IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	}	
Plaintiff	}	**Civil Action No.**
v.	}	**3-06-CV-1732-K**
EXXONMOBIL CORPORATION,	}	
Defendant.	}	

PLAINTIFF'S SUPPLEMENTAL BRIEF
AND AMENDED REQUEST FOR PRELIMINARY RELIEF

COMES NOW the Plaintiff Equal Employment Opportunity Commission (hereafter "EEOC") and files this Supplemental Brief and Amended Request for Preliminary Relief on behalf of Buford "Buff" Barrett as another member of the class of pilots forced into retirement by the Defendant. With this brief, EEOC reasserts its request for preliminary injunctive relief for Mike Morschauser and now Burford "Buff" Barrett, both of whom ExxonMobil has removed from active flight status, and other pilots who may reach age 60 prior to the conclusion of the underlying civil action. EEOC requests the preliminary injunction to preserve the positions of the parties until full discovery can be conducted and a trial can be held on the merits of the EEOC's age discrimination lawsuit against ExxonMobil on behalf of Mike Morschauser, Glenn Skaggs, Buford Barrett and a class of similarly situated pilots adversely affected by ExxonMobil's mandatory retirement policy.

The EEOC also files this supplemental brief in an effort to provide information to the Court relating to FAA Administrator Marion Blakey's public remarks on January 30, 2007, and the FAA's announcement of proposed rulemaking on the FAA's Age 60 Rule, 14 CFR

§121.383(c). The EEOC has always maintained, consistent with FAA regulations, that the FAA's Age 60 Rule for commercial airline pilots does not apply to corporate aviation pilots such as the pilots whose claims are being forwarded in the present case. It has been and continues to be the EEOC's position that ExxonMobil's blanket mandatory retirement policy violates the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (ADEA). It also continues to be the position of the EEOC that (1) the lack of an amendment of 14 CFR §121.383(c) to include the business aviation pilots not previously covered, and (2) the FAA's choice not to promulgate a parallel regulation to govern the age of the non-covered pilots, is conclusive evidence of thoughtful and purposeful inaction by the FAA because there is no safety-related or other business necessity for the arbitrary age limitation. Notwithstanding the direct inapplicability of the FAA's Age 60 regulation to the particular class of pilots affected in the case currently before this Court, the EEOC understands that the Court is interested in the implications, rationale and policy considerations related to safety which underlie the regulation. Since the Defendant has attempted to draw upon the safety-related justifications underlying the inapplicable FAA regulation to construct a false exception for its non-compliance with the ADEA, the EEOC would show the Court as follows:

FAA'S ANNOUNCEMENT OF JANUARY 30, 2007 DISMISSES SAFETY REASONS AS RATIONALE FOR AN AGE 60 RULE

On January 30, 2007, FAA Administrator Marion Blakey addressed the National Press Club in Washington D.C. with a speech entitled: "Experience Counts." In her remarks, Administrator Blakey said that it was a "seize the day moment" for commercial aviation . "It is time to close the book on age 60," Blakey said. "The retirement age for pilots needs to be raised, so the FAA will propose a new rule to allow pilots to fly until they are age 65." Administrator Blakey affirmed the decision of the International Commercial Aviation Organization's (ICAO)

November 2006 increase of the flying age to 65 as "the right thing to do." She said that the rule the FAA intended to propose would be parallel to the ICAO standard: "Either pilot or co-pilot may fly to age 65 as long as the other pilot is under age 60." (Transcript of Administrator Blakey's speech attached as Exhibit 1.)

It is not surprising that the prepared part of Blakey's speech about 14 CFR §121.383(c) did not include any mention of corporate pilots for business aviation like the ExxonMobil pilots whose continued careers are at issue in the present case. However, during a question and answer session following the Administrator's speech, the issue of whether there would be any implications of the rule change for senior business aviation pilots was raised and pointedly dismissed. The Administrator did not miss a beat in distinguishing the commercial airline pilots affected from the situations involving corporate business plane pilots.

> Q: How will the proposed rule affect the current pool of pilots who fly for business aviation and who may be over the age of 60?
>
> A: They're able to fly right now. You know, in fact, one of the interesting things that I followed in this is that NetJets has a very large pool of pilots over the age of 60. And we have continued to monitor that situation and look at the data. And again, the data is very positive from the standpoint of the competency of people who are over 60. So I don't anticipate this would do anything but, you know, provide the opportunity to continue to fly in that environment. There may be somewhat fewer pilots who then are moving over into business aviation if they continue to fly for the carriers, but I don't think we see this as having a major impact.

