

MASSACHUSETTS BOARD OF RETIREMENT,

Appellants,

No. 74-1044

--VS.--

MURGIA,

Appellee.

Washington, D.C.

Friday, December 12, 1975

The above-entitled matter came on for argument,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM M. REHNQUIST, Associate Justice

APPEARANCES:

TERENCE P. O'MALLEY, ESQ., Assistant Attorney General of Massachusetts,
on behalf of the Appellant.

ROBERT D. CITY, ESQ.
on behalf of the Appellee.

Massachusetts Board of Retirement vs. Murgia

THE COURT: We'll hear arguments next in the Massachusetts Board of Retirement against Murgia. Mr. O'Malley, you may proceed whenever you are ready.

MR. O'MALLEY: Mr. Chief Justice, and may it please the Court:

This is an appeal from the order of a three-judge district court enjoining the enforce on a Massachusetts general law, chapter 32, section 26, subsection 3. That statute requires that members of the uniform branch of the Massachusetts state police retire upon reaching the age of 50, or upon serving 20 years, whichever occurs later. The action was initiated by the plaintiff, a member of the uniform branch, shortly after he was notified by the board in May of 1972 that he would be retired on his 50th birthday. The complaint filed in the federal district court essentially alleged that this statute denied his equal protection under the law. The district judge that originally heard the case dismissed the case for failure to raise a substantial federal question. The district judge recognized the interest of the Commonwealth in insuring a high level of physical capability of uniform officers of the state police. The court ruled that retirement at age 50 was at least a rational if not the only means of achieving these purposes. Plaintiff appealed to the court of appeals, which court remanded for the convening of a three-judge district court.

THE COURT: Is this a class action?

MR. O'MALLEY: No, it is not, Your Honor.

THE COURT: The--I ask because the joint supplemental memorandum

that was filed here very recently on December 8 indicates that Mr. Murgia has materially changed his employment--I'm reading--he is presently employed as security manager in the Westminister, Massachusetts, plant of Digital Equipment Incorporated. He began this \$17,000 per year job supervising a 12-man security force in August of 1975. Does that indicate or imply that he no longer is interested in getting his job back on the Massachusetts police force?

MR. O'MALLEY: I have not been informed to that effect, Your Honor, and I am informally informed that he would, if granted reinstatement, would retake his position with the state police. Therefore, I don't believe the case is moved or affected by that.

THE COURT: You are, at least your side of the case--this is a joint submission, I understand--

MR. O'MALLEY: Yes, Your Honor, it wasn't a--

THE COURT: So I can feel free to ask you about it.

MR. O'MALLEY: Yes, Your Honor. I think that evidence concerning his new job might relate to the question of what kind of effect retirement has on whether he can get other employment or not. This shows that he can--

THE COURT: It doesn't imply that his case is moot in any way.

MR. O'MALLEY: Certainly. There is nothing in that joint supplemental memorandum that the Commonwealth believes materially affects the case. We just had the admonition of the court in mind, that if any new material does come to light, that it be presented. After the three-judge district court took the evidence in documentary form, it issued an opinion declaring the statute unconstitutional. It stated it was irrational because, under state police procedure, an officer over the age of 40 takes a medical

examination annually. The court ruled that these medical examinations were available, and did not justify retirement at the age of 50. The court also noted that the board of retirement had not proved that a critical area is reached at 50, which would justify disregarding these examinations. The issue brought to this Court is whether mandatory retirement of members of the uniformed branch of the Massachusetts state police contravenes the equal protection clause of the 14th Amendment. Plaintiffs appear to concede that the retirement statutes are generally constitutional, these irrational means of effectuating legitimate state purposes. These purposes are: increasing the efficiency of the public service, and providing financial security for retired employees. There's no reason to carve out an exception for the retirement statute of the state police. It is clearly rationally related to the effectuation of a legitimate state interest.

THE COURT: Isn't one of the purposes sometimes advanced for these kinds of statutes to the desirability of avoiding having to make individualized determinations, and tell Officer Smith that you have to retire at 62 because you're not quite in as good shape as you used to be, but Officer Jones, you can stay on for three or four more years?

MR. O'MALLEY: Exactly, Your Honor. We've stated in our briefs that this is a demeaning and depressing task, and is also one taken in an area of very great medical uncertainty. It's highly questionable whether the state can actually quantify the degree of diminishing productivity of an individual.

