

Employee Relations

LAW JOURNAL

Employee Benefits

Supreme Court Rules on Age Discrimination and Early Retirement Eligibility

Anne E. Moran

The Supreme Court recently issued a decision in *Kentucky Retirement Systems v. Equal Employment Opportunity Commission* holding that a state pension plan did not violate the Age Discrimination in Employment Act (ADEA) when it imputed less service to an older worker who was disabled than it might have provided to a younger disabled worker. The basis for the Court's 5–4 split decision was that the disparate treatment of participants was not actually motivated by age. A strongly worded dissent suggested that the decision may create uncertainty for benefit plan sponsors and participants. Employers who have struggled with ADEA in coordinating disability and retirement benefits may take some comfort from this decision, but the case itself illustrates that careful drafting and articulation of a rationale for plan provisions is important.

In *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*, the Supreme Court held that a provision in a Kentucky pension plan imputing service until a disabled person was eligible for early retirement, did not violate the Age Discrimination Employment Act (ADEA), despite the fact that in many cases older disabled persons would not benefit at all from the rule, while younger workers (who were more likely not to have attained early retirement) would benefit.

The case is important because it illustrates how plans can be designed, in a manner that uses age as a measure of retirement benefits, but nonetheless pass muster under ADEA. A vigorous dissent, however,

Anne E. Moran is a partner at Steptoe & Johnson LLP in Washington, DC. She advises clients on executive compensation issues and on benefits issues arising under retirement, health, and other benefit plans. Over the course of her career, she has served as Tax Counsel for the Senate Finance Committee and on the ERISA Advisory Council for the Department of Labor. Ms. Moran may be reached at amoran@steptoe.com.

also illustrates the pitfalls of relying on the holding in the case without careful analysis when drafting retirement plan provisions that are affected by age.

Procedural Background

The facts in the case involve a retirement plan (Plan) for state and county police and other employees in Kentucky who worked in “hazardous positions.” The Plan’s benefit formula was 2.5 percent of final average pay multiplied by years of service. Participants were eligible for normal retirement under the Plan if they completed 20 years of service or reached age 55 and completed five years of service. The Plan provision at issue stated that an employee who becomes disabled before becoming eligible for normal retirement would be credited with a number of “imputed” years of service so that the employee’s total years of service would equal the years of service necessary to reach normal retirement age. The Plan also provided a ceiling on imputed service based on the number of years the employee previously worked.

The affected employee and plaintiff in this case, Mr. Lickteig, became eligible for retirement under the Plan when he attained age 55, but he continued to work. At 61, he became disabled and retired. Because he was already eligible for normal retirement benefits at the time he became disabled, he was not awarded with any additional “imputed” service. By contrast, had a 40 year old with fewer than 20 years of service become disabled, he would have been awarded service until the earlier of the date he was 55 and had five years of service (including imputed service), or until he had 20 years of service (including imputed service).

The Equal Employment Opportunity Commission (EEOC) brought suit on Mr. Lickteig’s behalf, arguing that the Plan failed the ADEA on its face because the reason he received no additional service credit was because he was disabled after attaining age 55. The initial decision by the Kentucky district court awarded summary judgment to the Plan, finding that there was no age discrimination. The Court of Appeals for the Sixth Circuit originally agreed and affirmed the district court, but upon reconsideration, the Sixth Circuit found that age discrimination existed. The case was brought to the Supreme Court, which agreed with the Plan that no discrimination existed under ADEA.

Statutory Language

The Age Discrimination in Employment Act provides that it is unlawful for an employer to discriminate against any individual “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”¹ The statute makes it clear that such “compensation, terms, and benefits,” etc., includes benefits under a bona fide employee benefit plan. The statute also provides, however, that an

employer may follow the terms of a bona fide employee benefit plan if it is not a subterfuge designed to evade the purposes of the Act.

Majority Decision

The majority opinion was written by Justice Breyer and joined by Chief Justice Roberts, and Justices Thomas, Souter, and Stevens.

The rationale for the majority's decision was that the plaintiff had not provided that age actually motivated the decision of the employer. Rather, the Plan document contained rules that used age as part of a definition for pension eligibility. Under these circumstances, according to the decision, the plaintiffs were required, and failed, to show that age was a motivating factor for the Plan provision.

