not engage in subterfuge even if it relies on a preference for younger workers when it avails itself of one of the ADEA's exemptions. The court emphasized that the pertinent inquiry is whether the plan evades "one of the substantive provisions of the ***12** ADEA," and that defendants "cannot be liable for their motives if their conduct has not evaded the ADEA's prohibitions." *Id.* at 429. Thus, as we explain in our opening brief, *Bell,* like *Betts,* establishes that a claim of subterfuge must allege a violation of a substantive provision of the ADEA, and adds that absent such violation, evidence that an employer favored younger workers is not probative of subterfuge.

The plaintiffs and AARP offer no response to our submission that *Bell* guides an analysis of this case other than to say that like *Betts, Bell* was rendered invalid by the OWBPA. *See* Drnek Br. at 25-26, 38 n.31; AARP Br. at 12. As we explain above, that view is indefensible. Thus, *Betts* and *Bell* provide the framework for analyzing the plaintiffs complaints. And under that framework, the plaintiffs have failed to state a claim for relief.

II. THIS LAWSUIT RESTS ON NO PROPER THEORY OF LIABILITY UNDER THE ADEA.

With *Betts* and *Bell* as a guide, it is clear that the plaintiffs have utterly failed to state a claim for relief under the ADEA. Contrary to the plaintiffs' mischaracterization of our submission, we neither advocate a "heightened pleading standard" nor request that they prove their case in response to our motion to dismiss. *See* Drnek Br. at 24-25. Rather, we submit that even ***13** the liberal federal notice pleading standards cannot save their complaints, because the claims they seek to prove are not claims for which relief could be granted. Even more important, in their submissions below and in this court, the plaintiffs have made plain that they intend to pursue a claim that turns on how section 623(j) should be construed. For that reason, the district court properly concluded that this case turns on a controlling question of law.

A complaint must contain a "short and plain statement showing the plaintiff is entitled to relief ...." *Thompson v. Illinois Department of Professional Regulation,* 300 F.3d 750, 753 (7th Cir. 2002). The purpose of such a statement, as the plaintiffs agree, is to provide a defendant with "notice of the claims and the grounds they rest upon." *Id. See* Drnek Br. at 24 (quoting *Swierkiewicz v. Sorema,* 534 U.S. 506, 512 (2002)). Nevertheless, the details a plaintiff chooses to allege in his complaint, or later in its defense, can demonstrate that the plaintiff is not entitled to relief. *See, e.g., Thompson,* 300 F.3d at 753-54; *Sanjuan v. American Board of Psychiatry and Neurology,* 40 F.3d 247 (7th Cir. 1994), *cert. denied,* 516 U.S. 1159 (1996).

Here, the problem is not that the plaintiffs have failed to provide the City with notice of their claim -- by now, we know ***14** exactly what their claim is. The problem is that the plaintiffs have failed to provide the City with notice of a claim for which relief could be granted. The district court was itself concerned that the complaint failed to advance a claim for which relief can be granted, and ordered the plaintiffs to provide additional detail as to what type of claim they intended to pursue. *See* Drnek R. 41. By their own account, both in their briefs in the district court and in this court, the plaintiffs hope to prove only two things: that the mandatory retirement plan is an illegal subterfuge because its enactment was not motivated by public safety concerns, and because it was used to accomplish a "political objective" of creating large-scale employment opportunities for younger workers, minorities, and women. Drnek Br. at 23. Certainly the plaintiffs deny that they intend to

pursue any subterfuge claim of the type we acknowledge would be proper -- a claim that a mandatory retirement law was enacted in retaliation for an assertion of rights under the ADEA, or that the law at issue is not really a retirement law at all but merely moves older workers into lower-paying jobs. *See* Opening Br. at 52-53. The claim that the plaintiffs actually press, however, would not, if proved, entitle the plaintiffs to relief, and thus is not a claim for which relief could be granted. Moreover, because that claim turns on the proper construction of ***15** section 623(j)(2), it was properly certified for interlocutory appeal.

A. Allegations That A Mandatory Retirement Plan For Police And Fire Personnel Was Not Motivated By Public Safety Considerations Do Not State A Claim Of Subterfuge.

The plaintiffs assert that because public safety motivated Congress to enact section 623(j), public safety is the "*only* legitimate reason[]" for mandatorily retiring a public safety employee, and the subterfuge language precludes "other, illegal purposes." Drnek Br. at 19-20 (emphasis in original). At bottom, this amounts to a request that the court read a public safety justification into section 623(j).