ANALYSIS AND ARGUMENT

EEOC REASSERTS ITS REQUEST FOR PRELIMINARY INJUNCTION TO PRESERVE THE PILOTS' EMPLOYMENT RIGHTS PENDING DISPOSITION BY COURT ORDER OR RESOLUTION OF LITIGATION IN THE UNDERLYING ADEA CASE

Pursuant to the EEOC's authority under Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626 (the "ADEA") and Rule 65 of the Federal Rules of Civil Procedure the EEOC seeks a preliminary injunction against ExxonMobil, requesting that this Court restrain

and enjoin ExxonMobil from implementation of its policy and practice of removing pilots from active flight status and then involuntarily retiring them when they turn age 60. EEOC specifically seeks preliminary relief on behalf of ExxonMobil pilot Mike Morschauser, who was removed from active flight duty on September 7, 2006, though not yet involuntarily retired as a result of the Court's request for maintenance of status quo pending a decision on the preliminary injunction. In this supplemental brief, EEOC further seeks preliminary relief on behalf of Buford "Buff" Barrett, who was more recently removed from active flight duty on his birthday on December 7, 2006, after commencement of this action. Mr. Barrett has not yet been forced to involuntarily retire by ExxonMobil. EEOC continues to seek preliminary relief to preserve the employment rights of Morschauser, Barrett and any other pilots who may reach age 60 prior to full discovery, litigation and settlement or trial of the underlying ADEA civil action.

It is the EEOC's position that, if the Court continues to deem it helpful to look to the FAA or 14 CFR §121.383(c) for guidance on how to evaluate the validity of ExxonMobil's defense, the recent and fortuitously timely FAA announcement of rulemaking has substantially, if not conclusively, increased the likelihood of the EEOC's prevailing on the merits. While neither the requirements for proof of discrimination under the ADEA, nor the standard for preliminary injunctive relief have changed[1] the defense and rationale of safety raised by Defendant in support of its position in favor of an arbitrary age 60 cut-off for pilots has evaporated. This is a clear example of where a long-held position of the EEOC has now been reinforced by another agency, the FAA. The conflict of government policy which Defendant has so vigorously attempted to accentuate between the objectives or interpretations of two federal

[1] A preliminary injunction is awarded if a movant establishes: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damages that the injunction might cause; and (4) the injunction will not disserve the public interest. *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)

agencies, can no longer be a cover for its conduct. The transparency of the Defendant's position can be noted by the Court in that prior to the January 30, 2007 announcement, ExxonMobil repeatedly paid genuine deference to the FAA as it sought refuge in the obsolete regulation for the commercial airline pilots. However, the prior deference has now become a disingenuous distancing and dismissive disavowal of the FAA's own pronounced departure from a rule that is admittedly unsupportable. ExxonMobil is now left with the last resort appeal that until the rule is administratively formalized, the parties and the Court should just knowingly look away while the Defendant intransigently continues to maintain its own unjustified policy for another year or two.

The prohibitions against age discrimination as set forth in the Age Discrimination in Employment Act ("ADEA") are contained in 29 U.S.C. § 623(a). Section 623(a) states:

> 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 chapter.
> 29 U.S.C. § 623(a) (1999).

The ADEA provides an exception to its general prohibition against age discrimination "where age is a *bona fide* occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). In order to prove a BFOQ defense, ExxonMobil has the burden to show that its policy: (1) is reasonably necessary to the safe operation of its corporate aviation department; and (2) is a legitimate proxy for safety because (a) the employer has reasonable cause to believe that all or substantially all pilots over age 60 would

be unable to safely and efficiently fly, or (b) it is impossible or highly impractical to individually test older pilots' health and flight competency. *See Western Airlines v. Criswell*, 472 U.S. 400, 415 (1985). Likewise, there was nothing in FAA Administrator Blakey's speech or the FAA's announced rulemaking that supports a BFOQ requirement for excluding pilots who turn 60. To the contrary, the FAA firmly and confidently acknowledges the obsolescence of such a notion.

The FAA's decision to "close the book" on the FAA Age 60 Rule makes it extremely difficult, if not impossible, for ExxonMobil to establish prongs (1) and (2) of the BFOQ defense and conversely, pursuant to the preliminary injunction burden of proof, makes it very likely that the EEOC will succeed on the merits. It is clear from the Administrator's speech that the FAA supports the position long held by EEOC that age 60 cannot be used as an accurate measure of a pilot's health or safety. During her speech she explained the common sense practicality behind the decision to change the rule:

> "Why the change? Well, first, medically speaking, there are no scientific studies out there that say, "Don't do this." In fact, I think we'd all agree that medical science is at a place where we're all living longer and healthier, and that includes in the cockpit."
>
> "Back in 1955, the average lifespan in the United States was 69-and-a-half. Today, it's more than 77. And if there's a group of employees out there that are in better shape than airline pilots, generally speaking, they're not coming to mind."