THE COURT: May, on reaching age 50, an officer be continued?

MR. O'MALLEY: He may not, Your Honor--

THE COURT: Under any circumstances?

MR. O'MALLEY: Unless he has not served 20 years yet.

THE COURT: Oh, I see.

MR. O'MALLEY: He must serve 20 years before he is granted a pension. That problem doesn't come up in any substantial degree.

THE COURT: But if he has served 20 years, and reaches age 50, he may not be continued. There is no process to continue him. He must retire.

MR. O'MALLEY: Exactly, Your Honor.

THE COURT: I see.

THE COURT: Mr. O'Malley, how can the 20-year problem ever come up if you have, as I understand from your brief, you do have, another statute that one may not enter into the service beyond age 30?

MR. O'MALLEY: Historically, Your Honor, about 35 people have been over the age of 50 upon retirement. A large number of that group was kept after age 50 because they were veterans in World War II and went over the enlistment age and a special act was enacted so that they could still enlist. There were a few people that were members of the uniformed branch before the enlistment statute was enacted in 1939, so it's very few cases. There might be a few others where a leave of absence was granted and then an officer returned to the service.

THE COURT: Well, if someone came in at the age of 48, he could serve to the age of 68, on the face of the statute, couldn't he?

MR. O'MALLEY: Yes, but no one could come in at the age of 48 now, and historically no one had come in at the age of 48.

THE COURT: One more question, now that I've interrupted you. Is there

any right on the part of the colonel here, or anyone else, at age 50, to transfer to some other division of the state police, where the retirement age is later?

MR. O'MALLEY: Not that I know of, Your Honor. That hasn't really come up. The procedures for joining the detective branch, or any other public service job, are very separate, and there is no particular statute which gives any particular rights to another type of employment.

THE COURT: Massachusetts does have other mandatory retirement statutes, does it not? You do have one affecting judges, do you?

MR. O'MALLEY: Yes, Your Honor.

THE COURT: And some other?

MR. O'MALLEY: Yes, we have a very comprehensive retirement scheme of which there are about four basic groups. Group One is the general category of employees; retirement is age 70.

THE COURT: That's mandatory?

MR. O'MALLEY: They're all mandatory. Group Two is generally more hazardous duties than the average employees, which is 65. Group Three is the uniform branch of the state police, the age of 50. And Group Four is essentially local policemen and firemen, and so forth, which is age 65. So there are a great number of public employees covered by retirement provisions.

THE COURT: You're not uncomfortable because everyone on this bench is over 50, are you?

MR. O'MALLEY: I am uncomfortable, your honor, but not essentially because of that.

THE COURT: We're not uniformed state policemen.

MR. O'MALLEY: Exactly, Your Honor.

THE COURT: We're not uncomfortable, either.

MR. O'MALLEY: The fact that the age for retirement at 50 is lower than the general retirement age does not justify carving out an exception to the general rule that the retirement statutes are constitutional. Performance of the public safety duties of the state police require a high degree of strength, agility, and stamina. It was found by the district court that the ability to perform these functions generally decreases with age. Drawing the line at age 50 is well within the legislative discretion, in setting a mandatory retirement age. In fact, the district court acknowledged that the service in the uniformed branch is significantly different from that of other law enforcement groups, and the fact that a higher retirement age is set for the state police detectives and local police did not provide the basis for a viable equal protection claim. The attack on the statute made by the plaintiff essentially is that because there is this medical examination procedure, it is irrational to use any other procedure relative to retirement.

It is very important to note what the medical examination does and what it does not. It has a very limited function. As described by the state police surgeon in his testimony, the purpose of the examination is to determine whether an officer has a physical defect which would disqualify him from state police duties. An example of a temporary defect would be a knee injury, or a hernia. A permanent injury might be hypertension, or cardiovascular disease. The examination does not measure the decrease

in strength, stamina or agility that generally occurs as one ages. Nor does it measure the rate of aging or the functional age of an officer. These are all areas where there is a great degree of medical uncertainty and the testing in the area is still in its state of infancy. Because of this testimony, there is a great degree of uncertainty, and the legislative determination should be upheld. Indeed, when concerning the area of incurring diseases generally associated with aging, the plaintiff's expert testified that we don't know much about the causes of most of the diseases we think of as diseases of aging. Showing the distinct purposes of the medical exam, also shows the distinct purposes of the retirement statute. The medical is based on definable medical conditions which may be determined by a medical examination. The goal is--

THE COURT: Mr. O'Malley, would you be making the same argument if your system were, didn't have built-in physical examinations? Just age 50 as the retirement age?