As we observe above and in our opening brief, *Betts* rejected that approach to subterfuge, a point the plaintiffs wholly ignore. *See* Opening Br. at 35-42. In *Betts,* the plaintiffs asserted that employers had to justify their use of the benefit plan exemption on grounds of cost, and that this costjustification requirement could be gleaned from the statute's subterfuge provision. *See id.* at 169. The Court rejected this argument, holding that no such requirement appeared in the exemption's language and therefore could not be derived from its subterfuge provision. The Court reached this conclusion notwithstanding interpretive regulations to the contrary, because such regulations were inconsistent with the statutes plain ***16** language. *See id.* at 170, 172. Similarly, in *Leonard F.,* the Second Circuit held that the ADA's subterfuge clause should not be construed to require underwriters to base decisions on "sound actuarial principles," since *Betts* rejected a construction of the term "subterfuge" that would require an employer to offer any particular justification for a challenged policy. *See* 199 F.3d at 104-05. *See also, e.g., Aramark,* 298 F.3d at 269-72; *Krauel,* 95 F.3d at 678-79. The claim that section 623(j) requires a public safety justification is no different. The exemption's plain language contains no such requirement, as the plaintiffs themselves concede. *See* Drnek Br. at 23. That should be the end of the matter.

Nevertheless, the plaintiffs rely on section 623(j)(2)'s requirement that employers administer fitness tests, once those tests are developed by the Secretary of Health and Human Services ("SHHS"), to support their claim that employers engage in subterfuge unless they are motivated purely by public safety. *See* Drnek Br. at 20-23. In particular, they claim that the future testing requirement establishes Congress's intent that public safety employees continue to work if they are fit to do SO. Id. at 20-21. The statute demonstrates exactly the opposite intent. Employers are not required to administer tests until SHHS develops non-discriminatory tests. *See* Age Discrimination ***17** in Employment Amendments of 1996, Pub. L. No. 104-208, sec. 119, §§ 2(a), (c), (d), 110 Stat. 3009, 3009-24 to 3009-25. Thus, absent SHHS tests, employers may mandatorily retire police and fire personnel regardless whether they are fit to continue working. In other words, as we explain in our opening brief, in the absence of SHHS tests, Congress presumed that age could be a proxy for fitness and therefore did not require state or local governments to show that their mandatory retirement policies have a public safety justification. *See* Opening Br. at 40-42.[5] To the extent that the plaintiffs contend that a mandatory retirement plan will not be a subterfuge if City legislators and officials honestly believe that mandatory retirement is justified for public safety reasons, even if they are mistaken or have no support for that belief, *see* Drnek Br. at 20-23, 31-33, that is an absurd construction of the exemption. And to the extent that the plaintiffs contend that the City must always prove that mandatory retirement is justified by public safety, *see id.,* they ***18** effectively place the burden of developing fitness tests on local governments in direct contravention of the statute, which places that burden on SHHS.

As we explain in our opening brief, we do not doubt that portions of section 623(j)(2)'s legislative history suggest that its supporters believed that it was a public safety measure. *See* Opening Br. at 40-41. But this does not mean mandatory retirement under section 623(j)(2) is a subterfuge unless it too was motivated by public safety concerns, or that Congress intended that justification. Moreover, *Betts* makes clear that an exemption's plain language controls; after all, there was apparently some basis from the legislative history of section 623(f)(2) to believe that Congress viewed that exemption as cost-based, *see* 492 U.S. at 189-91 (Marshall, J., dissenting), AARP Br. at 10-11, but the Court still concluded that the statute's plain language precluded any cost-justification requirement. And finally, when section 623(j)(2) was enacted in 1996, Congress was aware of *Betts'* admonition that additional burdens cannot be gleaned from a subterfuge provision. Yet,

Congress did not write a public safety motivation into section 623(j)(2). This court should therefore follow *Betts* and conclude that section 623(j)(2) ***19** does not require a public safety justification.[6]

With the statute's plain language against them, the plaintiffs and AARP seek refuge in the general presumption that exceptions to the ADEA, a remedial statute, should be narrowly construed. *See* Drnek Br. at 36-37; AARP Br. at 15-17. That presumption, however, is not a free pass to engraft conditions or limitations onto a statute's plain language: "[a]s a general matter, the ADEA may benefit from the presumptions associated with a 'remediall' statute.... This characterization, however, does not invest the Act with a sort of talismanic quality so that all other canons of statutory construction will be disregarded." *Graczyk v. United Steel Workers of America,* 763 F.2d 256, 262 (7th Cir.), *cert. denied,* 474 U.S. 970 (1985) (citations omitted). Section 623(j)(2)'s plain language does not require a public safety motivation. The basic tenet of statutory ***20** construction requiring adherence to a statute's plain language should not take a back seat to a generalized presumption of narrow construction.