With these statements, Administrator Blakey and the FAA put to rest the arguments that medical science supports an Age 60 Rule as reasonably necessary to the safe operation of commercial or corporate aircraft or that age is a legitimate proxy for safety.[2] The EEOC and medical experts have contended for many years that there is no additional medical or safety risk that begins when pilots reach their 60th birthday. In his affidavit, already filed in this case, Dr. Stanley Mohler confirms that research has shown that regardless of age, professional pilots are

[2] This is especially compelling in the context of corporate pilots, who fly only a few passengers at a time, compared to commercial pilots who usually carry hundreds of passengers on each flight.

the healthiest group of individuals in the world. Their average risk for future heart problems is significantly less than the general population's risk. Their average lifespan is much longer than the general population's lifespan. (Mohler affidavit at paragraph 45) Simulator studies have estimated that the risk of cardiac incapacitation for any age pilot occurring at a critical point in flight is less than one event in more than 20 million flight hours, with a calculated probability of an accident occurring as a result of a cardiac incapacitation of a pilot of less than one accident every 400 years. Chapman, PJC, *The Consequences of In-flight Incapacitation in Civil Aviation.* Aviation Space Environmental Medicine, 1984; 55:497-500 Accident rate data such as found in the FAA's Hilton Study shows that pilots age 60-64 actually had the lowest accident rate of any age group studied. (See Affidavit of Jefferson Koonce, p.13, already filed in this case.) The Hilton Study concluded that there was "no support for the hypothesis that pilots of scheduled air carriers had increased accident rates as they neared the age of 60. Clear and convincing evidence, including medical and scientific data, as well as the continuing advancements in science, medicine and technology, have all weighed heavily and decisively against an age 60 Rule. Administrator Blakey even went as far in her speech as to suggest that medical science may have had little to do with the actual basis for the origination of the FAA's Age 60 Rule:

> It's still a matter, I think, of genuine debate as to why the government made age 60 the limit. American Airlines at that point prevailed on the FAA in particular for this rule. Perhaps it was the strike that occurred. Maybe it was just a move to get beyond the issue. The man in charge of American at that point was C.R.Smith, and he wrote to Pete Quesada, my predecessor, who was the administrator at the time. He wrote, and I quote, "It appears obvious that there must be some suitable age for retirement."

Administrator Blakey recognized in her speech that international aviation has already stepped away from an age 60 mandatory retirement rule. One reason Blakey cited for the FAA's proposed rulemaking is for harmonization with the international pilots and the International Civil Aviation Organization (ICAO). In November 2006, the ICAO changed its policy to allow a

pilot to fly until his 65th birthday, with a compromise agreement that one pilot in the cockpit must be under age 60.[3]

The ICAO is an international organization developed by member countries as a means to secure international cooperation and the highest possible degree of uniformity in regulations and standards, procedures and organization relating to civil aviation matters. Since at least the 1990s, the ICAO has debated and considered raising the upper age limit for pilots. The ICAO sought and received comment from the Aerospace Medical Association (AsMA), the International Academy of Aviation and Space Medicine (IAASM) and the International Air Transport Association (IATA). In its comments, the AsMA concluded that there is insufficient medical evidence to support restriction of pilot certification based on age alone. The IATA agreed with the AsMA and recommended that the age be increased to 65. The IAASM also supported ICAO's review of the validity of the age 60 limit.

In 2003, the ICAO Secretariat sought information from the Contracting States regarding their upper age limits for pilots. The Secretariat received information from 116 states and international organizations – a majority of which indicated that an upper age limit above 60-years-old was appropriate. In fact, survey results from the 116 States showed that 72 percent of them believed that age 65 was the most appropriate upper age limit for pilots. (See ICAO graph attached as Exhibit 2.)

In February 2005, the ICAO issued a report that included the following key findings:

- The report broadly agreed with the AsMA that there is insufficient medical evidence to support restriction of pilot certification based upon age alone.

[3] EEOC supports raising the age limit for Part 121 pilots to age 65 for a specific time period as a reasonable *interim* step in the process of eventually eliminating age as a determinative factor in the employment of commercial airline pilots. As with age 60, there is no credible medical, scientific or aviation evidence to suggest that concerns for safety require a mandatory retirement age for pilots of 65. Raising the age limit to 65, however, may serve as a useful transitional step, allowing commercial pilots to continue flying beyond age 60 while the FAA continues to move in the direction of individualized testing of the skills and health of all pilots, regardless of age.

