

## LAW JOURNAL NEWSLETTERS

Employment Law Strategist

January 2010

### **Can Your Retirement Plan Survive an ADEA Claim?**

By Karla Grossenbacher

In *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008), the Supreme Court held that, where an employer adopts a pension plan that includes age as a factor, and the employer then treats employees differently based on pension status, an employer will only be liable for disparate treatment under the ADEA if the plaintiff can adduce sufficient evidence to show that the differential treatment was actually motivated by age and not pension status.

#### **Six Factors**

In reaching its conclusion that the pension plan at issue in *Kentucky Retirement System* did not violate the ADEA, the Supreme Court relied on six factors, which are discussed below. Employers have been tempted to transform the Supreme Court's reliance on these six factors into a bright-line "six-factor" test they can apply to determine whether or not their retirement plans comply with the ADEA. The problem with this approach is that the Supreme Court never said that the six factors it considered were the only ones that were relevant to the analysis of whether or not a retirement plan that uses age as a factor violates the ADEA — or that, if these six factors were not present in a future case, this would mean that the plan at issue could not survive an ADEA challenge.

Indeed, a close reading of the Court's analysis of the six factors in its opinion shows that the Court did not intend to create a litmus test for employers to use in validating the legality of their pension plans. The real touchstone in the case was the Court's conclusion that there was insufficient evidence upon which to conclude that any differential treatment was actually motivated by age and not pension status.

Absent further guidance from the Supreme Court or the EEOC, an employer's safest approach would be to use this touchstone to evaluate its retirement plan instead of focusing solely on the six factors relied up by the Court in *Kentucky Retirement Systems*.

#### **The Court's Decision**

The plaintiff in the *Kentucky Retirement Systems* case, Charles Lickteig, was a deputy sheriff in the state of Kentucky. State employees in Kentucky who are 55 years of age and have satisfied a minimum service requirement of five years, or who have worked for Kentucky for 20 years, are eligible to receive normal retirement benefits. *Id.* at 2365. The Kentucky plan calculates normal retirement benefits based on actual years of service. Because he was a "hazardous duty worker," Lickteig was eligible to retire in the event he became disabled in the line of duty regardless of age or years of service. In calculating the retirement benefits for a hazardous duty worker who becomes disabled prior to the age of 55, Kentucky adds a number of "imputed" years of service to the employee's actual years of

service that equal the number of years the employee would have had to work in order to become eligible for normal retirement benefits. *Id.* Lickteig decided against retiring at age 55, kept working and became disabled at age 61, having accumulated 18 years of service. Since Lickteig had reached 55 years of age and had worked more than the minimum of five years, no "imputed" years were used in the calculation of his retirement benefits. When he found out that his retirement benefits were being calculated without any imputed years of service, Lickteig filed a charge of age discrimination. The EEOC later filed suit, claiming that Kentucky had failed to impute years to Lickteig solely because Lickteig became disabled after age 55.

The district court and a panel of the Sixth Circuit Court of Appeals determined that the Kentucky plan complied with the ADEA. *Id.* at 2365-66. The Sixth Circuit, sitting *en banc*, disagreed and determined that the plan violated the ADEA's prohibitions against age discrimination. *Id.* at 2366. The Supreme Court reversed. *Id.* at 2371.

### **The Court's Six Factors**

In determining whether or not Kentucky's system violated the ADEA, the Supreme Court considered six factors.

*First*, the Court noted that "as a matter of pure logic, age and pension status remain 'analytically distinct' concepts." *Id.* at 2367. For example, the Court stated that, in a plan where retirement eligibility begins when a participant reaches age 65, and a participant does not retire until 70, it is clear the plan will not start paying the participant retirement benefits based on age, but rather on pension status. *Id.*

*Second*, the Court held that "several background circumstances eliminate[d] the possibility that pension status, though analytically distinct from age, nonetheless serves as a 'proxy for age' in Kentucky's Plan." *Id.* In particular, the Court emphasized the fact that it was considering "not a single employment decision, but a set of complex systemwide rules," which "involve, not wages, but pensions — a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age." *Id.*

*Third*, the Court held that Kentucky's Plan included "a clear non-age-related rationale for the disparity at issue," making it "obvious, then, that the whole purpose of the disability rules is, as Kentucky claims, to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits." *Id.* at 2368. The Court concluded that the Kentucky plan did not violate the ADEA because "[a]ge factors into the disability calculation only because the normal retirement rules themselves permissibly include age as a consideration." *Id.*