B. A Mandatory Retirement Plan That Creates Employment Opportunities For Younger Workers At The Expense Of Older Workers Is Not A Subterfuge To Evade The Purposes Of The ADEA.

The plaintiffs have defended their complaint on only one ground beyond their claim that the City was not motivated by public safety: that the City used mandatory retirement to further a political objective of creating hiring opportunities for younger workers, minorities, and women. *See, e.g.,* Minch R. 1-1 at 8-9; Drnek R. 6 at 5; Drnek R. 41. *See also* Drnek Br. at 23.[7] This does not describe a claim for which relief could be granted. This claim does, however, turn on the proper construction of section 623(j)(2), and hence the district court properly certified this case for interlocutory appeal.

As we explain in our opening brief, the plaintiffs' claim cannot possibly describe subterfuge. *Betts* instructs that a plaintiff claiming subterfuge must identify a statutory ***21** requirement that a retirement plan "evades," and that mere reference to the statute's general purpose of eliminating age discrimination in employment will not do. *Betts* further instructs that a retirement plan will not be a subterfuge if the only way in which it can be said to "evade" a statutory requirement is in the way that every such plan would.

The plaintiffs allegation of subterfuge boils down to one that the City desired to replace older workers. This claim may invoke the ADEA's general "purpose" of eliminating age discrimination, but that is not enough. The claim may also invoke the ADEA's substantive prohibition on age-based discharge, but so would any other mandatory retirement ordinance, as the plaintiffs observe. *See* Drnek Br. at 39-40. That is exactly why the City's use of mandatory retirement to create job opportunities, if true, cannot be the basis of liability. It does not signal anything unusual about the plan. The very purpose of the section 623(j)(2) exemption is to permit public employers to replace older public safety workers. A plan that does just that does not "evade" any "purpose" of the A.DEA.

The most the plaintiffs can say is that their claim invokes the ADEA's substantive prohibitions against discrimination in "compensation, terms, conditions, or privileges of employment, because of age," since they allege "loss ... of employment, ***22** wages, benefits, and compensation." Drnek Br. at 28. This approach ignores *Betts* and common sense. The loss of salary and other employment benefits will result from any mandatory retirement plan. The assertion that Chicago's mandatory retirement plan evades a substantive ADEA prohibition because it permits the discharge of workers based on age is nonsense; the purpose of addition section 623(j) is to ensure that the ADEA did not bar this type of so-called "discrimination." All of the allegations in the complaints describe injuries that would result from any mandatory retirement program. *See* Drnek R. 6 ¶¶ 19, 26-28; Minch R. 1-1 ¶¶ 3, 5-7, 26-27, 36. Thus, those injuries cannot be enough to show that this retirement law falls outside section 623(j)(2)'s exemption.

The plaintiffs complain that we have unfairly limited their claim to one alleging replacement of older workers with younger workers, and that there is no requirement that plaintiffs allege every fact supporting their claims. *See* Drnek Br. at 28. Of course, a complaint should not be dismissed if the plaintiff could prove any set of facts that would entitle him to relief, *see Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), but that "set of facts has to be the plaintiff's, not a figment of someone else's imagination." *Kyle v. Morton High School,* 144 F.3d 448, 455 (7th Cir. 1998). Here, when their complaint was challenged by our ***23** motion to dismiss, the plaintiffs were unable to articulate any claim that they intended to pursue which had any merit under a sound construction of section 623(j)(2). Of course, one entirely proper function of a motion to dismiss a complaint is

to determine if the plaintiff intends to pursue any potentially meritorious claim. Indeed, the Supreme Court has observed that the purpose of a motion to dismiss is to alert the plaintiff to

> the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of the case.

