2002 WL 32307758 (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 (consolidated).
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

Brief of Defendant-Appellant City of Chicago

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JURISDICTIONAL STATEMENT

The plaintiffs, Donald Drnek, James Minch, Richard Graf, and Richard Cosentino [hereafter referred to collectively as "plaintiffs"], are Chicago police officers and uniformed Chicago Fire Department personnel who were retired under the City's mandatory retirement ordinance, Municipal Code of Chicago, Ill. 2-152-140 (rev. 2000).[1] In two separate but virtually identical complaints, they sued the City of Chicago, alleging that the mandatory retirement ordinance violates the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (1994 & Supp. V 1999) ("ADEA"), and their due process rights under the United States and Illinois Constitutions. Minch R. 1-1 (class action complaint); Drnek R. 6 (amended complaint). The district court did not formally consolidate the two cases, but considered them together because they raised the same claims. *See* App. A3, A43; Drnek R. 9. The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331 (2000), and had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 (2000).

On June 8, 2001, the City moved to dismiss the complaints. Minch R. 7; Drnek R. 10. On March 25, 2002, the district court denied that motion as to the plaintiffs' ADEA claims. App. A6- ***1** a27.[2]***2** On April 4, 2002, the City moved for an order amending the March 25, 2002, order to include certification of the ADEA claims for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (2000). Drnek R. 33. The court elected to construe the City's motion as a motion for certification and as a motion to reconsider. App. A43-A44; Drnek R. 51-2 at 3-4. On May 22, 2002, the court denied the motion to reconsider, but granted the motion to amend the March 25, 2002, order, to certify an immediate interlocutory appeal. App. A41-A55.

On May 31, 2002, pursuant to 28 U.S.C. 1292(b) (2000) and Fed. R. App. P. 5, the City petitioned this court for permission to appeal. Minch R. 56; Drnek R. 46 (attaching petitions) . This court granted the petition on June 11, 2002, and also consolidated the two cases for purposes of disposition and briefing. Minch R. 56; Drnek R. 46. The court has jurisdiction over this appeal pursuant to 28 U.S.C. 1292(b) (2000).

***3** ISSUE PRESENTED FOR REVIEW

As framed by the district court, the issue certified for 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)." App. A54 (emphasis in original).

***4 STATUTE AND ORDINANCE INVOLVED**

Section 623(a) of the ADEA provides, in pertinent part:
(a) Employer practices. It shall be unlawful for an 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 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 Act.

29 U.S.C. § 623(a) (1994).

Section 623(d) of the ADEA provides, in pertinent part:

> (d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation,

proceeding, or litigation under this Act.

29 U.S.C. § 623(d) (1994).

Section 623(j) of the ADEA provides, in pertinent part:
(j) Employment as firefighter or law enforcement officer. It shall not be unlawful for an employer which is a ... political subdivision of a State ... to discharge any individual because of such individual's age if such action is taken --

***5** (1) with respect to the empicyment of an individual as a firefighter ar as a law enforcement officer, the empicyer has complied with section 3(d) (2) of the [ADEAJ Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained --

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

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

(I) 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 ... retirement plan that is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. § 623(j) (1994 & Supp. V 1999).

The Municipal Code of Chicago, Ill. § 2-152-140 (rev. 2000), provides, in pertinent part:
(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 ***6** equipment, including an employee engaged in this activity who is transferred or appointed to a supervisory ar administrative position.

(c) ....

(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.

....

Municipal Code of Chicago, Ill. § 2-152-140 (rev. 2000).

***7** STATEMENT OF THE CASE

The plaintiffs in these consolidated appeals have alleged that the City's mandatory retirement ordinance violates the ADEA. Chicago's mandatory retirement ordinance for police officers and firefighters requires police officers and uniformed fire

department personnel to retire at age 63. The plaintiffs allege, among other things, that the ordinance was enacted not for its stated purpose of protecting the public safety, but for the purpose of eliminating older police and fire personnel in favor of younger workers, and was therefore an illegal "subterfuge to evade the purposes of the ADEA," within the meaning of section 623(j)(2) of that statute, 29 U.S.C. § 623(j)(2) (1994 & Supp. V 1999). Minch R. 1-1 at 8-9; Drnek R. 6 at 5; Drnek R. 41.[3]

On March 25, 2002, the district court denied the City's motion to dismiss the plaintiffs' ADEA claims. App. Al-A27, A40. The City subsequently moved for an order amending the March 25, 2002, order to include certification of the district court's March 25 ruling for interlocutor appeal. Drnek R. 33. The court elected to construe the City's motion as both a motion for certification and as a motion to reconsider. App. A43-A44; Drnek R. 51-2 at 3-4. On May 22, 2002, the court denied the motion to ***8** reconsider, but granted the motion for certification. App. A41-A55. On May 31, 2002, the City petitioned this court for permission to appeal. Minch R. 56; Drnek R. 46. This court granted the petition on June 11, 2002, and consolidated the cases for briefing and disposition. Minch R. 56; Drnek R. 46.

*9 STATEMENT OF FACTS

As early as 1939, the City had in effect an ordinance establishing a mandatory retirement age of 63 for certain Chicago police and fire personnel. *See* Municipal Code of Chicago, Ill. § 25-37 (1939).[4] In 1974, however, Congress extended the ADEA -- which prohibited, among other things, discharge from employment on the basis of age -- to state and local governments, which had been expressly excluded from the original act, *see*29 U.S.C. § 630 (b) (1970). *See* Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 28(a) (2), 88 Stat. 55, 74 (1974) . Under the ADEA, state and local governments could enforce mandatory retirement laws for police and fire personnel, but were required to demonstrate that age was a bona fide occupational qualification for those positions. *See Ko-pec v. City of Elmhurst,* 193 F.3d 894, 897-99 (7th Cir. 1999) . The City's mandatory retirement ordinance was subsequently amended to reflect these changes in federal law.[5]

***10** In 1986, Congress amended the ADEA to include an exemption for state and local governments regarding mandatory retirement of police and fire personnel. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. 99-592, § 3, 100 Stat. 3342, 3343 (1986). *See also Kopec,* 193 F.3d at 897. The exemption permitted state and local governments with age restrictions for ***11** police and fire personnel in place an March 3, 1983, to resume application of those age restrictions. *See* 100 Stat. 3342, 3343; *Kopec,* 193 F.3d at 897.[6] The 1986 amendments also directed the Secretary of Health and Human Services to conduct a study regarding the feasibility of testing police officers and firefighters for physical and mental fitness. *See* 100 Stat. at 3343; *Kopec,* 193 F.3d at 897 n.l. The study was conducted, but no guidelines were ever proposed. *See Kopec,* 103 F.3d at 897 n.l. In response to the 1986 amendments, Chicago reinstated mandatory retirement of police and fire personnel at age 63. *See* Municipal Code of Chicago, Ill. § 25-37 (1988) (recodified at Municipal Code of Chicago, Ill. § 2-36-020 (1990)).[7]

The 1986 exemption expired by its terms on December 31, 1993, *see* 100 Stat. at 3343; *Kopec,* 193 F.3d at 897, and until 1996, there was no exemption from the ADEA for police and fire ***12** personnel. Then, in 1996, Congress reinstated the exemption and authorized its retroactive application to December 31, 1993. *See* Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208, § 1, 110 Stat. 3009-23 to 3009-25 (1990) (codified at 29 U.S.C. § 623(j) (1994 & Supp. V 1999)). This exemption contains no sunset provision. Moreover, as in 1986, Congress called for a study regarding the feasibility of testing the fitness of firefighters and police officers. *See* 110 Stat. at 3009-24; *Kopec,* 193 F.3d at 898 n.2. To date, no guidelines have been issued.

In response to the reinstated exemption, the City, on May 17, 2000, enacted another mandatory retirement ordinance to require retirement of certain police and fire personnel at age 63. Municipal Code of Chicago, Ill. § 2-152-140 (rev. 2000). The preamble to the ordinance provides that its purpose is to protect the public safety of the residents of Chicago. *See* Drnek R. 10, exh. C (Chicago City Council, *Journal of Proceedings,* May 17, 2000, at 32899-32901). This ordinance is the subject of the present lawsuits.

