

MEETING OF INDIANA BENEFITS CONFERENCE

2009 March 17

EMPLOYEE BENEFITS AND THE ADEA: Some Recent Developments

Equal Employment Opportunity Commission
101 W. Ohio Street, Suite 1900
Indianapolis IN 46204-4239
(317) 226-7212
www.EEOC.gov

The Age Discrimination in Employment Act of 1967

In general, the ADEA makes it unlawful for an employer, employment agency, or labor organization to discriminate because an employee is age 40 or older.

(29 U.S.C. § 623(a), (b), (c), (d), (e).)

“A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.”

(29 U.S.C. § 623(k).)

“Except as otherwise provided in this subsection, it shall be unlawful” to “maintain an employee pension benefit plan which requires or permits, in the case of a defined benefit plan, the cessation of an employee’s benefit accrual, or the reduction of the rate of an employee’s benefit accrual, because of age” (29 U.S.C. § 623(i)(1)(A).)

“Except as otherwise provided in this subsection, it shall be unlawful” to “maintain an employee pension benefit plan which requires or permits, in the case of a defined contribution plan, the cessation of allocations to an employee’s account, or the reduction of the rate at which amounts are allocated to an employee’s account, because of age” (29 U.S.C. § 623(i)(1)(B).)

Two exceptions to general prohibition on age discrimination.

- Cost
- Early retirement incentive plan

Cost exception

It is not unlawful “to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10” of the EEOC regulations.
(29 U.S.C. § 623(i)(5).)

Cost exception – continued

A “bona fide” plan (a) sets forth all of its terms in writing and (b) doles out benefits in accordance with the written terms.

(29 C.F.R. § 1625.10(b).)

Cost exception – continued

Cost data must be “valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years.”

(29 C.F.R. § 1625.10(d)(1).)

Cost exception – continued

Cost comparisons “must be made on a benefit-by-benefit basis or a ‘benefit package’ basis . . .”

(29 C.F.R. § 1625.10(d)(2).)

Cost exception – continued

Employee contribution to premium may increase with age “so long as the *proportion* of the total premium required to be paid by the participants does not increase with age.”

(29 C.F.R. § 1625.10(d)(4)(ii).)

Cost exception – continued

Even if employer establishes a cost reason to reduce a benefit to an older worker, the employer may reduce the benefit level only to “the extent necessary to achieve approximate equivalency in cost for older and younger workers.”

(29 C.F.R. § 1625.10(a)(1).)

Employer may permit certain benefits to be provided by the government, even if eligibility for such benefits is based on age.

(29 C.F.R. § 1625.10(e).)

Specific safe harbor for “employee benefit plans [that] provide health benefits for retired participants that are altered, reduced, or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan . . . ”
(29 C.F.R. § 1625.32(b).)

Early retirement incentive plan must be a “bona fide” benefit plan and “consistent with the relevant purpose or purposes of” the ADEA.

(29 U.S.C. § 623(f)(2)(B)(ii).)

A benefit or early retirement incentive plan will not justify “the involuntary retirement of any individual [age 40 or older] because of the age of such individual.”

(29 U.S.C. § 623(f)(2).)

Notwithstanding the above, the ADEA is not violated “solely because an employee pension benefit plan . . . provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits.”

(29 U.S.C. § 623(1)(1)(A).)

Severance Pay

- Severance pay to which an individual is entitled may not be denied to persons eligible for immediate pensions.
- Pension payments to which an individual is entitled may not be delayed because of receipt of severance pay.

Deductions from Severance Pay

May deduct from severance pay available as a result of a contingent event unrelated to age:

- “the value of any retiree health benefits received by an individual eligible for an immediate pension”
- when individual is eligible for an unreduced and immediate pension, the value of additional pension benefits “that are made available solely as a result of the contingent event unrelated to age”

(29 U.S.C. § 623(1)(2).)

*Kentucky Retirement Systems v.
EEOC,*

128 S. Ct. 2361 (2008)

Facts

Commonwealth of Kentucky has a benefit plan that pays disability retirement benefits to certain employees who become disabled. To compute such benefits, in many instances the Commonwealth imputes years of service.

Facts – continued

The years of service added to actual years of service are limited so the total is less than the number of years needed for normal retirement benefits.

Facts – continued

The total years are also limited by age. That is, the imputed number of years will not exceed the number of years until the individual reaches age 55.

Question Presented

The Court phrased the question as follows:

“Thus we must decide whether a plan that
(1) lawfully makes age in part a condition
of pension eligibility, and (2) treats workers
differently in light of their pension status,
(3) *automatically* discriminates *because of*
age.”

(128 S. Ct. at 2367.)

Reasoning

The Court concluded that Kentucky had not
violated the ADEA. The Court’s opinion is
a listing of six “circumstances,” which,
“taken together, convince us that, in this
particular instance, differences in treatment
were not ‘actually motivated’ by age.”

(128 S. Ct. at 2367.)

First Circumstance

As “a matter of pure logic,” age and pension status are distinct concepts.

(128 S. Ct. at 2367.)

Second Circumstance

This “circumstance” is itself an amalgamation of circumstances:

- system of rules, not individual employment decision
- rules pertain to pensions, not wages, and the ADEA treats pensions more leniently
- when any employee is hired, e is promised disability benefits if eligible
- Congress has used age in disability calculations

(128 S. Ct. at 2367-68.)

Third Circumstance

It is “obvious” that the purpose of the rules is to treat disabled workers as if they were disabled after becoming eligible for normal retirement.

(128 S. Ct. at 2368-69.)

Fourth Circumstance

Sometimes the plan will benefit older workers. “Consider, for example, two disabled workers, one of whom is aged 45 with 10 years of service, one of whom is aged 40 with 15 years of service.”

(128 S. Ct. at 2369.)

Fifth Circumstance

The plan does not make stereotypical assumptions about age. Rather, the plan assumes employees would work “to the point at which they would have become eligible for a pension.”

(128 S. Ct. at 2369.)

Sixth Circumstance

It would be difficult to fashion a remedy.

(128 S. Ct. at 2369.)

Thus, the EEOC, according to the Court, had not met its burden to prove that the Commonwealth's plan was "actually motivated by age."

www.EEOC.gov