Neitzke v. Williams, 490 U.S. 319, 329-30 (1989). *Accor, e.g., Health Cost Controls v. Skinner,* 44 F.3d 535, 538 (7th Cir. 1995). Nevertheless, the only claims the plaintiffs have articulated lack any legal merit. The plaintiffs have vigorously defended their complaints, and have, over and over, described what they hope to prove, but they have never articulated an intention to pursue any type of claim that could entitle them to relief. For that reason, the district court properly concluded that the controlling question in this case is one of law -- whether section 623(j)(2) permits the plaintiffs to press the claim that they actually advance. And because that claim is not ***24** sound under a proper construction of section 623(j), this litigation should be put to an end.

C. The Private Motivations Of Individual Legislators And City Officials For Supporting The Mandatory Retirement Ordinance Cannot Invalidate An Otherwise Valid Ordinance.

Unable to identify a statutory violation, the plaintiffs announce that they seek to hold the City liable for its thoughts rather than its actions: "It is the motive of the employer that makes the conduct lawful or unlawful, not simply its result." Drnek Br. at 40. This court squarely rejected such an approach in *Bell,* when it held that defendants "cannot be liable for their motives if their conduct has not evaded the A.DEA's prohibitions." 975 F.2d at 429. Thus, any inquiry into legislative motive must be tied to a perceived violation of some statutory requirement.

Ignoring *Bell,* the plaintiffs assert that evidence of "discriminatory intent" of individual legislators and municipal officials can show subterfuge, and that they would not need to show that a majority of City Council members shared a 'discriminatory intent. Drnek Br. at 41-42.[8] They also assert ***25** that courts sometimes do allow inquiry into legislative motive. *Id.* at 42-43. Finally, they contend that "subterfuge" demands a fact-based inquiry. *Id.* at 40-41. These assertions are wholly beside the point. We have not suggested that inquiry into legislative motive is always forbidden, even in a case alleging subterfuge. If the plaintiffs had articulated some intent to evade a statutory requirement -- as *Betts* and *Bell* demand -- inquiry into legislative motive to collect proof of that claim might be warranted. Here, all the plaintiffs hope to prove is that the City wanted to replace older workers, knew that mandatory retirement would accomplish that, and desired that result for political reasons rather than public safety. That is not a claim for which relief can be granted, as we explain above.

As we explain in our opening brief, inquiry into legislative motive is difficult, intrusive, and of limited use, and therefore should be reserved for extraordinary cases. Statutes should not be readily construed to require consideration of legislative ***26** motive given the great difficulties that such an inquiry poses. In this case, for example, on the plaintiffs' view, apparently Chicago's ordinance could be invalidated under the ADEA if the legislators who voted for it had something other than public safety in mind, but an identical ordinance could then be enacted, and if the legislators could purify their thoughts to the satisfaction of the district court, it should be upheld. Surely the ADEA should not be construed to permit such an absurd result.

D. Section 623(j)(2)'s "Subterfuge" Provision Is Not Superfluous.

In our opening brief, we discuss why the *Betts* approach to subterfuge claims would not render section 623(j)(2)'s subterfuge provision superfluous. *See* Opening Br. at 52-54. To that end, we offer two examples of actionable subterfuge in mandatory

retirement: a plan enacted to evade the ADEA's prohibition against retaliation; and a plan that gives retired personnel preference for a new, lower-paying job, thus potentially evading the ADEA's prohibition against discrimination in compensation. *See id.* at 52-53.

The plaintiffs offer virtually no response to this submission except to weakly characterize their claim, like the one in our second example, as alleging evasion of the ADEA's prohibition against discrimination in compensation, because ***27** mandatory retirement reduces compensation. *See* Drnek Br. at 35. Unlike the situation in our example, however, the plaintiffs have never claimed, and still do not claim, that the City discriminates against mandatorily retired workers in compensation, or uses mandatory retirement for that purpose. As we explain above, this case alleges discrimination in the mandatory retirement itself, a form of discharge. Reduced compensation is merely a consequence of that alleged discrimination.

E. The Controlling Question Should Be Answered In The Negative And Judgment Should Be Entered For The City On The ADEA Claims.

The district court determined that resolution of the plaintiffs' ADEA claims turned on a controlling question of law: "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)." App. A54 (emphasis in original). As we explain in our opening brief, this question should be answered in the negative where the plaintiff cannot identify a substantive prohibition of the ADEA that the mandatory retirement plan violates (other than its prohibition against agebased discharge and its general purpose of eliminating age discrimination). *See* Opening Br. at 54-56.

