OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-518 & 84-710

TITLE ROBERT W. JOHNSON, ET AL., Petitioners V. MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.; and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Petitioner V. MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

PLACE Washington, D. C.

DATE April 22, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT W. JOHNSON, ET AL., :

Petitioners, :

V. : No. 84-518

MAYOR AND CITY COUNCIL OF :

BALTIMORE, ET AL.; and :

EQUAL EMPLOYMENT OPPORTUNITY :

COMMISSION, :

Petitioner, :

V. : No. 84-710

MAYOR AND CITY COUNCIL OF :

BALTIMORE, ET AL. :

- -x

Washington, D.C.

Monday, April 22, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

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APPEARANCES:

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of the petitioners.

L. WILLIAM GAWLIK, ESQ., Assistant City Solicitor of Baltimore, Baltimore, Maryland; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Johnson against the Mayor and the City Council of Baltimore and the related case.

Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEE: Mr. Chief Justice, and may it please the Court, this case arises out of the efforts by the City of Baltimore to enforce its policy of mandatorily retiring some of its firefighters at age 55.

The only issue before this Court is a very narrow one, and one that we believe the Court decided two years ago in EEOC versus Wyoming.

The Age Discrimination in Employment Act prohibits the federal government, with some exceptions, from employment discrimination based on age regardless of the employee's age. It also prohibits other employers engage in interstate commerce from age discrimination against employees between the ages of 40 and 70.

One of the exceptions for federal employees is contained in a federal civil service statute which provides for mandatory retirement at age 55 for some federal law enforcement officers and firefighters. It

does not apply to those who have not completed 20 years of service, and the agency has the discretion to grant an extension to age 60.

Like the federal government, the City of Baltimore also requires some but not all firefighters to retire at age 55, but its exceptions are different. In Baltimore's case, persons who have attained the rank of fire lieutenant or above need not retire until age 65, even though they have the same exposure to physical risks, and other exceptions are keyed to whether the individual was or was not in service as of July 1, 1962, and whether he became a member of the retirement system at the time of its establishment.

The petitioners are the EEOC and six Baltimore City firefighters who contend that the city's mandatory retirement violates their rights under the ADEA. The city's basic defense is that mandatory retirement is important to the safety of its citizens, who depend upon a physically fit firefighting force.

There are two basic approaches to the problem of the identification and the elimination from the work force of those whose performance becomes less effective with increasing age. The first one, the one at issue here, is a presumptive group approach in which all persons are automatically swept out once they reach a

certain age.

And the other approach is an individual approach, determines ability on an individual basis. The District Court found that in the case of firefighters this is best done by periodic stress tests which are fairly inexpensive to administer.

Now, as its name discloses, the Age Discrimination in Employment Act is an antidiscrimination statute, so that any age-based employment criterion is at the first level of analysis a violation of the Act.

Nevertheless, Congress has not totally prohibited the presumptive approach. It has provided a narrow exception which permits the mandatory retirement of groups as groups rather than individuals as individuals, so long as the employer can show that age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

Since it is an exception to an antidiscrimination statute, however, it is narrowly construed. In this case, following a six-day trial, the District Court held that respondents had failed to show that age 55 is a bona fide occupational qualification reasonably necessary to the normal operation of the

city's fire department.

On appeal, the majority of the Court of Appeals took no issue with any of the District Court's factual findirgs, but reversed solely on the ground that since Congress had selected age 55 as the retirement age for some federal firefighters, Congress has thereby made a determination as a matter of law that age 55 is a BFOQ for all firefighters under all circumstances.

QUESTION: General Lee, did the District Court consider as evidence of either reasonable cause or the city's belief that its limit was desirable or as evidence of whether the age limit that the city has is reasonably necessary, did the District Court consider the federal policy and the expressions contained in the House report, for example, as some evidence?

MR. LEE: Justice O'Connor, I am reluctant to give an unqualified answer to that question because I am just not sure. As I read the opinion, I think it is fair to say that if the District Court gave it any weight at all, it was minimal.

QUESTION: Do you think that the District Court could appropriately at least consider what Congress has said as some evidence of those issues?

MR. LEE: I think that if I were a District Judge and it were offered as evidence, I think it would

be admissible as some evidence. For reasons that I am about to discuss, however, I think it is very minimal.