Allegations of the Present Lawsuits

In these lawsuits, the plaintiffs allege that the mandatory retirement ordinance violates the ADEA in two respects. First, they allege that the City violated the ADEA by mandatorily retiring them without affording them the opportunity to prove ***13** their fitness for duty. *See* Minch R. 1-1 at 10-11; Drnek R. 6 at 6-7. Second, they allege that the mandatory retirement ordinance was an illegal "subterfuge" to evade the purposes of the ADEA within the meaning of section 623(j)(2) of that statute. Minch R. 1-1 at 8-9; Drnek R. 6 at 5. In particular, the plaintiffs allege that the City's "real purpose" for enacting the ordinance "was not to promote the interests of public safety," but was enacted to "eliminat[e] from the ranks of the Police [and Fire] Department [s] officers who had surpassed 63 years of age so that, among other reasons, the City could hire and promote younger" police and fire personnel. Minch R. 1-1 at 8-9; Drnek R. 6 at 5.

The City moved to dismiss all of the plaintiffs' claims. Minch R. 7, 24, 26; Drnek R. 10, 24. At a hearing before the district court, the plaintiffs provided additional factual allegations purporting to support their claim of subterfuge. *See* Drnek R. 41 (transcript). The plaintiffs summarized that this additional factual information tended to show that the mandatory retirement ordinance 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 what was referred to by Alderman Beavers as the deadbeats in the department and the old-timers in the department." Drnek R. 41 at ***14** 6-7. The plaintiffs cited public statements by the sponsor of the mandatory retirement ordinance and other City officials in support of this conclusion. For example, the plaintiffs claimed that the sponsor of the ordinance stated that the ordinance would "make room for young people coming in," *id.* at 9, and that "[y]ou get more work out of young upstarts than out of old-timers," *id.* at 12. According to the plaintiffs, the Fire Commissioner stated that the ordinance "gives younger people a chance to move up, bringing fresh ideas and talent, and gives the older members a chance to enjoy the retirement years that they worked so hard to earn," *id.* at 11, and the Chicago Tribune reported that "retirement of older supervisors who climbed through the ranks of what city consultants called an old boy network also would open positions for minorities," *id.* at 15. *See generally id.* at 12-16. The plaintiffs also claimed that the City had waited four years after the 1996 exemption to enact its ordinance so that a friend of the Mayor's in the police department could retire voluntarily at age 68, and thus did not have a "legitimate public safety interest" in enacting the ordinance. *Id.* at 7, 13, 14.

On March 25, 2002, the district court denied the motion as to the ADEA claims. Among other things, the court rejected the plaintiffs' claim that the City violated the ADEA by failing to afford them the opportunity to demonstrate their fitness for duty. App. A10-A17. The court also rejected the plaintiffs' ***15** contention, raised in their response to the City's motion to dismiss but not in their complaints, that the City violated section 623(j)(1) of the ADEA by expanding the scope of personnel who had been subject to mandatory retirement under the ordinance existing in 1983. App. A17-A18, A26. The court did conclude that the plaintiffs stated a claim of subterfuge by alleging that the mandatory retirement ordinance was not enacted for public safety reasons, but to create opportunities for younger workers. App. A18-A25. In the district court's view, "replacement of older employees by younger employees solely on the basis of age is precisely the type of discrimination that the ADEA was enacted to prevent," and "[a]ge-based retirement is tolerated in limited circumstances under § 623(j), but not for the wrong reasons, i.e., not for reasons that are merely a cover-up for the type of ageism prohibited by the ADEA." App. A23-A24. The court further determined that the question whether the mandatory retirement ordinance was a "subterfuge" is one of fact, and that "the intent or desire of aldermen and other City officials is both relevant and material" to that inquiry. App. A2***I***-A23. The court observed that the subterfuge inquiry "necessarily requires the trier of fact to look beyond the defendant's statement of purpose or intent to see whether it is just an excuse or an 'artifice of evasion' to cover-up otherwise prohibited conduct." *Id.* (quoting ***16***Public Em-Plovees Retirement System of Ohio v. Betts,* 492 U.S. 158, 171 (1989)).[8]

On April 4, 2002, the City moved for an order amending the March 25, 2002, order to include certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) (2000). Drnek R. 33. In that motion, the City identified the following question of law as controlling: "whether 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)(2) of the ADEA." Drnek R. 33 at 5; App. A43.

The district court elected to construe the City's motion as both a motion for amendment to include certification for immediate appeal and a motion for reconsideration. *See* App. A43-A44; Drnek R. 51-2 at 3-4. On May 22, 2002, the district court denied the motion for reconsideration, but certified its March 25, 2002, order for immediate appeal. *See* App. A4***I***-A55. In so doing, the court reframed the controlling legal question as: "whether a plaintiff can demonstrate subterfuge under 623(j)(2) with any kind of evidence if there is no violation of 623(j)(1)." ***17** App. A54 (emphasis in original).

On May 31, 2002, the City petitioned this court for permission to appeal the March 25, 2002, order, as certified an May 22, 2002, pursuant to 28 U.S.C. § 1292(b). Minch R. 56; Drnek R. 46. On June 11, 2002, this court granted the petition and consolidated the two cases for purposes of disposition and briefing. Minch R. 56; Drnek R. 46.

***18** SUMMARY OF ARGUMENT

The ADEA provides an express exemption from its prohibition of age discrimination in employment for mandatory retirement of police and fire personnel. The sole limitation on this exemption is that it may not be a "subterfuge to evade the purposes" of the ADEA. Of course, one of the purposes of the ADEA is to authorize mandatory retirement of police and firefighters -- that is the express objective of the exemption in section 623(j). In order to state a claim of subterfuge, accordingly, the City's ordinance must be something other than an ordinary mandatory retirement plan -- it must amount to an effort to evade one of the ADEA's substantive prohibitions. Thus, allegations or evidence that a plan was motivated by a desire to benefit younger workers is irrelevant -- the ADEA permits an employer to replace older firefighters and police officers with younger personnel.

Rather than require the plaintiffs to identify a statutory prohibition allegedly evaded by the mandatory retirement ordinance, the district court determined that the plaintiffs stated a claim of subterfuge by their allegations that the mandatory retirement ordinance was motivated not by a concern for public safety, but by the allegedly illicit desire to create hiring and promotional opportunities for younger workers at the expense of older workers. The court further determined that the question whether the ordinance was a "subterfuge" could only be ***19** answered by permitting the plaintiffs to inquire into the private motivations of the individual legislators and City officials who supported it.

These conclusions were erroneous. The plain language of section 623(j) does not require employers utilizing that exemption to justify a mandatory retirement plan on public safety grounds, and Supreme Court precedent instructs that such a requirement cannot be inferred from the exemption's "subterfuge" provision. Moreover, the plaintiffs' allegations that the ordinance was intended to remove older workers in order to create opportunities for younger workers only demonstrate that the City's ordinance is exactly what it seems to be: a program to remove older workers precisely based on their age. This is exactly the point of the exemption. Any mandatory retirement plan involves removal of older workers and thereby creates opportunities for younger workers.

Finally, the inquiry into legislative motive that the plaintiffs seek to undertake is unwarranted. Courts have consistently expressed reluctance to intrude into the workings of the legislature by probing legislative motive, and in the absence of any allegation that the ordinance evades some substantive prohibition of the ADEA, there is no basis to call upon the majority of the legislators who supported the ordinance to discuss their private motivations for supporting the mandatory ***20** retirement ordinance. The plaintiffs' allegations establish that the City's ordinance does not evade any statutory prohibition, and that result does not change simply because some legislators and City officials were allegedly pleased or motivated by the ordinance's inevitable consequence of creating employment opportunities for younger workers.