The plaintiffs take an artificially narrow view of the ***28** district court's question and observe that section 623(j) requires a mandatory retirement plan to satisfy both the timing requirements set out in section 623(j)(1), and the subterfuge provision of section 623(j)(2). *See* Drnek Br. at 33-34, 37-39. That is true; after all, sections (1) and (2) of the exemption are conjunctive, not disjunctive, requirements. *See* 29 U.S.C. 623(j) (2000). We submit, however, that when, as here, section 623(j)(1)'s timing requirements are concededly satisfied, the plaintiff must show (or here, allege) subterfuge under 623(j)(2) to invalidate a mandatory retirement plan. And where the plaintiff cannot identify a statutory violation within the meaning of *Betts,* then it cannot demonstrate subterfuge with any kind of evidence. If the plaintiffs could identify a statutory violation, the question might be answered affirmatively. They have not.

In the end, as we also explain in our opening brief, the precise formulation of the controlling question lacks practical significance; the denial of the City's motion to dismiss turns on a question of law involving construction of the phrase "subterfuge to evade the purposes" of the ADEA, and this appeal presents the question whether as properly construed, the plaintiffs have alleged a claim of subterfuge. Because the plaintiffs have no intention of pursuing a claim for which relief ***29** can be granted, under a proper construction of section 623(j)(2), the district court should be directed to dismiss their ADEA claim.

***30 CONCLUSION**

For the foregoing reasons, the judgment of the district court denying the City's motion to dismiss the plaintiffs' ADEA claims should be reversed, and judgment for the City should be entered on the ADEA claims.

Footnotes

[1] This court acknowledged as much in *Bell,* when it applied *Betts* to a case involving the pre-OWBPA version of section 623(f)(2). *See* 975 F.2d at 423-24, 429. Under the plaintiffs' flawed rationale, however, Congress' purported rejection of *Betts'* interpretation of the pre-OWBPA version of section 623(f)(2) would have precluded *Bell's* reliance on *Betts.* Here, as in *Bell,* we rely on *Betts* for its construction of the subterfuge provision as it appeared in the prior version of section 623(f)(2), because that provision is identical to the one in 623(j)(2). In contrast, *Solon v. Garv CommunitY School Corp.,* 180 F.3d 844 (7th Cir. 1999), which the plaintiffs and AARP cite on this point, *see* Drnek Br. at 26 & n.21; AARP Br. at 12, is inapposite. The court stated that Congress had "overruled" *Betts* by changing the statutory language discussed in *Betts, see* 180 F.3d at 849 n.2, but did not discuss whether

Betts' analysis was appropriately consulted with regard to other statutes containing the same language analyzed there; no subterfuge provision was even at issue in *Solon.* The same is true for *Ouinones v. City of Evanston,* 58 F.3d 275 (7th Cir. 1995), which the AARP cites. *See* AARP Br. at 12.

2 Thus, the plaintiffs and the AARP are quite wrong to claim that at mast this oase involves mere Congress's failure to amend section 623(j) in response to *Betts. See* Drnek Br. 26 n.21; AARP Br. at 13. The version of section 623(j) that was in effect when *Betts* was decided expired by its terms in 1993. *See* Age Discrimination in Empicyment Amendments of 1986, Pub. L. No. 99-592, § 3, 100 Stat. 3342, 3343 (1986) . The current version of section 623(j) (2), as we explain above, was not enacted until 1996, and then Congress chose to use the same phrase that the Court had construed in *Betts.*

3 In the same vein, the plaintiffs and AARP assert that it is the employer's burden to show that a mandatory retirement plan was not a subterfuge. Drnek Br. at 29-30; AARP Br. at 18-19. That exact contention was rejected in *Betts* with regard to section 623(f)(2). *See* 492 U.S. at 181-82. Relying on its longstanding interpretation of Title VII, the Court made clear that the subterfuge provision "itself delineates which employment practices are illegal and thereby prohibited and which are not." *Id.* at 181 (internalt quotation marks and citation omitted). Thus, an employee challenging a plan as a "subterfuge to evade the purposes" of the ADEA bears the burden of proof on that issue. *See id. Accord, e.g., Aramark,* 208 F.3d at 273 (after *Betts,* it is employee's burden to show subterfuge under ADA). Moreover, the assertion that the OWBPA reallocated the burden of proof should be rejected. The OWBPA did not amend section 623(j)(2), and when Congress reenacted section 623(j)(2) in 1996, it did not allocate the burden of proof to employers. Finally, it bears noting that the plaintiffs took the contrary position on this point in the district court, admitting that *Betts* makes it their burden to prove subterfuge. *See* Minch R. 16 at 11 n.7, 1819; Minch R. 59 at 10-12.