MR. O'MALLEY: The district court ruled that because we had the examinations available, the statute was irrational. We would also state that the statute would certainly be rational if there were no medical procedures. In fact, a major point we wish to make today, Your Honor, that if the statute is held unconstitutional, solely because the state has attempted in some manner to make individualized determinations, then the effect would be to hinder experimentation and the utilization of individualized medical tests.

THE COURT: You could argue that the existence of the medical examination requirement after age 40 means that a decision had been made that after age 40 the policeman in uniform is in a suspect class,

in a sense, and they cut it off at 50 with a cursory rule.

MR. O'MALLEY: Yes, Your Honor. The district court said that we hadn't proved that a critical area was reached at age 50. The experience of the state police is that they have an examination biannually before the age of 40. Once they reach the age of 40, because as the state police surgeon testified, there is a high degree of incurring hypertension and other cardiovascular diseases, the tests must be given annually. Moreover, the test is also expanded to include electrocardiograms and other procedures, because of the concern they have with officers of that age.

THE COURT: --(illegible)--I'd like a summary.

THE COURT: Yes, footnote 90 suggests 70, and in the text he's talking about 55, as every other state has this kind of law, mandates retirement at 55 rather than 50, and I thought that at least largely they thought 50 was just too young.

MR. O'MALLEY: I think that explains the opinion, that he thought 50 was too young.

THE COURT: Yes, well, what I'm trying to get at is, it really is the thrust of his invalidation that Massachusetts has this individual medical examination requirements?

MR. O'MALLEY: He never really defined the critical area, or how it was defined, but the first thing he did note, Your Honor, was that medical screening, individualized judgments, are not only practical, but available. Therefore, it was irrational to have this overall cut off. And from there--

THE COURT: It certainly sounds as though he thought that 50 was just irrational, under any circumstances.

MR. O'MALLEY: I think so, Your Honor.

THE COURT: At 55 might be all right; 70 certainly might be all right.

MR. O'MALLEY: If you apply the analysis of the district court to a 55-year-old retirement statute, I don't see how it could be any different.

THE COURT: I guess it's true, is it not? He says that the plaintiff has furnished a list of statutes in which it appears Massachusetts is the only state compulsarily retiring police officers before age 55. Page 28 of the jurisdictions statement.

MR. O'MALLEY: Your Honor, with respect to the other states and their retirement statutes, I did note that the State of Delaware has a 20-year service requirement and an officer must retire upon reaching, serving 20 years.

THE COURT: Even if he's only in his 40s?

MR. O'MALLEY: Yes, so that might well work out to be an earlier retirement age. Moreover, the State of Maine has a 25-year service requirement, and if the average age of enlistment is 25, a 50-year-old retirement statute would pertain there. However, the state, having undertaken these medical examinations, is not confined to merely removing the physically unfit. The retirement statute is a very positive objective, which is to promote the overall capability of the force as a whole. Therefore, the retirement statute for uniformed members of the state police is a rational exercise of legislative power, and the judgment of the district court should be reversed.

THE COURT: Mr. City?

MR. CITY: Mr. Chief Justice, and may it please the Court:

The single issue before this Court is whether the United States District Court of the District of Massachusetts was declaring that portion of a Massachusetts statute which separated members of the uniformed branch of the Massachusetts state police from the general retirement classification in which they had been placed, and forced mandatory retirement upon these officers at the age of 50 on the grounds that these men were superannuated. The undisputed facts show that each officer has been determined fit to continue in his duties. The basis of the decision of the court below rests upon its analysis of this statute in terms of the equal protection clause of the 14th Amendment.

THE COURT: You say each officer, Mr. City. I thought earlier someone said this was not a class action.

MR. CITY: It's not a class action, Your Honor. The point that I'm making here is that the elaborate medical screening which the uniform branch uniformly applies across-the-board from the time a man first joins to the time he reaches his 50th year is applied to every single member.

THE COURT: I see.