***21 ARGUMENT**

As early as 1939, long before the enactment of the ADEA, the City adopted a policy of mandatorily retiring police and fire personnel at age 63. The ADEA itself, by exempting mandatory retirement of police and fire personnel from its prohibition on age-based discharge, reflects Congress' acceptance of such a policy. Nevertheless, the plaintiffs allege that more than sixty years after the City enacted its first mandatory retirement ordinance, the City reenacted that ordinance not for its stated purpose of protecting the public safety, but as a "subterfuge" for age discrimination within the meaning of section 623(j)(2) of the ADEA. The plaintiffs' allegations, however, fail to state a claim under the ADEA, and the district court therefore erroneously denied the City's motion to dismiss the plaintiffs' ADEA claims.

At the outset, we note that, while the district court denied our motion to dismiss, it concluded that this determination merited interlocutor review. App. A4*I*-A55. That conclusion was correct under the standard governing interlocutor appeal: that the district court's judgment turned on a controlling, debatable question of law, the resolution of which will materially advance

the termination of this litigation. *See Ahrenholz v. Board of Trustees,* 219 F.3d 674, 675 (7th Cir. 2000). The question identified by the district court -- "whether a plaintiff can ***22** 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)" -- is one of law, because it requires construction of a statutory provision -- the term "subterfuge." Moreover, the question is controlling because the district court rejected all of the plaintiffs' other claims under the ADEA: that the mandatory retirement ordinance failed to qualify for the section 623(j) exemption because it improperly expanded the group of police and fire personnel subject to it beyond the class included prior to 1983 in violation of section 623(j)(1); and that the City violated the ADEA by not allowing the plaintiffs to demonstrate their fitness for duty before mandatorily retiring them. *See* App. A54; *see also* App. A6-A27. Construction of the subterfuge provision is also open to debate, because it appears to be a question of first impression in the context of section 623(j)(2). And finally, resolution of the question presented would materially advance the ultimate termination of these cases, because it could dispose entirely of the police officer plaintiffs' suits as well as the ADEA claims by the firefighters, leaving only the firefighters' due process claim for disposition in the district court. This modest claim, unlike the ADEA claims, would require only limited discovery, if any, for ***23** disposition.[9] Resolution of the subterfuge claim before embarking on unnecessary and extensive discovery is therefore the most efficient course of action, as the district court correctly determined. *See* App. A54; Drnek R. 51-3 at 8.

As for the motion to dismiss, in ruling on a motion under Fed. R.Civ.P. 12(b)(6) for failure to state a claim, a court "must take as true all factual allegations in the plaintiff's pleadings and draw all reasonable inferences in his favor." *Frederick v. Simmons Airlines, Inc.,* 144 F.3d 500, 502 (7th Cir. 1998). Dismissal is warranted, however, if the plaintiff could "'prove no set of facts in support of his claim which would entitle him to relief.'" *Stevens v. Umsted,* 131 F.3d 697, 700 (7th Cir. 1997) (quoting *Conlev v. Gibson,* 355 U.S. 41, 45-46 (1957)). This court reviews dismissals pursuant to Rule 12(b)(6) de novo. *See Loo-Per Maintenance Service, Inc. v. City of Indianapolis,* 197 F.3d 908, 911 (7th Cir. 1999).

In this case, the district court certified its order denying the City's motion to dismiss the ADEA claims for failure to state a claim. Review of that certified order requires this court to ***24** determine whether the plaintiffs have properly stated a claim of subterfuge under section 623(j)(2) of the ADEA. Because the plaintiffs cannot state such a claim, the district court's denial of the City's motion to dismiss the plaintiffs' ADEA claims should be reversed, and judgment should be entered for the City on those claims.

As we explain in part I below, the plain language of section 623(j) authorizes mandatory retirement for any reason, so long as it is not a subterfuge to evade the ADEA's purposes. To state a claim of subterfuge, the plaintiffs must allege that the City's ordinance had something other than the characteristics of an ordinary mandatory retirement plan authorized by the 623(j) exemption, and was instead devised as a scheme to evade one of the ADEA's substantive prohibitions. In other words, the plaintiffs must identify a provision of the ADEA that the mandatory retirement ordinance allegedly "evades." Without such identification, claims that supporters of the ordinance harbored illicit motives are irrelevant.

And as we explain in part II below, this lawsuit rests on no proper theory. Rather than require the plaintiffs to identify a statutory provision allegedly evaded by the ordinance, the district court determined that the plaintiffs stated a claim of subterfuge by allegations that the ordinance was not motivated by a concern for public safety. That approach contravenes the ***25** statute's plain language, which does not require a public safety justification for mandatory retirement. The district court also determined that the plaintiffs could state a claim of subterfuge by their allegations that the City enacted the ordinance to create employment opportunities for younger workers at the expense of older workers. Those allegations, however, reveal only that the City's ordinance is a classically valid mandatory retirement plan that functions like any mandatory retirement plan would. Next, the district court determined that a showing of subterfuge necessitates inquiry into the private motivations of individual legislators and City officials for supporting the ordinance. In the absence of any allegation that the ordinance evades some substantive prohibition of the ADEA, however, the broad inquiry that the district court authorized and the plaintiffs wish to undertake is simply unwarranted. Finally, and also contrary to the district court's conclusion, requiring the plaintiffs to identify a statutory prohibition that has allegedly been "evaded" does not render section 623(j)(2)'s subterfuge prohibition meaningless, but instead gives effect both to the exemption and its subterfuge provision. Because the plaintiffs have failed to state a claim of subterfuge, the City is entitled to judgment on the ADEA claims.

I. MANDATORY RETIREMENT OF POLICE AND FIRE PERSONNEL IS PERMISSIBLE UNDER THE ADEA.

Section 623(j) expressly exempts local governments from the ***26** ADEA's prohibitions with regard to mandatory retirement of police and fire personnel, so long as mandatory retirement is not a subterfuge to evade the ADEA's purposes. And a mandatory retirement ordinance evades the ADEA's purposes only where it circumvents a substantive prohibition of that Act. Where a plan is not alleged to evade a substantive prohibition of the ADEA, allegations that an employer desired by its plan to benefit younger workers are irrelevant.

A. Mandatory Retirement of Police and Fire Personnel Is Authorized For Any Reason Except As A Subterfuge To Evade The ADEA's Purposes.

"The starting point for interpreting a statute is the language of the statute itself." *E.g., Gwaltnev of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 56 (1987) (internalt quotation marks and citation omitted). Section 623(j) provides, in pertinent part, that "[i]t shall not be unlawful" for a local governmental employer "to discharge any individual because of such individual's age ... if such action is taken ... with respect to the employment of an individual as a firefighter or as a law enforcement officer ... and pursuant to a bona fide retirement plan that is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. 623(j) (1994 & Supp. V 1999).

By these explicit terms, section 623(j) exempts mandatory retirement of police and fire personnel from the ADEA's general ***27** prohibition on age-based discharge. The only limitation placed on the exemption is that the mandatory retirement not be "a subterfuge to evade the purposes" of the ADEA. 29 U.S.C. 623(j)(2) (1994 & Supp. V 1999).[10] Thus, the section 623(j) exemption allows municipalities to mandatorily retire police and fire personnel for any reason, so long as the retirement plan is not a subterfuge to evade the ADEA's purposes.