- Only 25 countries have an age limit of 60 or younger. The U.S., China and France have been the only developed nations with limits that low.

- Over 80 percent of countries surveyed were in favor of an age limit above 60 years.

- The ICAO report recommended that the current upper limit for pilots be revised from 60 to 65 with the caveat that 65 is still an arbitrary age limit and there is still a need to collect data to definitely disprove the safety issues.

- There are no studies that indicate a significant increase in risk to flight safety posed by older airline pilots. On the contrary, both the previous (1995) and the present ICAO survey indicate that older pilots do not present any particular risk to flight safety. No scientific research exists that dictates the maintenance of the current upper age limit.

- A recent study of 165 commuter aircraft accidents in the U.S. between 1983 and 1997 points to no notable differences between the age groups except that the percentage of crashes involving pilot error decreased somewhat with age, being lowest for pilots between 58 and 63.

- A Japanese study of its 60 to 63-year-old airline pilots found that none had been involved in an accident during the 10-year-study period.

- The risk of two older pilots becoming medically incapacitated at the same time, during the same one-hour flight is one per trillion hours – a risk so low that it can safely be disregarded.

The information in this ICAO Report was considered by the FAA committees reviewing the Age 60 Rule. (See Age 60 Aviation Rulemaking Committee Report to the FAA, November 29, 2006, attached as Exhibit 3.). In announcing its proposed Rulemaking, Blakey said it "doesn't make sense" to have international pilots over age 60 flying U.S. passengers over U.S. skies while American pilots over age 60 are grounded. The FAA Administrator's direct comments as well as the behind-the-scenes view of the FAA decision and the ICAO's findings and approach, together convincingly establish that ExxonMobil will not be able to meet it burden of proving that age 60 is a *bona fide* occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1).

EXXONMOBIL CANNOT BE ALLOWED TO CONTINUE TO RELY ON THE FAA AGE 60 RULE

Throughout this litigation (and most recently in the Joint Status Report), ExxonMobil has claimed that it is entitled to rely upon the FAA Age 60 Rule as an excuse for its claimed BFOQ exception to the ADEA's requirements and prohibitions. It is undisputed that the FAA regulation established in 1959 prohibits an air carrier[4] from using the services of any person as a pilot after his or her 60th birthday, and prohibits any such person from serving as a pilot in air carrier operations if that person has reached his or her 60th birthday. 14 C.F.R. 121.383(c). This rule resides in Part 121 of the FAA regulations that sets forth certification criteria and operating rules for major air carriers.

The FAA Age 60 Rule does not, however, apply to business aviation or corporate pilots, which are governed by Part 91 of the FAA regulations. FAR Part 91 governs corporate flight operations, training flights, test flights and flights flown by private pilots for personal or business or pleasure. During the 47 years of existence of the Age 60 Rule, the FAA has never issued a statement or announcement or indicated, in any way, an intent that the Age 60 Rule does apply or should apply to the corporate aviation pilots**.** It is important for this Court to note that even ExxonMobil, itself, admits that the FAA Age 60 Rule does not apply to corporate aviation. In a document titled: "Age 60 Rule and Special Termination payment ExxonMobil Corporate Pilots" (attached as Exhibit 4), produced by the Defendant to the EEOC during its federal investigation, ExxonMobil indicates its strategy for talking to pilots about ExxonMobil's mandatory retirement policy. In this question and answer format, ExxonMobil includes a candid admission that the FAA Age 60 Rule does not apply to corporate aviation:

[4] An air carrier is defined as aircraft with a passenger capacity of 10 seats or more in fare-paying, regularly scheduled service and regularly scheduled cargo flights in aircraft in excess of a certain weight.

4. What is to be communicated by Aviation Management to Exxon and Mobil pilots offered positions with ExxonMobil?

The following points should be communicated verbally:

- ExxonMobil's policy is to remove pilots from flight duty at age 60, consistent with the FAA's "Age 60 Rule" for commercial aircraft pilots.