MR. CITY: And, it's our contention that having screened this group through this fine mesh, the only group that reaches 50, the only group that can continue to serve at age 50, because everyone who doesn't meet these standards is set aside--he just cannot continue to serve--so the only way you can get to reach your 50th year is to continue to be fit. Therefore,

the group upon which this statute applies its across-the-board classification is a group which by definition--the Commonwealth has already defined as fully fit and fully qualified to perform.

THE COURT: Doesn't this show that Massachusetts has a view that beginning at age 40 they must check their members of their police force annually to determine their fitness for duty? And then they cut off permanently at age 50? Isn't that the essence of it?

MR. CITY: Your Honor, there's no doubt about the fact that the burden upon the individual member increases at age 40. He has to be found to be fit every single year. The problem we have is that these members continue to be fit. Those members in their 40th or 41st or 42nd year who are unfit are separated, and only those men who are fit continue. The question is, why then draw the line at the 50th year?

THE COURT: Would you be here if they had drawn it at 55?

MR. CITY: Well, I think that the district court opinion addresses itself to that problem, and I think the later that we get in age, the inevitable aging does set in, and the problems that are incumbent upon us become greater. But, Your Honor, let me suggest this--

THE COURT: Well, have you answered my question? Would you be here if the age were 55?

MR. CITY: I would not be here provided that at age 55, the medical testing, which is already the order of the day, showed one of two things: one, it showed that some of the group, at least some of the group, were not being fit. Were just not able to meet standard. That is, in any given year, the number who would come back was significantly less. Secondly, the district court suggests that perhaps the issue of

predictive validity is another reason to retire men. That perhaps at age 50 or 51, even though a man passes a physical examination, it's no assurance that he's going to continue to be fit for the next year until he's examined again. The evidence shows that in the case of airline pilots the predictive validity of physical examinations as extensive and elaborate as this one really only begins to break down at around the age of 60. So the point is--

THE COURT: This is for airline pilots?

MR. CITY: Airline pilots. I would say, Your Honor, that that would be the most critical situation; here you have to worry about a man suffering a disability under stress situations. I think that while state police may be in analogous situations, I think that they are not in as regularly, so I would submit to the court that the standards used in airline pilots are certainly the rigorous ones, and I think the Commonwealth is hard placed to--

THE COURT: Also, too, the examination is much more extensive. Much more.

MR. CITY: Your Honor, I would submit that the examination used in this case, which covers 60 pages of the appendix here, is an extremely extensive physical examination.

THE COURT: Is it my understanding that airline pilots--

MR. CITY: Your Honor, we had a medical expert who testified in this case, who was similar--who was familiar with the medical--was a doctor for the airlines, and was familiar with the medical tests, and he felt that they were comparable.

I think one point ought to be cleared up: state police officers are members of the Department of Public Safety, and are classified under the General Massachusetts Retirement Statute as Group Three employees. If you look in the General Massachusetts Retirement Statute, you will find that Group Three employees are required to retire at age 55. The statute which is the subject of the case before this Court selects particular members of the state police, that is, members of the uniformed branch, selects them out of Group Three, and puts them in a separate subclassification which requires retirement at age 50. And the statute by its terms says it does this on the grounds that these men are superannuated. That is, that the state's necessary interest in keeping a fit force--

THE COURT: They mean superannuated in relation to the duties they are called on to perform, do they not?

MR. CITY: That's--I think that's correct, Your Honor. It's a function of the relationship.

THE COURT: Well, an airline pilot is presumed superannuated, possibly so, at 60, and not later, I think it is, than 64. But lawyers and judges are not necessarily, or librarians, superannuated at 60, of 64, or 65. Are they?

MR. CITY: There's no doubt, Your Honor, that there are different retirement ages for different activities. And again I want to make clear, we are not challenging here the variable retirement ages which the statute applies in Massachusetts. We're talking about 70 for the general employees, 65 for the policemen, whose duties are quite similar to the state policemen, have to retire at age 65, even age 55, for the members of the

Department of Public Safety. We're talking about a situation here where they take and remove this particular subgroup from age 55 and require them to retire at age 50.

THE COURT: What language, what statutory language, were you referring to, Mr. City? When you said the language, when you said the statute made specific references and gave us a specific reason--the hypothesis that these people were superannuated. What language were you referring to?