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

In *Public Em-plovees Retirement SVstem v. Betts,* 492 U.S. 158 (1988), the Supreme Court held that a "subterfuge to evade the purposes" of the ADEA must be a scheme to violate one of the ADEA's substantive requirements, and not a law that merely utilizes one of the statute's express exemptions. The Court considered the meaning of the phrase "subterfuge to evade the purposes" of the ADEA in the context of section 623(f)(2) of that statute, which exempted from the ADEA's prohibitions certain actions taken in observance of "the terms of ... any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter ...." 492 U.S. at 165 (citing ***28**29 U.S.C. 623(f)(2) (1982 & Supp. V 1987)).[11] The plaintiff in *Betts* challenged a disability retirement benefit plan under the ADEA on the ground that it denied disability benefits to certain employees on account of their age. *See id.* at 163-64. The Court held that the term "subterfuge" should be afforded its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion." *Id.* at 167 (internal quotation marks and citation omitted). The Court added that to prove subterfuge, a plaintiff must show that the plan at issue was intended to "evade a statutory requirement": a plan "cannot be a subterfuge to evade the ADEA's purposes] ... unless it discriminates in a manner forbidden by the substantive prohibitions of the Act." *Id.* at 177. The ADEAs "purposes," according to the Court, could not be separated from its substantive prohibitions, since those prohibitions were the "best evidence of the evils Congress sought to eradicate." *Id.* at 176 ***29** (citing *United Air Lines, Inc. v. McMann,* 434 U.S. 192, 198 (1977) ("the Act is the vehicle by which its purposes are expressed and carried out").

The Court then concluded that the fact that a challenged disability plan authorized age discrimination could not in itself support a claim of subterfuge. The Court reasoned that because section 623(a) of the ADEA effectively prohibits any age-based retirement plan, any age-based benefit could be said to violate or "evade" section 623(a) of the ADEA. *See*492 U.S. at 176-77. This approach, the Court found, 'would in effect render the [section 623(f)(2)] exemption nugatory," and would also "be facially irreconcilable with the prohibitions" in section 623(a): 'It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes ...." *Id.* at 177. *See also id.* at 177-78 ("'Because all retirement plans necessarily make distinctions based on age, I fail to see how the subterfuge language ... could have been intended to impose a requirement which almost no retirement plan could meet."') (quoting *McMann,* 434 U.S. at 207) (White, J., concurring)). Instead, the Court concluded that a benefit plan was not a forbidden subterfuge under the ADEA "so long as the plan is not a method of

discriminating in other, non-fringe benefit aspects of the ***30** employment relationship." 492 U.S. at 177. Such an interpretation, according to the Court, appropriately hews to

> a congressional judgment that age-based restrictions in the employee benefit plans covered by section AD623(f)(2)] do not constitute the "arbitrary age discrimination in employment" that Congress sought to prohibit in enacting the ADEA. Instead, under this construction of the statute, Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment.

Id. The Court determined that any other interpretation of the statute would "eviscerate" section 623(f)(2). *Id.* In short, the Court concluded, "Congress intended to exempt employee benefit plans from the coverage of the Act except to the extent plans were used as a subterfuge for age discrimination in other aspects of the employment relation."*Id.* at 180.

Moreover, in *Betts,* the Court explained that its construction of the ADEA, while granting 'employers wide latitude in structuring employee benefit plans," did not render the "'not a subterfuge' language [of section 623(f)(2)] a dead letter." 492 U.S. at 180. Instead, the Court observed, "[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.* The Court then offered two examples of actionable subterfuge. *See id.* First, the court explained, an employer might engage in subterfuge if it adopted a benefit plan provision designed to ***31** retaliate against an employee who had opposed an action made unlawful under the ADEA, filed an age-discrimination complaint, or participated in age-discrimination litigation against the employer. *See id.* In such a case, the employer's benefit plan could be viewed as a subterfuge to evade the ADEA's prohibition on retaliation, 29 U.S.C. § 623(d) (1994). *See id.* Another example of illegal subterfuge, the Court observed, could arise if an employer reduced all employees' salaries but at the same time increased benefits for younger workers. *See id.* Such conduct "might give rise to an inference that the employer was in fact utilizing its benefits plan as a subterfuge for age-based discrimination in wages, an activity forbidden by" section 623(a)(1) of the ADEA. *Id.*

The same approach should guide construction of the section 623(j) exemption. A mandatory retirement plan cannot be a subterfuge merely because it permits an employer to replace older workers with younger ones -- all mandatory retirement plans do that. To state a claim of subterfuge under section 623(j)(2), a plaintiff must identify some substantive prohibition of the ADEA that they believe the ordinance "evades" other than its general prohibition on age discrimination.

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

It follows that an employer does not engage in a forbidden ***32** subterfuge merely because it prefers younger workers to older ones, and relies on that preference when it decides to avail itself of one of the ADEA's exemptions. In *Bell v. Purdue University,* 975 F.2d 422 (7th Cir. 1992), this court made just this point in the context of section 623(f)(2) -- the same section at issue in *Betts.* There, relying on *Betts,* this court concluded that the university's plan, which ended contributions to employee pensions at age 65, was not a subterfuge within the meaning of section 623(f)(2). *See id.* at 423-24. The court reiterated *Betts*' definition of subterfuge, and observed that its inquiry "must focus on whether the [university's pension plan] is a subterfuge to evade one of the ADEA's substantive provisions." *Id.* at 429. In that case, the plaintiffs had relied on "statements and anecdotal evidence that some [university] officials ... preferred younger faculty," and claimed that "from this evidence the plaintiffs insisted that a fact finder could draw the inference that the cut in contributions ... was intended to weed out faculty members over 65." *Id.* at 429. Rejecting this approach, the court concluded that "the defendants cannot be liable for their motives if their conduct has not evaded the ADEA's prohibitions." *Id. See also Henn v. National Geographic Society,* 819 F.2d 824, 830 (7th Cir.) ("Any early retirement program reduces average age, because only older employees are eligible to retire. That the [employer] favored ***33** the results of its program does not condemn the program."), *cert. denied,*484 U.S. 964 (1987).[12]

In *Bell,* this court then ultimately held that the plan at issue, which on its face was an age-differential permitted by section 623(f)(2) of the ADEA, did not "evade" any of the ADEA's relevant substantive prohibitions. *See*975 F.2d at 429. For example, the plaintiffs contended that the university's cessation of contributions evaded either the ADEA's prohibition against wage cuts or involuntary retirement. *See id.* The court rejected these contentions. Because the plaintiffs had no evidence that the cessation in benefits camouflaged a wage cut to older employees, they could not show that the plan was intended to evade the ADEA's wage discrimination prohibition. *See id.* Thus, the plaintiffs could not establish that "the fringe benefit cut ... is anything more than meets the eye -- an age differential in fringe benefits which is permitted under the ADEA." *Id.* Nor could the plaintiffs show that the university intended to evade the prohibition against involuntary retirement, because the plan did not require the plaintiffs to choose between retiring at age 65 or losing their pensions entirely. *See id.* Although the plan took away an incentive for employees to ***34** continue working past age 65, the court explained, "taking away an incentive in the form of a fringe benefit is not the kind of evasion prohibited by *Betts*' interpretation of the ADEA." *Id.*

In short, *Bell,* like *Betts,* clearly establishes that there is no subterfuge where there is no allegation or evidence of a violation of a substantive prohibition of the ADEA outside the exemption's scope. But *Bell* adds that plaintiffs without such allegations or evidence cannot show subterfuge by claiming merely that an employer favored younger employees or otherwise harbored "illicit" motives for adopting a retirement plan.

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

Under the framework for analyzing a claim of "subterfuge" described above, the plaintiffs' claims are insufficient as a matter of law to impose liability on the City. To support a claim advanced in a complaint, the plaintiffs need only provide "a short and plain statement showing the plaintiff is entitled to relief, the purpose of which is to give the defendant notice of the claims and the grounds they rest upon." *Thompson v. Illinois Department of Professional Regulation,* 300 F.3d 750, 753 (7th Cir. 2002). *See*Fed. R.Civ.P. 8(a). But "if the plaintiff chooses to provide additional facts, beyond the short and plain statement requirement, the plaintiff cannot prevent the defense from suggesting that those same facts demonstrate the plaintiff is not entitled to relief." *Thompson,* 300 F.3d at 753-54. Here, ***35** because the complaints provide notice of no claim other than one based on supposedly illicit motives not tied to any violation of a substantive policy of the ADEA, it fails to state any claim for which relief can be granted.