- If an appropriate alternative position is not available at that time, you will be separated from the Corporation and provided special compensation in consideration. (*Remain silent on specific amount or process for calculating.)*

- **If in the future the Corporation changes its policy of removal from flight duty at age 60, or if removal from flight duty at age 60 becomes law* special compensation would not be provided. (**Example: if the FAA were to expand the "Age 60 Rule" to cover corporate pilots.) …***

On January 30, 2007, the FAA Administrator's answer in response to a question confirms that the FAA does not intend for the Age 60 Rule to apply to corporate or business aviation. As the videotape of the question and answer shows even more clearly than the written transcript, Administrator Blakey had no hesitation and did not mention exclusions or specific circumstances or other options for business aviation pilots. She simply said: "*They are able to fly right now.*" (Blakey transcript, attached as Exhibit 1.)

This recent announcement by the FAA affirms the Ninth Circuit's decision in the case of *EEOC v. The Boeing Company*, 843 F.2d 1213 (9th Cir. 1988). In that case, the EEOC challenged Boeing's practice of removing its corporate pilots from active flight duty at age 60. Boeing Company indicated that it removed its pilots based on the FAA's Age 60 Rule. The Ninth Circuit concluded that the FAA Rule should not be given conclusive weight in this case that did not involve commercial airline pilots.

Defendant has argued and continues to argue that ExxonMobil should be allowed to hide behind the FAA Age 60 Rule because its corporate aviation operations are in "congruity" with the Part 121 pilots, such as those who fly for United Airlines, Delta Airlines, Southwest Airlines or American Airlines. Not only has the "congruity" argument become moot by the FAA's announcement for airline pilots, but even if congruity were still the issue, the facts simply do not support that Defendant's argument. ExxonMobil pilots fly aircraft in many respects that are simply not congruent with Part 121 airlines like United Airlines. ExxonMobil has three types of planes: Gulfstream IV, Global Express and Challenger. Depending on their configuration, these three planes seat 11, 10 and 8 passengers, respectively. United Airlines flies A-319, B737-300, B747-400, B757-200, B767-300 and B777-200. These planes are configured to seat 120, 120, 347, 182, 244 and 348 passengers, respectively. At ExxonMobil, flight logs show that the aircraft often are flown with just a few passengers. (Aircraft Flight and Service Reports attached as Exhibit 5) Rarely does a United Airlines plane fly with only a couple of passengers. In fact, according to the affidavit provided by United Airlines captain Mary Ann Schaffer, she can remember only when occasion when she piloted a plane with fewer than 5 passengers. (Schaffer affidavit, attached as Exhibit 6). Ordinarily, the aircraft was more than 80 percent full. The United Airlines jets are clearly much larger than the jets flown by ExxonMobil. The wingspan of the Boeing 777 is 199 feet and 11 inches. The wingspan of the Gulfstream IV (the largest jet in service at ExxonMobil) is less than half the size at 77 feet, 10 inches. Even the smaller United Airlines Airbus 319 has a wingspan of 111 feet, 3 inches.

Further, according to United Airlines Captain Schaffer, she flew many more hours than the ExxonMobil pilots. Specifically, in her affidavit, Captain Schaffer states that during 2004, while assigned to the B767/757, she flew 672 flight hours, and was away from home for over

150 days that year, and each month was away from home for approximately 300 hours. (Schaffer affidavit, Exhibit 6). By contrast, in 2004, Skaggs, Morschauser and Barrett flew 310.9, 353.4 and 324 flight hours, respectively. (See "Block Time" on 2004 Annual Pilot Flight Log for Skaggs, Morschauser and Barrett, attached as Exhibit 7). Skaggs, Morschauser and Barrett were away from home 73, 72 and 65 days, respectively. (See "RON" on 2004 Annual Pilot Flight Log for Barrett and Morschauser, Exhibit 7.) According to Captain Schaffer, airline pilots perform very few additional non-flying duties. They fly gate-to-gate. On the other hand, ExxonMobil pilots are required to refuel, carry luggage, greet passengers, perform office duties and other non-flying responsibilities. For example, Barrett indicates that it was one of his duties to recommend and help implement changes in Federal Aviation Regulations and ExxonMobil specific operational procedures and practices in the company's Dulles operations. The training Barrett did ensured that all of the ExxonMobil crews could perform their duties in normal and abnormal conditions in a standardized manner to ensure the best Crew Resource Management possible. Similarly, Morschauser was responsible for office duty and standardization duties as well as duties training pilots as they were hired by ExxonMobil. Unless they request special leave, ExxonMobil pilots are on call 24 hours a day. Their duties do not end at the gate.