*Fourth*, the Court stated that, while the record before it involved an older worker whose retirement benefits had been adversely affected by the disability retirement benefits scheme in Kentucky's plan, "in other cases, [Kentucky's plan] can work to the advantage of older workers." *Id.* at 2369. The Court cited a scenario in which a 45-year-old employee with 10 years of service would receive 10 imputed years of service, whereas a 40-year-old employee with 15 years of service would only receive five imputed years, respectively, with the older employee faring better. *Id.* The court was satisfied that this "fact help[ed] to confirm that the underlying motive [of Kentucky's plan] is not an effort to discriminate 'because of ... age.'" *Id.*

*Fifth*, the Court also underscored that Kentucky's plan "does not rest on any stereotype about the work capacity of 'older' workers relative to 'younger' workers." *Id.*

*Sixth*, the Court expressed concern about how Kentucky would be able to amend its plan to eliminate the differential treatment complained of by Licksteig. The Court stated that the difficulty of finding an alternative "that can both correct the disparity and achieve the Plan's legitimate objective ... further suggests that this objective and not age 'actually motivated' the Plan." *Id.* at 2369.

### **Amici Briefs**

This pragmatic approach was no doubt a result of the drum consistently beat by a number of the *amici* who filed briefs on behalf of the Kentucky plan and argued in no uncertain terms that the Court's failure to reverse the decision of the *en banc* Sixth Circuit would have dire consequences on the pensions of millions of Americans. See e.g., Brief of NASRA, NCPERS and NCTR as *Amici Curiae* at pp. 13-14 ("Clearly, the failure by this Court to reverse this decision could have catastrophic and destabilizing results.")

The Court concluded that the foregoing six factors "all taken together convince us that the Plan does not, on its face, create treatment differences that are 'actually motivated' by age." *Id.* Despite the seemingly formulaic approach taken by the Court in Kentucky Retirement Systems, district courts have wrestled with how to interpret the Court's opinion and what significance to place on the Court's reliance on the six factors. For example, must all six factors be present to find a violation of the ADEA, and if not, how many factors must be present? How complex and systemic do a plan's rules have to be in order not to violate the ADEA? What is a sufficient "non-age-related rationale" for the disparity in a plan?

District courts have varied in their approaches to applying the holding of Kentucky Retirement Systems. Some courts have held that where all or a majority of the six factors apply to the plan before them, then the plan does not violate the ADEA. See *EEOC v. Baltimore County*, 593 F. Supp.2d 797, 802 (D.Md. 2009) (plan upheld where all six factors apply); *Schultz v. Windstream Communications*, No. 4:08CV3086, 2009 U.S. Dist. LEXIS 32361 \*24-31 (D. Neb. April 16, 2009) (no violation found where only four factors present). Other district courts have entirely ignored the six factors relied upon by the Supreme Court and simply analyzed whether or not the disparity in the plan was based on pension status rather than age. See *Lerman v. City of Fort Lauderdale*, No. 02-6096-CIV-ZLOCH, 2008 U.S. Dist. LEXIS 103799 at \*41-43 (S.D.Fla. Dec. 23, 2008); *Northwest Airlines, Inc. v. Phillips*, 594 F. Supp.2d 1075, 1086 (D. Minn 2009); *Walker v. Monsanto Co. Pension Plan*, No. 3:04-cv-436-JPG (S.D.Ill. June 11, 2009). Still another district court limited its analysis solely to the issue of whether or not age was the "motivating factor" behind the disparity in the plan complained of by the plaintiff. See *Rosenblatt v. United Way of Greater Houston*, 590 F. Supp.2d 863, 873 (D. Texas 2008).

As the varied approaches taken by district courts demonstrate, the Supreme Court did not establish a bright-line test in Kentucky Retirement Systems, and it would be an oversimplification of the Court's holding in that case to suggest it did. Rather, the Supreme Court established a guidepost for employers in determining whether their pension plans violate the ADEA, which is to ask the question whether or not any disparate treatment of older workers in the retirement plan is motivated by age instead of pension status.

### **Conclusion**

Whether one answers this question by analyzing the six factors relied upon by the Supreme Court in *Kentucky Retirement Systems* or by focusing on whether or not age was motivating factor behind the disparity, if the answer to this question is "no," the plan should withstand an ADEA challenge.

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