The complaints in these cases fail to give the City notice of any claim for which relief could be granted, and the additional facts the plaintiffs chose to provide purporting to support their claim only bolster the conclusion that they are not entitled to relief. In particular, the complaints wholly fail to identify any prohibition of the ADEA that the City's ordinance allegedly "evades," and the plaintiffs articulated no such provision in response to the City's motion to dismiss or motion for certification of the district court's order. Nor have the plaintiffs claimed to be interested in pursuing any violation of a substantive ADEA provision in the briefs they filed below in response to our motion to dismiss their complaints. To the contrary, they have never identified any feature of the City's ordinance that distinguishes it from any other valid mandatory retirement ordinance.

As we explain above, the complaints and the plaintiffs' arguments in support of them below provide fair notice of only one claim -- that the City has no public safety justification for its mandatory retirement ordinance, but instead merely prefers younger workers. That is not, however, a subterfuge to evade any ***36** purpose of the ADEA. Section 623(j) does not require an employer to satisfy a court that its mandatory retirement ordinance has a public safety justification; instead it permits an employer to prefer younger workers in safety-sensitive positions.

Rather than require the plaintiffs to identify a statutory prohibition that has allegedly been evaded by the mandatory retirement ordinance, the district court accepted a different approach to stating a claim of subterfuge. The district court concluded that the plaintiffs stated a claim of subterfuge by alleging that the mandatory retirement ordinance was motivated by considerations other than public safety and by alleging that the ordinance was intended to create employment opportunities for younger workers at the expense of older workers. The court further held that the question of subterfuge necessitated inquiry into the private motivations of individual legislators and City officials for supporting the mandatory retirement ordinance. Moreover, according to the district court, the *Betts* method of analyzing subterfuge we describe above would render the subterfuge provision of section 623(j)(2) superfluous. All of these conclusions were erroneous, as we

explain below.

A. Allegations That A Mandatory Retirement Plan Was Not Motivated By Public Safety Considerations Do Not State A Claim Of Subterfuge Under Section 623(j)(2).

The plain language of section 623(j) belies the plaintiffs' contention -- which the district court endorsed -- that an ***37** ordinance requiring the mandatory retirement of police and fire personnel is a "subterfuge" to evade the ADEA unless it is justified by concerns for public safety. *See* Minch R. 1-1 at 8-9; Minch R. 16 at 11-12; Drnek R. 6 at 5. Nowhere does the statute require that an employer who mandatorily retires police and fire personnel be motivated either exclusively or in part by public safety concerns, or that it offer any justification at all for such a policy. Indeed, the Secretary of Health and Human Services has twice been charged by Congress with establishing guidelines that employers could use to retire police or firefighters based on their fitness for duty, yet has been unable to produce guidelines. Plainly Congress has not required public employers to demonstrate the relationship between public safety and age in that context; the inquiry is simply too difficult.

Because nothing in the plain language of section 623(j) requires an employer to justify its use of the exemption on public safety grounds, the "subterfuge" provision cannot be construed to require such a justification. The Supreme Court made precisely this point in *Betts.* There, the plaintiff contended that section 623(f)(2) exempted age-based distinctions in benefit plans "only when justified by the increased cost of benefits for older workers," and that although such a requirement did not appear in the statute's plain language, the requirement could be drawn from the statutory provision that an age-based ***38** distinction in a benefit plan could not be a "subterfuge to evade the purposes" of the ADEA. 492 U.S. at 169-70. For this proposition, the plaintiff relied on an interpretive regulation promulgated by the Department of Labor, which provided that the purpose of section 623(f)(2) was to "permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations," and defined "subterfuge" to require a cost-based justification for an age-differential in benefit plans. *Id.* at 170.

The Court rejected this contention, expressly holding that "this approach to the definition of subterfuge cannot be squared with the plain language of the statute." 429 U.S. at 170. The Court observed that the regulation's "objective cost-justification requirement failed] to acknowledge" the "subjective element" of the term "subterfuge." *Id.* Indeed, in reaching this result, the Court declined to defer to the agency's interpretation of the statute, holding that 'no deference is due to agency interpretations at odds with the plain language of the statute itself." *Id.* As the Court made clear, the "subterfuge" exception to the section 623(f)(2) exemption "cannot be limited in the manner suggested by the regulation." *Id.* at 172.

Here, the plaintiffs claim that the only legitimate justification for a mandatory retirement ordinance under section 623(j) is "public safety." This purported "public safety" ***39** justification, however, is no different from the purported costjustification rejected in B*etts.*Section 623(j) does not contain any public safety requirement, and under *Betts,* that requirement cannot be manufactured out of the subterfuge provision.

If Congress had intended that "public safety" be the only rationale justifying utilization of the section 623(j) exemption, it could easily have included that requirement in the exemption's plain language. Indeed, after *Betts,* Congress amended section 623(f)(2) to add the express requirement that employers demonstrate a cost-justification for age-based benefit plans, and to remove the term "subterfuge" from that section. *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 978-89 (1990) [hereafter "OWBPA"]. Section 623(j), in contrast, was not drafted to include any analogous "public safety" requirement, even at the time it was amended -- after *Betts* -- in 1996, and the court should not read it into the plain statutory language. *See, e.g., Bates v. United States,* 522 U.S. 23, 29 (1997) (where a requirement does not appear on statutes face, court should not read it into the statute).[13]

***40** Beyond the obstacle posed by the exemption's plain language, requiring mandatory retirement of police and fire personnel to be justified on public safety grounds would effectively require employers to demonstrate that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" before engaging in mandatory retirement. 29 U.S.C. § 623(f)(1) (1994). But as this court concluded in *Kopec v. City of Elmhurst,* 197 F.3d 894 (7th Cir. 1999), Congress could not have intended to require such a showing under section 623(j), because the "bona fide occupational qualification" or "BFOQ" defense is separate and distinct from the section 623(j) exemption. *See id.* at 902.

Thus, "[s]ectionin 623(j) would ... accomplish nothing if the exemption from the ADEA were conditioned upon a BFOQ showing; and we are loathe to adopt constructions that render a statutory provision superfluous."*Id.*[14]

41** If the plain language of section 623(j) were not clear enough, the legislative history of section 623(j) only bolsters our submission. The legislative history makes clear that section 623(j) reflects Congress's willingness to presume that mandatory retirement of police and fire personnel benefits the public safety rather than require public employers to prove that relationship. For example, advocates of the exemption explained that age limits would ensure that public safety officers are in peak condition. *See* 141 Cong. Rec. E283-01 (Feb. 7, 1995) (extension of remarks of Rep. Fawell); 141 Cong. Rec. H3822-01 (Mar. 28, 1995) (statements of Reps. Fawell, Owens, and Weldon). Advocates also observed that, as a matter of medical fact, age directly affects a person's ability to work as a police officer or firefighter, and that exempting state and local police and fire departments from the ADEA "is literally a life or death matter." 141 Cong. Rec. H3822-01, 3823 (statement of Rep. Owens); 141 Cong. Rec. S3891-02, 3894-95 (Mar. 14, 1995) (statement of Sen. Mosley-Braun). *See Kopec,* 193 F.3d 903-04. Furthermore, mandatory retirement was viewed as necessary at least until effective alternatives to age-based policies that had no disparate impact on women and minorities could be developed. ***42See* 141 Cong. Rec. H3822-01, 3823 (Mar. 28, 1995) (statement of Rep. Owens). These statements thus make plain that a determination that mandatory retirement benefits the public safety is built into the section 623(j) exemption. For that reason, it was unnecessary -- and indeed would have been illogical -- for Congress to require employers to further justify mandatory retirement on public safety grounds.

In short, a claim like the plaintiffs' -- that an employer who enacts a mandatory retirement ordinance pursuant to section 623(j) engages in illegal subterfuge unless the employer was motivated by public safety concerns -- contravenes the exemption's plain language and is no basis on which to predicate a claim of subterfuge under the ADEA.

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.

As we explain above, a claim of subterfuge requires a plaintiff to identify a substantive requirement of the ADEA allegedly evaded by the mandatory retirement ordinance. The plaintiffs have never done that here; in fact, the plaintiffs' allegations demonstrate that the City's plan is valid, and therefore not a subterfuge.