The type of aircraft flown by ExxonMobil and the job duties and responsibilities of the ExxonMobil pilots make the work at ExxonMobil much more congruent with other business aviation than with an airline. Actually, ExxonMobil aircraft, number of passengers and job duties have a great deal of similarity to the more than 400 members of the National Business Aircraft Association who responded to the NBAA Operator Profile and Benchmarking Survey. (See various charts showing results of NBAA survey, attached as Exhibit 8). ExxonMobil and its NBAA cohorts are not covered by the FAA Age 60 Rule; thus the Defendant should not be

permitted to rely on the regulation to create an exception to the ADEA that does not otherwise exist, and which cannot now be justified by anyone's interpretation of the regulation that was applied to the major airline pilots in the past.

THE TIME CONSUMING ADMINISTRATIVE PROCESSES WHICH ENCUMBER THE FAA IN THE IMMEDIATE REVOCATION AND REWRITE OF THE RULE FOR AIRLINE PILOTS DOES NOT GIVE EXXONMOBIL A LEGAL BASIS TO CONTINUE A POLICY THAT VIOLATES THE ADEA

In its Joint Report, ExxonMobil stated its position as follows: "Exxon proposes to continue to apply the FAA Age 60 Rule unless and until the FAA changes it, and then to apply any new rule." Although Blakey anticipates that the FAA proposed rulemaking on the new Rule will take approximately 18-24 months from announcement to implementation, there is no parallel administrative requirement or protracted process that applies to ExxonMobil's ability to come into compliance with the ADEA. There is no legal basis upon which the Court should allow ExxonMobil a two-year window to continue its policy and practice of retiring pilots under an age 60 rule simply because governmental administrative prerequisite processes require a delay in the formalization of its policy. ExxonMobil has the ability to change, correct or update its policy with the nod of a head and the stroke of a pen. The failure to do so in the face of the acknowledgement by the FAA that safety is not a *bona fide* reason would be an act of unjustifiable recalcitrance which does not escape enforcement of the ADEA. Already, ExxonMobil has involuntarily retired Glen Skaggs because of his age (January 6, 2006) and has removed from active flight duty Mike Morschauser (September 7, 2006) and Buford "Buff" Barrett (December 7, 2006). As the attached ExxonMobil pilot list shows (attached as Exhibit 9), pilots Steven Herman (60th birthday May 22, 2007), Thomas O'Malley (June 1, 2007) and Gary Schaffer (May 31, 2007) are also expected to be involuntarily retired this Spring.

In conversations between the EEOC and with the Court, counsel for ExxonMobil has

indicated that the company does not intend to reinstate any pilots who have already turned 60, or who will turn 60 and thus, who can be expected to lose their jobs with ExxonMobil prior to the finalization of the new FAA rule. Defendant is apparently relying on the fact that FAA's proposed rulemaking does not include a waiver or "grandfather" clause to bring back pilots who are already retired or who may be retired prior to finalization of the revised rule. Certainly, the FAA and various major airlines might want to avoid the burden and complicated process of determining the reinstatement rights of hundreds or thousands of airline pilots over countless prior years, many of whom may not have stayed current in their flying qualifications. But, such impediments to smooth transition are in no way comparable to the lesser logistics that are required for ExxonMobil to correct its displacement of the pilots who have been or will be identified in the EEOC's case, and who are still current in their skills and qualifications. It can in no way be argued by ExxonMobil that the reinstatement of these few pilots is an unmanageable or overly burdensome task. To the contrary, the ease by which most, if not all, of the handful of ExxonMobil pilots can be returned to the pilot seats while those seats are still relatively warm should bring a resolution of this case well within reach.

Blakey specifically addressed some of the difficult administrative problems the FAA would face with applying the Rule retroactively to the entire airline industry:

> Q: Similarly, would you consider making the age 65 retirement age retroactive to those pilots who have already retired.
>
> A: I know this is hard, but no. We do not plan to do that. Think about it for a moment. People who are already out of the system, who have already gone on. The questions of trying to bring people back in and whether at that point for what would be a very brief period of time, the training, the skills, are they up on the specific equipment, etc? I think this would be a very disruptive thing to do, and at the end of the day, I do not expect that this would be a part of a final rule.

But ExxonMobil is not faced with the same challenges as the major airlines in the case

presently before this Court. Given a total pilot crew of only 27 people, ExxonMobil does not face disruption and training problems that would be encountered on a large scale by the national airline industry as governed by the FAA. A presumption against retroactivity as might typically come into play with some legislation need not be applied in this case because: (1) the new FAA age rule was never directly applicable to ExxonMobil for all of the reasons stated above, and (2) a change in ExxonMobil's mandatory retirement policy to remove the age 60 limit would actually be a remedial action. ExxonMobil should not be allowed to discriminate against pilots Morschauser, Barrett and Skaggs. These pilots should be protected from future discrimination while ExxonMobil claims to be waiting on the FAA Administrative process to run its course on a mandatory retirement policy that is neither applicable to the company's aviation practices, nor justified by safety and health concerns.