4 AARP observes that early retirement incentive plans are legal if they are "'consistent with the relevant purpose or purposes of [the ADEA],"' and cites *Solon v. Garv Community School Corp.,* 180 F.3d 844 (7th Cir. 1999); *Auerbach v. Board of Education,* 136 F.3d 104 (2d Cir. 1998); and *Karlen v. City Colleges of Chicaqo,* 837 F.2d 314 (7th Cir.), *cert. denied,* 486 U.S. 1044 (1988), for the proposition that courts have referred to the ADEA's purposes rather than its substantive prohibitions to evaluate the legality of early retirement incentive plans. AARP Br. at 6-7 (quoting 29 U.S.C. 623(f)(2)(B)(ii) (2000)). To begin with, none of these cases considered the question squarely confronted in *Betts* - whether the ADEA's purposes could be distinguished from its substantive prohibitions. *Solon,* moreover, did not even address an ADEA exemption, let alone a subterfuge provision, and *Karlen* was decided before *Betts.* In any event, none of these cases undermines our submission. Early retirement incentive plans, as AARP acknowledges, violate the ADEA if the retirement was not truly voluntary or if the plan reduced benefits with age in order to induce earlier retirement. *See, e.g., Solon,* 180 F.3d at 850-53; *Auerbach,* 136 F.3d at 113-14; *Karlen,* 837 F.2d at 317-20. In such circumstances, the early retirement incentive plan violates the ADEAs "purpose" of eliminating arbitrary age discrimination in the workplace because it violates the ADEA's "prohibition" on age-based discharge or involuntary retirement (outside the police and fire context). *See* 29 U.S.C. 623(a)(1) (2000).

5 The legislative history we cite in support of this proposition in our opening brief, derived from debates about earlier though not significantly different versions of section 623(j), *see* Drnek Br. at 31 n. 25, is perfectly Konsistent with the enacted version of that statute. In those debates, certain advocates viewed mandatory retirement as necessary until effective non-discriminatory testing alternatives could be developed. *See* Opening Br. at 41-42. Section 623(j), as we explain above, allows mandatory retirement without fitness testing until SHHS develops non-discriminatory tests.

6 *Quinones v. City of Evanston,* 829 F. Supp. 237 (N.D. Ill. 1993), *aff'd,* 58 F.3d 275 (7th Cir. 1995), which the plaintiffs cite, does not help them. There, Evanston was trying to use section 623(j) to justify something other than mandatory retirement: exclusion of a firefighter from its pension fund. *See id.* at 242. In that context, the court observed that section 623(j) was passed "to ensure public safety," and that public safety would not be "enhanced in any way simply by reducing the pension coverage of a firefighter, who in any case would perform the same duties." *Id. See* 58 F.3d at 278. In other words, public safety would be served by mandatory retirement, but not by discrimination against firefighters in pension benefits. Nothing in *Quinones* suggests that mandatory retirement must be justified on public safety grounds.

7 As an aside, the alleged "true reasons" for the mandatory retirement ordinance all relate to public safety, as we explain in our opening brief. The plaintiffs insinuate that the City's exclusion of paramedics from the ordinance undermines its stated public safety purpose, *see* Drnek Br. at 18 n.12, but paramedics do not appear to fall within the scope of section 623(j). *See* 29 U.S.C. 623(j); 630(j), (k) (2000).

8 Plaintiffs cite *Hunt v. City of Markham,* 219 F.3d 649 (7th Cir. 2000), for this proposition. *Hunt,* however, did not involve an employment decision made in the context of an ADEA exemption and did not construe the term "subterfuge." Where the claim is that a City ordinance was enacted as a "subterfuge to evade the purposes" of the ADEA, it makes little sense to say that the sentiments of a few legislators would be sufficient to prove at trial the sentiments of the City Council as a whole in passing the ordinance. That is the point of *Matthews v. Columbia County,* 294 F.3d 1294 (11th Cir. 2002), *petition for cert. filed,* 71 U.S.L.W. 3519 (U.S. Dec. 2, 2002) (No. 02-1114), which we cite in our opening brief. There, the court made clear that in order to show that a legislature acted with improper motives, a plaintiff must show that a majority of legislators supporting the ordinance ratified

those motives when they voted for the ordinance. *See id.* at 1296-98. The fact that *Matthews* concerned municipal liability under section 1983 does not undermine the applicability of its reasoning.

End of Document