The only claim the plaintiffs have ever pled or otherwise advanced in this case is that the City's "real purpose" for enacting the ordinance was to "eliminat[e] from the ranks of the ***43** Police [and Fire] Department[s] officers who had surpassed 63 years of age so that, among other reasons, the City could hire and promote younger" police and fire personnel. Minch R. 1-1 at 8-9; Drnek R. 6 at 5. *See generally* Drnek R. 41. This, in terms, is an allegation that the City used its mandatory retirement plan as a way of removing older workers from the police and fire departments to the benefit of younger workers. But this is no more than the statute allows.

The plaintiffs' so-called allegations of subterfuge -- that the ordinance was intended to terminate the employment of older workers, replace older workers with younger workers, and create more opportunities for younger workers -- merely describe the inevitable results of any mandatory retirement plan. The very point of mandatory retirement is to remove older workers, and as this court has explained, "[w]hen older employees leave the work force, for whatever reasons, they will often be replaced by younger employees." *Kier v. Commercial Union Insurance Cos.,* 808 F.2d 1254, 1258 (7th Cir.), *cert. denied,*481 U.S. 1029 (1987). The replacement of older workers with younger workers therefore merely "represents the normal course of employment histories, and is nothing to marvel at." *Id.* In fact, replacement of mandatorily retired workers with younger workers is not only the likely result of a mandatory retirement plan, but may even be necessary in order to run adequately staffed police and fire ***44** departments. Yet, under the plaintiffs' theory, mandatory retirement would be permissible only so long as the City did not hire or promote younger workers to replace the retired workers. This illogical construction of the subterfuge provision renders section 623(j) meaningless; a local government would face a difficult decision if forced to choose between the safety concerns presented on average by older workers, and being short staffed because it was unable to promote or hire younger workers to fill the vacancies created by the mandatory retirement of older employees.

Indeed, because creation of job opportunities and replacement of older workers with younger workers is the consequence of "terminating" older workers under a mandatory retirement plan, the only ADEA prohibition the plaintiffs' claims could remotely be said to invoke is its prohibition on age-based discharge. *See*29 U.S.C. § 623(a)(1) (1994). But of course, any

mandatory retirement plan for police and fire personnel under section 623(j) could be viewed as evading that prohibition; any mandatory retirement age is, of course, an age-based discharge. Such an interpretation of the subterfuge provision would therefore eviscerate the section 623(j) exemption and is precluded by *Betts*' construction of the subterfuge language. Thus, Congress must have intended by section 623(j) to exempt mandatory retirement plans for police and fire personnel from the ***45** ADEA's prohibition on age-based discharge, except to the extent such plans were used as a subterfuge for age discrimination "in other aspects of the employment relation." *Betts,* 492 U.S. at 180. A plaintiff must therefore identify some substantive prohibition of the ADEA allegedly evaded by a mandatory retirement plan, other than the prohibition on age-based discharge, to avoid wiping out the exemption. The plaintiffs did not do so here.[15]

In short, the plaintiffs have claimed not that the City's ordinance evades any provision of the ADEA, but that the ordinance does precisely what any mandatory retirement plan would inevitably do and operates no differently than any mandatory retirement plan would. Their own theory of liability therefore demonstrates that the mandatory retirement ordinance is nothing more than meets the eye. Such allegations cannot possibly state a claim of "subterfuge" within the meaning of section 623(j), and therefore fail to state any claim upon which relief could be granted.

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

Keeping the focus on whether a plaintiff has raised allegations that an age-based retirement plan evades a statutory prohibition avoids the untoward path that the plaintiffs and the district court envisioned for the balance of this litigation. The plaintiffs alleged, and the district court accepted, that the City had an allegedly "improper" motive for instituting the mandatory retirement plan. But as *Bell* makes clear, a valid plan cannot be rendered invalid even if some legislators or City officials allegedly favored the inevitable effects of the plan. For this reason, the district court's determination that the plaintiffs should be permitted to inquire into the motivations of City council members and other City officials for supporting the ordinance based merely on their allegation of these effects as evidence of subterfuge, *see* App. A20-A25, was erroneous and should be rejected.

As we explain above, the plaintiffs' claim that City officials and legislators intended to use the ordinance to "eliminate" older workers in order to create employment opportunities for younger workers establishes nothing illegal or remarkable about the mandatory retirement ordinance, or that it evades any statutory prohibition, and thus does not state a claim that the ordinance is a subterfuge. That result cannot possibly ***47** change simply because some legislators or City officials were allegedly pleased by the ordinance's consequences, or even motivated by those consequences. The plaintiffs' claim, in fact, is not substantively different from the claim rejected in *Bell* that university officials' preference for younger faculty implied that the benefit plan at issue there was designed to weed out older faculty. *See Bell,* 975 F.2d at 429. Instead, to survive a motion to dismiss, the plaintiff must allege that the plan is a subterfuge to evade one of the ADEA's substantive provisions. *See id.* at 429-30.

This approach is consistent with the courts' generally cautious approach toward inquiry into legislative motive. Although such inquiry is permitted in the context of certain constitutional claims, even then, courts are ordinarily reluctant "to probe the motives of legislators and administrators." *Grossbaum v. Indiana-Polis-Marion Countv Building Authoritv,* 100 F.3d 1287, 1292-94 (7th Cir. 1996), *cert. denied,*520 U.S. 1230 (1997).[16] This guarded approach is based on a number of both "theoretical" and "practical" factors. *See id.* First, as this ***48** court has explained, "the text of the Constitution prohibits many government actions but makes no mention of governmental mentes reae (i.e., guilty minds)," and "[w]e are governed by laws, not by the intentions of legislators."' *Id.* (quoting *Conrov v. Aniskoff,* 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment)). A second problem, this court observed, is that legislators often support laws for numerous reasons: "Government action may be taken for a multiplicity of reasons, and any number of people may be involved in authorizing the action.... Moreover, once a court finds an illicit motive, may the legislature ... ever take the same action again without the imputation of an improper intent?" *Id.* at 1293. Indeed, the Supreme Court emphasized this very point in the context of federal preemption, concluding that "inquiry into legislative motive is often an unsatisfactory venture. What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Develo-Pment Commission,* 461 U.S. 190, 216 (1983). Thus, in *Pacific Gas,* the Court accepted California's legitimate "stated purpose" for the regulation at issue, and declined to examine evidence of the legislators' alleged additional, improper motives. *See id.*[17]

***49** Moreover, if the court were to permit the plaintiffs to inquire into legislative motive in this case, the plaintiffs would have to demonstrate not merely that the sponsor of the ordinance or one or two alderman harbored "impermissible" motives, but that the majority of the fifty-member City Council ratified those allegedly impermissible motives when it passed the ordinance. *See Matthews v. Columbia County,* 2002 WL 1337303 (11th Cir. June 19, 2002); *Mason v. Village of El Portal,* 240 F.3d 1337, 1339-40 (11th Cir. 2001). In *Matthews,* for example, the plaintiff challenged a county board's decision to eliminate Matthews' job. *See*2002 WL 1337303, at *1. A jury found that ***50** one member of the three-member board was motivated by a desire to retaliate against Matthews for her "protected speech activity" in violation of the First Amendment, and that the two other members of the board were influenced by that improperly motivated member. *Id.* The jury returned a verdict for Matthews, but the Ninth Circuit reversed, concluding that the "County can be subject to liability only if the commission itself acted with an unconstitutional motive. An unconstitutional motive on the part of one member of a three member majority is insufficient to impute an unconstitutional motive to the [board] as a whole." *Id.* at *2. The court explained:

> Lawmakers' support for legislation can come from a variety of sources; one commissioner may support a particular piece of legislation for a blatantly unconstitutional reason, while another may support the same legislation for perfectly legitimate reasons. A well-intentioned lawmaker who votes for the legislation -- even when he votes in the knowledge that others are voting for it for an unconstitutional reason and even when his unconstitutionally motivated colleague influences his vote -- does not automatically ratify or endorse the unconstitutional motive.