MR. CITY: The language, your honor, in the first part of chapter 32, in the definitions section, provides that a man will be retired for superannuation. I think the appendix will show that the notice that Colonel Murgia received from the Board of Retirement provides that you will be retired for superannuation at your 50th birthday.

THE COURT: Now, in assessing the constitutional validity of this state statute, are you suggesting that we're confined to assessing it to--the reason that the state gave for it?

MR. CITY: I would submit, Your Honor--

THE COURT: In other words, if we found that perhaps the presumption of superannuation might not support this, constitutionally, but that other factors and/or considerations might, we're not bound by the reason the state gave, are we?

MR. CITY: I would suggest, Your Honor, that this Court should be bound by the purposes stated in the statute the--

THE COURT: You're not suggesting that that's traditional,

conventional constitutional law?

MR. CITY: No, sir, I think there is, I will admit there is some dicta in some of the cases of this Court, particularly dealing with cases involving economic regulation, where there is language--that is, this Court can conceive of any rational basis to support the statute, I would say that--

THE COURT: The presumption is, of course, you would agree, that the statute is valid.

MR. CITY: There's no doubt about that. That burden remained on the plaintiff throughout, and I think the district court found that we adequately carried our burden.

THE COURT: And the equal protection clause is that if any rational set of facts can be conceived of that would support this legislation, it will be upheld. You say that economic legislation--and what else is this but economic legislation?

MR. CITY: Well, Your Honor, I think there are really a number of issues here. I think this somewhat of a novel case. Without any doubt, this is economic legislation in that the Commonwealth has a legitimate right to provide for retirement benefits for its employees. On the other hand, I think that we have here issues which deal with age discrimination, we have deep issues here dealing with a man's employment. I think the fundamental issue that we're talking about here, which is a personal right, is a right not to be classified irrationally, on the basis of age.

THE COURT: Well, that's just a play on words, it seems to me. It doesn't fit in at all with our equal protection decisions which

Justice Stewart just reminded you of, that say if any rational set of facts can be conceived that will support the thing, it will be upheld.

MR. CITY: My position is, even under that test, Your Honor, there is no rational basis on the facts that we have before us here.

THE COURT: But it isn't a question of the facts before us here, or the facts on the basis on which the state did--says it relies. It's if any set of facts can be conceived of. That's what this Court has said time and time again.

MR. CITY: Your Honor, I'll have to maintain my position. I cannot--I agree that that standard exists, and we--I cannot conceive of a rational basis. We have gone through a number of hearings in this matter. I think that any justification should be permitted to be tested before the bar--before the Court--and I think it's a very difficult standard, if ultimately the justification for any particular statute can rest on a justification which this Court might simply conceive of at this point. I think if, at the very least, if that were the case, we should be permitted the opportunity perhaps to go back to the lower court and to test and see if a rational--is the justification suggested here is, in fact, rational.

THE COURT: But it's not a question of fact. It's a question of constitutional law. It isn't something that you try in the district court and decide whether the district court reaches a different view than the legislature, which has the principle jurisdiction over the matter. It's a question, I think, of constitutional law, and I think that's what those

questions Justice Stewart propounded to you mean. It isn't a question that you need more factual hearings on.

MR. CITY: I agree with you, Your Honor. I would suggest that a rational, or an explanation for a statute must withstand the scrutiny of some examination as to whether in fact it is rational. I agree.

THE COURT: What if the state just wanted all of its policemen to not have gray hair as a matter of image or identification? Just as a person making a movie might want to have the lead roles played by people who do not have gray hair. Regardless of their health. And what if a state said, any policemen whose hair turns gray can no longer be a policeman working for us because we want only people whose hair is not gray? It's a matter of image for our police force. No matter how healthy.

MR. CITY: I would submit, Your Honor, that that is just not a rational basis on which to make a determination.

THE COURT: Why wouldn't it be? As a matter of the United States Constitution?

MR. CITY: I think it is a matter of the United States Constitution, the classification a state makes, by which it selects to retire its people, has got to have some functional relationship to the job it seeks to accomplish.

THE COURT: What you're saying, then, is that the legislature of the state cannot act on the generalization that men over 50 are not as competent to perform rigorous police duties as men 50 and under. That's what you're saying, isn't it?