The linkage to the FAA Rule which the Defendant has argued by way of "congruity" becomes irrelevant in the context of whether the pilots represented by the EEOC should be allowed to fly now. "Congruity" is of no import to the issue of how long it takes the government to formalize a policy into the written product through protracted administrative processes. "Congruity" has nothing to do with whether the few ExxonMobil pilots over 60 or soon to be 60 are currently qualified or can readily be prepared to fly in the absence of an age limitation which has been debunked. If this Court agrees with the FAA, the EEOC and ICAO that the age 60 rule should not be applied to pilots, the Court must determine if there is any basis for which the remedy for those pilots should be anything other than putting them back into the cockpit. The EEOC urges that the any pilot whose employment is at issue in this particular suit should be ordered to be returned to work as a pilot unless health and qualifications preclude such person from returning to the job.

POSSIBLE REMEDIAL MEASURES

In evaluating the effects of the FAA's pronouncement and correction, and in anticipation of the Status Hearing with the Court set for March 1, 2007, the EEOC identifies the following remedial measures that could be implemented through a settlement resolution or through the Court's ruling and ordered disposition on the preliminary injunction.

EEOC views the most significant remedy sought on behalf of Mike Morschauser and Buford "Buff" Barrett as an immediate return to active flight status with the same seniority, duties, pay and benefits[5] as when they were removed from flight duty.[6] Both Barrett and Morschauser have remained on the ExxonMobil payroll during the pendancy of this action, and neither has received his pension benefits yet. Morschauser has continued to fly for lesser pay and benefits as a pilot for Regal Aviation (now called "Jet Direct"). Barrett has sought other employment, and expects to soon receive an offer of employment for a pilot's position with lesser pay and benefits than his position at ExxonMobil. Given their continued work as pilots, EEOC anticipates that there would be very few competency or administrative obstacles involved in reinstatement of Barrett or Morschauser to active flight duty at ExxonMobil. The EEOC would, of course, agree that Morschauser and Barrett would be required to successfully complete a physical examination and training and testing necessary to restore currency on the G-IV, Global Express and Challenger 300.

EEOC does not agree that the pilots' legal right to continue to fly for ExxonMobil is strictly contingent on the FAA Age 60 Rule or even upon the extended age 65 limitation that is part of the proposed change to the FAA Rule. However, given the high value of reinstatement to

[5] EEOC specifically would request that four weeks of vacation time be restored for Morschauser because he used those four weeks in October 2006 during the pendancy of the EEOC's application for preliminary injunction.

[6] If the EEOC is to proceed to trial in this ADEA case, EEOC would also expect to seek reinstatement of Glen Skaggs who was retired in January 2006, or front pay in lieu thereof if the Court determines that reinstatement is not feasible because of the length of time since Skaggs' retirement.

the displaced ExxonMobil pilots, the EEOC and the pilots represented by this suit would find acceptable for purposes of this litigation only, a remedy that is consistent with the FAA's proposed parameters under the proposed rule with regard to continued qualification to fly. Without conceding that the ExxonMobil would be in compliance with the ADEA, the EEOC could agree to or accept a remedy applicable to the unique facts of this specific case, providing that the Defendant's policy of mandatory retirement at age 60 is enjoined. ExxonMobil has represented that it is willing to adopt a policy consistent with the revised FAA Rule. The disposition of this case on the claim brought by the EEOC would not require an order that determines the validity of a revised or extended age-related policy. The Court need only find that the Defendant's current policy of age-60 is unjustified as a BFOQ and therefore violates the ADEA, or that at the very least, that the EEOC has shown substantial likelihood of prevailing on the merits with regard to the age-60 limit.

If this Court, determines that despite the evidence and arguments presented by the EEOC, reinstatement to the pilot position is not an appropriate or feasible form of relief in the issuance of a preliminary injunction, the EEOC requests the Court to consider the following forms of interim relief pending the ultimate outcome of the underlying civil action:

> Even if the pilots are not allowed to fly for ExxonMobil, they would be given a choice of either:
>
> (1) remaining on the ExxonMobil payroll and continuing to be paid at the rate of the last salary earned, while accruing all of the options, medical benefits, vacation pay, thrift savings, and other compensation benefits and privileges which would ordinarily attach to their employment as pilots; or
>
> (2) accepting employment as pilots with other employers, leaving backpay to accrue for an award of damages if the EEOC prevails on the underlying suit.
>
> With respect to either of these two options, ExxonMobil would provide or pay for the training and medical certification requirements necessary for the affected class members to stay current as pilots for the G-IV, Global Express and Challenger 300.