Id. at *3. The court thus declined to force the "well-intentioned lawmaker ... either to vote against his own view of what is best for his county or to subject his county to [se]ection 1983 liability" by voting for the measure. *Id.*

In this case, the district court's approach to subterfuge would therefore result in depositions of the majority of the City Council to determine whether that majority voted for the ***51** mandatory retirement ordinance for "improper" reasons, notwithstanding the plaintiffs' failure to allege any improper reasons. Even then, the City Council would presumably remain free, even after an adverse decision in this case, to reenact an identical mandatory retirement ordinance if the legislators can purify their motives to the satisfaction of the district court. Leaving aside the likelihood that this approach to litigation under section 623(j) will be a long road to a dead end, it is unwarranted where, as here, the plaintiffs do not articulate any substantive provision of the ADEA that has been violated, as we explain above. Having failed to identify such a provision, the best evidence of what motivated the majority of the City Council to pass the ordinance is the ordinance itself, which provides that it was motivated by public safety concerns. *See* Drnek R. 10, exh. C (Chicago City Council, *Journal of Proceedings,* May 17, 2000, at 32899-32901). And there is no doubt that the majority of the City Council supported that concededly "legitimate" motivation by passing the ordinance.[18] In sum, there is simply no basis to invalidate this ordinance based on supposedly illicit legislative motivation when even the plaintiffs do not believe that it infringes any statutory policy except the overarching ***52** policy against age discrimination to which section 623(j) is an exception.

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

In the district court's view, application of the *Betts* subterfuge analysis to section 623(j) would render that section's subterfuge provision meaningless. That conclusion was erroneous; a plaintiff could establish "subterfuge" under the 623(j) exemption in a number of ways. For instance, the retaliation example offered by the Court in *Betts* applies with equal force to the section 623(j) exemption. Accordingly, a plaintiff might state a claim of subterfuge under section 623(j) if he alleged that a mandatory retirement ordinance was enacted to retaliate against an employee who had complained of age discrimination or participated in ADEA litigation against the City. Such a claim would allege that the mandatory retirement ordinance was intended to evade the ADEA's prohibition on retaliation, *see*29 U.S.C. 623(d) (1994). A plaintiff might also state a claim of subterfuge if 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. Such a claim would allege that the mandatory retirement ordinance was designed to circumvent the ADEA's prohibitions on age-based discrimination in compensation, *see****53**29 U.S.C. § 623(a)(1) (1994). Although we are confident that other examples of potential subterfuge exist, these two examples, as in *Betts,* "suffice to illustrate the not-insignificant protections provided to older employees by the subterfuge proviso" of section 623(j). *Betts,* 492 U.S. at 180.

In the district court's view, application of *Betts* to section 623(j) was inappropriate because "the exception in 623(f)[(2)] related only to fringe benefits, but left undisturbed all of the non-fringe aspects of the employment relationship that are protected by § 623(a), the ADEA's primary enforcement mechanism." App. A51 internalt quotation marks and citations omitted). Unlike section 623(f)(2), the court observed, section 623(j) "exempts employers entirely from the protections of § 623(a). That is, if an employee is mandatorily retired, there is nothing left of the employment relationship to protect." *Id.* Although the court acknowledged that the plaintiffs could state a claim of subterfuge by alleging that a mandatory retirement ordinance was retaliatory, the court opined that "if that were the only manner in which a plaintiff could demonstrate subterfuge," then the subterfuge provision of section 623(j)(2) would "provide[] no protection that is not already provided elsewhere in the ADEA, and would be rendered utterly meaningless." *Id.*

The district court's view that section 623(j)'s "subterfuge" ***54** provision describes separate, substantive protections apart from those delineated in the other provisions of the ADEA is incorrect. First, the retaliation example described in *Betts* is inconsistent with district court's view that "subterfuge" must offer a protection beyond the ADEA's other prohibitions. In *Betts,* the court determined that a retaliatory plan could be a subterfuge. Second, the district court's view is inconsistent with section 623(j)(2)'s plain language. As we explain above, section 623(j)(2) allows age-based discharge if accomplished through "a bona fide ... retirement plan that is not a subterfuge to evade the purposes of this chapter."29 U.S.C. 623(j)(2) (1994 & Supp. V 1999). 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. That is the very interpretation of the subterfuge language articulated in *Betts. See* 492 U.S. at 177-81.

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

As we explain above, the district court certified its order denying the City's motion to dismiss the ADEA claims because that ***55** order turned on a controlling, debatable question of law, the resolution of which would materially advance the ultimate termination of the litigation: "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). In this case, as we explain above, this question should be answered in the negative when, as here, the plaintiff does not identify any other provision of the ADEA that is violated by a mandatory retirement law. When, as here, a plan complies with section 623(j)(1) and a plaintiff fails to allege or identify any other prohibition in the ADEA that a mandatory retirement plan "evades" within the meaning of section 623(j)(2), other than its general prohibition on age discrimination, then the plaintiff cannot show subterfuge under section 623(j)(2) and there is no violation of the ADEA.

In the end, however, the precise formulation of the certified question has minimal practical significance. This court has made clear that on interlocutory appeal pursuant to section 1292(b), "we are not constrained on our appellate review to the controlling question alone, but may consider other pertinent issues reflected in the district court's order." *Hillman v. Resolution Trust Corp.,* 66 F.3d 141, 143-44 (7th Cir. 1995). That is because "an appeal under section 1292(b) brings up the whole certified order[,] ... rather than just the legal ***56** issue that led to certification." *United Air Lines v. Mesa,* 219 F.3d 605, 609 (7th Cir., *cert. denied,*531 U.S. 1036 (2000). *Accord, e.g., International Brotherhood of Teamsters v. PhiliP Morris, Inc.,* 196 F.3d 818, 821-22 (7th Cir. 1999). *See also*28 U.S.C. § 1292(b) (2000). Thus, regardless how the controlling question is phrased or precisely answered, the underlying order of the district court that gave rise to the certification is itself before this court. And it is clear the district court denied the motion to dismiss only because of its erroneous construction of section 623(j), which permitted the plaintiffs to prove subterfuge by reference to allegedly illicit motives not tied to a violation of any statutory policy other than the general prohibition on age discrimination.

Thus, the order certified for interlocutor appeal in this case erroneously denied the City's motion to dismiss the plaintiffs'

ADEA claims. The plaintiffs have failed to identify a relevant statutory prohibition that the ordinance evades, and have therefore failed to state a claim of subterfuge under section 623(j)(2) of the ADEA. Accordingly, the district court's judgment should be reversed, and the district court directed to enter judgment for the City on the ADEA claims.

*57 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.

*58 STATEMENT CONCERNING ORAL ARGUMENT

This appeal presents an issue of first impression, requiring the court to define the scope of the ADEA's exemption for mandatory retirement of police and fire personnel. The district court held that a mandatory retirement ordinance that was intended to retire older workers and replace them with younger workers could be a subterfuge to evade the ADEA's purposes, and that the plaintiffs should be permitted to inquire into the motivations of City officials and legislators for supporting the ordinance in order to support their subterfuge claim. The City has engaged in mandatory retirement for more than sixty years, since long before the ADEA's enactment, and in passing the ordinance at issue in this case made clear that its purpose was to protect the public safety. Accordingly, this case presents critical questions of law and public policy. Oral argument is therefore warranted to explore whether the district court's ruling was proper.

Appendix not available.

Footnotes

1 Plaintiffs Drnek and Cosentino were Chicago police officers. Plaintiffs Minch and Graf were Chicago firefighters.

2 The court also denied the motion as to the due process claims of the firefighter plaintiffs, but granted the motion as to the due process claims of the police officer plaintiffs. App. A27-A40. Those claims are not at issue on appeal, and do not affect the jurisdiction of this court over the ADEA claims. *See, e.g., Massey Ferguson v. Gurley,* 51 F.3d 102, 105 (7th Cir. 1995).