MR. CITY: No, sir. I'm not quite saying that. I'm saying that

the legislation might as well be able to do that, but that we have a unique factual situation here. We in fact have preexisting, individual testing and the data which that testing shows, shows the legislature that the classification it's making is irrational. So I'd like to qualify what you've said--

THE COURT: So, if they'd abolish all of the medical examinations, you wouldn't be here? Is that what you're saying?

MR. CITY: I think that the holding of the district court, which is the only issue that we have here before us, says that when the legislature is involved in an admittedly arbitrary line-drawing, which is the classification here, and too, it already has the data, it is not burdened to go out and get it--it already has the data which shows that the operation of that qualification is totally irrational--

THE COURT: You think the data in the record shows that men over 50 do not get tired quicker? More quickly?

MR. CITY: I think that the record shows that--

THE COURT: Or that men over 50 don't have the endurance that men under 50--

THE COURT: Or that their reflexes aren't as swift?

MR. CITY: I think that the standard that is required by the state police is set forward in its examination.

THE COURT: Well, that isn't what I asked you. I asked you, does the record--is the record responsive to the questions I asked you?

MR. CITY: Well, Mr. Justice White, I think that without any question age is a factor here. A man who is 50 may in some instances--

THE COURT: Well, you know, we speak with some personal knowledge here.

MR. CITY: Exactly, Your Honor. But the fact of the matter is, though, that the standards which are required to perform the duties are fully met by the testing. So that I would submit that even though a man of 50 may not be as fast as a man who is 20, the man who is 50, so long as he meets the regulations set by the police, by the state police here, is capable enough to do his job, and I submit that the difference that he may experience personally between when he was 20 and when he was 50 is irrelevant to his competence to complete his job.

THE COURT: Well, again, you're just saying that we shouldn't be entitled to add to the possible qualification that the state is asking of its policemen. If they might have thought that men over 50 get tired faster, and if they might have thought that was an important matter to consider in having policemen, can we recognize that?

MR. CITY: I'm suggesting that they could recognize that; except in this instance, Your Honor, I think again that where we have this individualized medical testing, it belies that.

THE COURT: I think that actually those requirements after 40, that each officer have a medical examination--I would suppose that really evidence of that, what the legislature thought was: you ought to go at 50, but maybe you'll deteriorate before age 50, between 40 and 50, and we want to examine you each year to see if we ought to let you out before you reach age 50. Not that they introduced the requirement of the examination to determine whether at 50 or after one is still capable.

MR. CITY: I think Senior Judge Aldridge said to the legislature, that's something you can't do if you're going to do that testing. Then you can't have it both ways, that you can't have this arbitrary line that you establish at 50 because--

THE COURT: Well, I gather if that's what he said, then what we've got before us is whether he was right in saying it.

MR. CITY: I think that's what the court was saying. It's a combination of factors, and I think without the medical examination, the issue may not have existed.

I would like to speak just briefly about the point of the retirement benefits, which has been brought up here. It's been suggested that the provision of retirement benefits is the reason for the subclassification. I would submit that on examination that just isn't the case. We have here state police officers who are classified under the statute as belonging to Group Three. As officers under Group Three they are entitled to retirement benefits. The particular statute, which is the subject of this case, takes the members out of Group Three, and puts them into a classification which requires them to retire five years earlier. Since they were already entitled to all of the benefits in Group Three, and this subclassification doesn't supply any substantially different or additional benefits, it can't be justification for the statute to provide this subclassification on the basis that it's providing retirement benefits for--

THE COURT: Well, this is not just a matter of drawing different lines for different functions in the government?

MR. CITY: No, your honor, I think the legislative package here clearly shows that the--what we're talking about here is a particular subclassification, the statute in its first one or two sections sets out the general terms of--establishes these three general classifications. Then when we get all the way back to section 26, we find a specific subclassification which is limited to just the members of the uniform branch. So, I think we're not talking about four classifications here, we're talking about three classifications and then a subclassification to that. And I would submit that if the rationale for supplying retirement benefits is a justification for taking this subclassification out and treating these members essentially different from any others, then retirement statutes in general will be a subterfuge for the state to practice age discrimination.

Thank you.

THE COURT: Mr. City, I understand that the original complaint, it also alleged sex discrimination, in that women officers, or at least some of them, were not required to retire at age 50. Is that issue still in the case?

MR. CITY: No, sir. That issue is not.

THE COURT: Thank you.