> ExxonMobil will provide the affected pilots with positive letters of reference, indicating the number of years they have safely flown for ExxonMobil, and a statement that each pilot has been an excellent performer for the company.

Through the remedial options presented above, the EEOC may be able to agree to settle the claims for one or more of the aggrieved individuals separately, with the understanding that the EEOC would move forward with claims brought on behalf of the other aggrieved individuals and on the EEOC policy-and-practice claim of age discrimination. Resolution of any claims brought by the EEOC would require ExxonMobil's agreement to sign a Consent Decree as to those individual claims which are resolved. The Consent Decree would include all of the monetary and non-monetary terms of settlement and be filed in federal district court.

CONCLUSION

In conclusion, EEOC reasserts its request for preliminary injunctive relief for Mike Morschauser and now Burford "Buff" Barrett, both of whom ExxonMobil has removed from active flight status. EEOC requests the preliminary injunction to preserve the positions of the parties until full discovery can be conducted and a trial can be held on the merits of the EEOC's age discrimination lawsuit against ExxonMobil on behalf of Mike Morschauser, Glenn Skaggs, Buford Barrett and a class of similarly situated pilots adversely affected by ExxonMobil's mandatory retirement policy.

The EEOC further urges the Court that the FAA Administrator's January 30, 2007 announcement about the U.S. government's intent to increase the mandatory retirement age for the pilots under 14 C.F.R. 121.383(c) offers substantial indisputable support for the rationale and legal argument forwarded by the EEOC's on its claim for preliminary injunction. The FAA's change of position and move to update the now obsolete 47-year-old regulation also provides

ample evidentiary basis upon which to uphold a finding by this Court in favor of the EEOC and the pilots represented. The EEOC is thus likely to succeed on the merits of this case because:

- The FAA Administrator supported the EEOC's position by specifically stating that the FAA Age 60 Rule does not apply to business aviation; and
- The FAA Administrator's pronouncement, the realization by the U.S. government of the practicality of coordinating with the ICAO's approach, as well as the behind-the-scenes work of the FAA in making its decision to "close the book" on the Age 60 Rule, all together support the EEOC's position that medical science and safety can no longer be used by the big or small aviation employers to justify claims that age 60 is a BFOQ under the ADEA.

The EEOC has met its burden of proof on its application for preliminary injunction. The EEOC respectfully requests that this Court grant the EEOC's application for preliminary injunction to return Mike Morschauser to active flight status. EEOC further requests that this Court grant similar preliminary injunctive relief to Buford "Buff" Barrett and return him to active flight status. EEOC seeks this preliminary injunctive relief to preserve the positions of the parties at status quo, including other pilots whose 60th birthday may come prior to the conclusion of the underlying civil action. This injunctive relief should be granted until full discovery can be conducted and settlement is achieved or a trial can be held on the merits of the EEOC's age discrimination lawsuit against ExxonMobil on behalf of Mike Morschauser, Glenn Skaggs, Buford Barrett and a class of similarly situated pilots adversely affected by ExxonMobil's mandatory retirement policy. EEOC remains open to the possibility of resolving this case completely through settlement, through reasonable remedial approaches, including any of the approaches identified above or through agreement to other monetary terms which would

reasonably compensate the pilots for past and future harms.

The EEOC, on behalf of the pilots, requests such other and further relief which this Court may deem appropriate. The EEOC makes this request not for purposes of delay, but so that justice may be served.

Respectfully Submitted:

GWENDOLYN Y. REAMS
Associate General Counsel

ROBERT A. CANINO
Regional Attorney
Oklahoma State Bar No. 011782

/s/ Suzanne M. Anderson
SUZANNE M. ANDERSON
Supervisory Trial Attorney
Texas Bar No. 14009470

WILLIAM C. BACKHAUS
Senior Trial Attorney
Texas Bar No. 01493850

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dallas District Office
207 South Houston, 3rd Floor
Dallas, Texas 75202
(214) 253-2740
(214) 253-2749 (FAX)

CERTIFICATE OF SERVICE

This is to certify that on this, the _____day of February 2007, I electronically transmitted the attached document to the Clerk of the Court using the ECF system of filing, which will transmit a Notice of the Electronic Filing to Defendant's counsel, an ECF registrant.

/s/ Suzanne M. Anderson
SUZANNE M. ANDERSON