The majority relied on a Sixth Circuit case, *Hazen Paper Co. v. Biggins*.² In that case, a 63 year old employee who had over nine years of service argued that his employer terminated his employment in order to avoid paying him the pension benefits to which he would have been entitled had he had ten years of service. The Court in that case found that age did not actually motivate the disparate treatment which the plaintiff had received. A dismissal based on pension status (which may have been illegal under other laws) was not a dismissal based on age that violated ADEA. The Court refused to accept such pension status as a proxy for age. Rather, in *Hazen Paper*, the Court held that age and pension status are "analytically distinct," since an employer could easily take one into account while ignoring the other.

The majority noted that the Kentucky Plan at issue conditioned eligibility for a pension either on the employee's having attained 20 years of service, or age 55 with five years of service. It also noted that ADEA specifically permits an employer to condition pension eligibility upon age.³ Thus, the Court reasoned, it had to decide whether such a provision "*automatically discriminates because of age.*"

The majority opinion went on to argue that in this case the Plan provision was not a proxy for, or motivated by, age. The benefit was offered to all employees in particular positions when hired on the same terms. Moreover, the plan provisions were not a proxy for age since they imputed only those years needed to attain normal retirement age eligibility (20 years of service or age 55 and five years). Thus, "eligibility for normal retirement," not age, was the important factor in determining the participant's benefit. A participant like Mr. Lickteig would not receive any additional imputed service because he was already eligible for early retirement. Another participant who is not eligible for retirement would receive sufficient additional imputed service to become eligible.

The opinion also pointed to the fact that other federal laws such as the Social Security disability laws and certain prior federal programs use an age-based formula to coordinate the timing of disability and retirement benefits. The majority also emphasized that there was a

clear, non-age rationale for the rule—the intent to treat disabled workers as eligible for retirement. The Plan only imputed sufficient service to accomplish this purpose.

The apparent age-neutrality of the provision was illustrated by the fact that an older worker might benefit from the provision at the expense of a younger worker. The difference in the extra benefit obtained depends in large part on service, not age. For example, a 45 year old who is disabled after ten years of service would receive an extra ten years of service; whereas a 40 year old with 15 years of service only would receive five years of service; in both cases, only enough to make them eligible for benefits.

It was also argued that the Plan provision at issue was not based on prohibited stereotypical assumptions about older employees. The assumption that disabled workers would work only until retirement—the basis for the provision—applies to all workers.

Finally, the majority also relied on a policy argument that a decision finding age discrimination could result in a loss of benefit for disabled employees, as plans would not be written to provide for enhanced disability benefits.

In applying this analysis, the opinion rejected the EEOC's argument (which is set forth in its Compliance Manual) that any differential treatment of employees of different ages causes a plan to violate ADEA.

Dissenting Opinion

The dissenting opinion, written by Justice Kennedy, and joined by Justices Scalia, Ginsberg, and Alito, argued to the contrary that the retirement Plan illustrated a “straightforward act of discrimination on the basis of age.” It maintained that the majority ignored the language and intent of the statute and relied on economic and other policy arguments for its decision. Although age is not a factor that reduces benefits in every case under the Plan formula at issue, in many cases older workers receive less of an advantage from the formula than younger workers.

The majority opinion, noted the dissent, would require workers subject to discriminatory plans to prove the existence of a prohibited, age-driven motive. The dissent also noted that after the Court's decision in *Public Employees Retirement System of Ohio v. Betts*,⁴ holding that bona fide employee benefit plans were exempt from ADEA, Congress specifically amended ADEA to provide that a benefit plan that discriminates on the basis of age is unlawful, except where the *employer* establishes one of ADEA's affirmative defenses. That, according to the dissent, should be the end of the matter; the *employer* must present an affirmative defense. The dissent also distinguished *Hazen Paper* because in the Kentucky Plan, unlike *Hazen*, age was a determining factor in *all* cases for workers over age 55 with five years of service. Finally, the dissent

warned that the decision rejected the analyses of other courts of appeals on this issue and creates more uncertainty in this area.

Conclusion

Employers whose plans do limit disability or enhanced pension benefits based on a participant's eligibility for retirement may find some comfort in this decision. But the dissent's warning is important. The case does not "clear up" all aspects of this issue, and there may be more arguments about how the ADEA works in other factual situations. Employers who are considering benefit formulas with age-related provisions defining retirement status need to consider this Court's analysis carefully.

Notes

1. 29 U.S.C. § 623.
2. 507 U.S. 604 (1993).
3. See 29 U.S.C. § 623(l)(1)(A)(i).
4. 429 U.S. 158 (1989).

Reprinted from *Employee Relations Law Journal* Winter 2008, Volume 34, Number 3, pages 93-97, with permission from Aspen Publishers, Inc., Wolters Kluwer Law & Business, New York, NY, 1-800-638-8437, www.aspenpublishers.com