3 As we explain above, the plaintiffs also raised due process claims, but those claims are not the subject of this appeal.

4 The 1939 ordinance provided: "The age of sixty-three years shall be the maximum age for the employment of policemen and firemen in the classified civil service of the city. Every policeman and every fireman in the classified civil service of the city who has attained the age of sixty-three years shall forthwith and immediately be retired from service." Municipal Code of Chicago, Ill. § 25-37 (1939).

5 The amended ordinance provided:
The age of seventy years shall be the maximum age for legal employment of sworn members of the Police Department and members of the uniformed service of the Fire Department in the classified career service of the City. Every sworn members [sic] of the Police Department and every member of the uniformed service of the Fire Department in the classified career service of the City who has attained the age of seventy years shall forthwith and immediately be retired from service. No sworn member of the Police Department or member of the uniformed service of the Fire Department shall be subject to mandatory retirement based on age before attaining the age of seventy, except where the Commissioner of Personnel, in conjunction with the Fire Commissioner or the Police Superintendent and after consultation with members of the City Council Committee on Administration, Reorganization, and Personnel, determines for a particular title or classification that age is a bona fide occupational qualification reasonably necessary to the normal operation of the Department in which the individual is employed. Nothing in this Section shall preclude the Departments of Police and Fire from maintaining, revising, or establishing additional performance standards, based on factors other than age, for all sworn members of the Police Department and all members of the uniformed service of the Fire Department, which standards must be met in order for sworn members of the Police Department and members of the uniformed service of the Fire Department to remain in the active service of these Departments, the health, welfare, and safety of the public requiring the same.
Municipal Code of Chicago, Ill. § 25-37 (1984).

[6] March 3, 1983, was the date that the Supreme Court upheld the extension of the ADEA to state and local governments against Tenth Amendment attack in *EEOC v. Wyoming,* 460 U.S. 226 (1983).

[7] The 1988 mandatory retirement ordinance provided:
The age of sixty-three years shall be the maximum age for legal employment of sworn members of the Police Department and members of the uniformed service of the Fire Department. Every sworn member of the Police Department and every member of the uniformed service of the Fire Department who has attained the age of sixty-three years prior to December 31, 1993, shall forthwith and immediately be retired from service.
Municipal Code of Chicago, Ill.§ 25-37 (1988).

[8] The City also argued that the ordinance could not be a subterfuge to evade the ADEA's purposes because it merely reinstated, following the 1996 exemption, the same age requirement that was in place before the ADEA's enactment, and because it was part of an overall, bona fide system of retirement benefits. The district court rejected these arguments. App. A19-A20.

[9] The district court determined that resolution of the question in the City's favor would dispose of the firefighter plaintiffs' due process claim as well because that claim depends upon the firefighter plaintiffs' ability to state a claim under the ADEA. *See* App. A54; *see also* App. A29-A32. This rationale would provide an additional reason why disposition of the ADEA claim would materially advance the ultimate termination of the litigation and why the question is controlling.

[10] There is no claim in this case that the City's mandatory retirement plan was not "bona fide" within the meaning of section 623(j)(2).

[11] Although *Betts* involved a different ADEA provision, the subterfuge language of the two provisions is virtually identical. *Compare*29 U.S.C. § 623(j)(2) (1994 & Supp. V 1999) (authorizing mandatory retirement of police and fire personnel when accomplished "pursuant to a bona fide ... retirement plan that is not a subterfuge to evade the purposes of this chapter) *with*29 U.S.C. § 623(f)(2) (1982 & Supp. V 1987) (authorizing actions taken in observance of "the terms of ... any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter"). Other courts have consulted *Betts*' definition of "subterfuge" in construing section 623(j). *See, e.g., Knight v. Georgia,* 992 F.2d 1541, 1545-46 (11th Cir. 1993) ("precedents construing the phrase 'subterfuge to evade [the ADEA]"' "should properly be consulted to give meaning to the term 'subterfuge' as it appears in" section 623(j)) (brackets in original) (citation omitted).

[12] *Henn*'s earlier discussion of subterfuge in the context of section 623(f)(2) of the ADEA, *see*819 F.2d at 827, is rendered obsolete by *Betts* and *Bell,* as is the discussion of that section in *EEOC v. Home Insurance Co.,* 672 F.2d 252 (2d Cir. 1982), on which the district court relied.

[13] Nor, for that matter, was section 623(j) amended after *Betts* to remove its "subterfuge" language. As the Eleventh Circuit explained in *Knight v. Georgia,* 992 F.2d 1541 (11th Cir. 1993), this omission is significant. In *Knight,* the court held that it could "infer ... from the fact that Congress removed the subterfuge language from [section 623(f)(2)] while leaving it unaltered in [section 623(j)] ... that the OWBPA was meant to modify only [section 623(f)(2)]. 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.

[14] Indeed, the legislative history of the exemption's original enactment suggests that Congress actually intended the exemption to relieve local governments from the burden of relying on the BFOQ defense with regard to mandatory retirement of police and fire personnel:
There is a very strong need for this exemption at this time. As of March of this year 33 States or localities were facing litigation by the EEOC on this issue. Numerous other private suits have also been filed, threatening fiscally pressed State and local governments with potential added litigation costs. There is no uniformity in this litigation *and much* uncertainty of how a bona fide occu-Pational Qualification defense will be treated."
132 Cong. Rec. S16850-02, 16,865 (Oct. 16, 1986) (statement of Sen. Ford) (emphasis added).

[15] The plaintiffs failed to make such an identification notwithstanding their agreement that *Betts*' definition of "subterfuge" applies to this case, *see* Minch R. 16 at 11 n.7, 1819; Minch R. 59 at 10-12, and notwithstanding our position -- which we took repeatedly in the district court and in our petition for permission to appeal, *see* Drnek R. 33 at 9-10; Drnek R. 46 & Minch R. 56 at 15-16 (attaching petition) -- that the only substantive prohibition of the ADEA even remotely invoked by their claims was the prohibition on age-based discharge.

[16] Even in *Arlington Heights v. Metro-politan Housing Development Corp.,* 429 U.S. 252 (1977), on which the plaintiffs primarily relied in the district court, the Court acknowledged that calling legislators to testify regarding "the purpose of the official action" is reserved for "extraordinary instances." *Id.* at 268. *See also id.* at 268 n.18 ("Placing a decisionmaker on the stand is therefore 'usually to be avoided."') (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971)).

[17] Likewise, in *Fraternal Order of Police v. City of Hobart,* 864 F.2d 551 (7th Cir. 1988), a case involving allegations that a city council's enactment of an ordinance violated the First Amendment, this court held that evidence of legislative motive was inadmissible. In that case, the plaintiffs were a group of police officers who had supported the opposing candidate during the mayor's primary campaign. *See id.* at 553. A few weeks after the primary election, the council enacted an ordinance requiring all City employees to work an average of 40 hours per week, and the plaintiffs claimed that the only motive for enactment of the ordinance was to punish the police for having opposed the mayor in the primary. *See id.* The ordinance was applicable "citywide" on its face, but affected only the police department, whose employees worked fewer than 39 hours per week, and the fire department. *See id.* at 553, 556. The court concluded that the principle "that courts 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive' ... survives undiminished in cases such as this where the statute or ordinance does not single out particular individuals or groups for benefits or burdens and is not challenged as discriminating on invidious grounds such as race, religion, and sex." *Id.* at 554 (quoting *United States v. O'Brien,* 391 U.S. 367, 383 (1968)). In this case, the challenged mandatory retirement ordinance applies to all police officers and firefighters, and is alleged to "discriminate" on the basis of age, rather than on any invidious basis. Inquiry into legislative motive should likewise be inappropriate here.

[18] As an aside, it bears noting that even the allegedly "illicit" or "non-public safety" reasons the plaintiffs allege motivated the ordinance are related to the stated purpose of protecting the public safety.

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