The holding by the Court of Appeals, the Court of Appeals conceded, that is, its construction of the statute was strongly influenced by its desire to avoid constitutional issues that would otherwise be presented by virtue of this Court's holding in National League of Cities versus Usery.

The holding of the Court of Appeals is very narrow, and the only question before this Court is correspondingly narrow. The case presents no constitutional issue, no issue concerning the standards for a bona fide occupational qualification, and no issue concerning whether the findings of the District Court supporting its holding that there is no BFOQ are clearly erroneous.

And contrary to the respondents' brief, the case in its present posture has nothing to do with safety. The only question before this Court is whether Congress has made a judgment that age 55 is a BFOQ for all firefighters as a matter of law. There are two independently sufficient reasons why the judgment of the Court of Appeals must be reversed.

QUESTION: And if it were clear that Congress had made that judgment, the findings would be beside the

point.

MR. LEE: That is correct, and that was the reasoning of the Court of Appeals majority, and indeed the majority said that in the absence of its determination with regard to that issue, and I am quoting, "we might well be persuaded by the thorough, impeccably reasoned opinion of the District Court."

The first reason, in our view, that the judgment of the Court of Appeals has to be reversed is that this issue has already been considered and resolved by this Court in EEOC versus Wyoming, and second, even in the absence of this Court's ruling in that case, the lower court's judgment is wrong.

QUESTION: The Court of Appeals then just plainly misread Wyoming? Is that it?

MR. LEE: They not only plainly misread it, Justice White, notwithstanding Chief Judge Whitter's pointing out to them Footnote 17, they didn't pay any attention, they didn't even mention it.

The issue in this case was not one of the questions presented in EEOC versus Wyoming, but during the oral argument, the question was posed to counsel for both sides whether it might be possible to dispose of the case on the ground that Congress as a matter of law had established age 55 as a BFOQ for all law enforcement

officers.

And it was a perfectly proper question, because if the case could have been decided on that ground, then the constitutional issue there would have been avoided, because under Wyoming law, game wardens, whose mandatory retirement was at issue in that case, are law enforcement officers.

QUESTION: General Lee, could I interrupt --

MR. LEE: Yes, surely.

QUESTION: -- before you get farther into your argument, because I just did want to -- have one thing I was a little puzzled about.

Is it clear that the primary argument or at least an important argument in the District Court was whether age 55 was the BFOQ? Because as I remember the opinion there was a great deal of emphasis on whether the defendants had established age 60 as a BFOQ, and the court seemed to talk about that more than age 55, if I remember correctly, which would, of course, not fit the Congressional determination at all.

MR. LEE: That is correct, and in our view what all of this shows is that it needs to be a case to case individualized determination, and the District Court's determination did refer to age 60 and age 55, and indeed in the case of most, as the record shows, in

the case of most fire departments, the mandatory age for retirement when they have them is at a higher age.

QUESTION: And most of these particular plaintiffs were also 60 or over, weren't they?

MR. LEE: That is correct.

QUESTION: They were being retired at 60 rather than 55, most of the named plaintiffs.

MR. LEE: That is correct. That is correct. And as to each one of them, the District Court found, and it isn't contested, that in fact even as of that time their work was not only satisfactory but above average.

The court reached the question in this case in EEOC versus Wyoming in the context of its discussion of the comparative weight of the federal estate interest which under the progeny to Usery was the fourth criterion to be considered. Nevertheless, we submit it squarely did reach and decide this issue.

The Court said, "We note that the strength of the federal interest underlying the Act is not negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers.

"Once Congress has asserted a federal interest, and once it has asserted the strength of that

interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than psychological analysis."

Moreover, even if the issue had not been decided by this Court two years ago, there is simply no evidence that Congress' retention in 1978 of mandatory retirement at age 55 for some federal employees represents any kind of a judgment concerning age as a bona fide occupational qualification.

What Congress did, quite clearly, in 1978 was based solely on a desire to expedite passage of the amendments to the ADEA, applying it to federal employees generally, while allowing the Congressional Committees with jurisdiction over particular federal retirement programs the opportunity to review preexisting provisions.

It was basically a matter of the respect for the jurisdiction of other Committees. The statements in the legislative history --

QUESTION: Has Congress followed up at all on that reservation of jurisdiction so as to either confirm or change the 1978 --

MR. LEE: There has been no change made in the seven years intervening, Justice Rehnquist, but --

QUESTION: Is there legislation pending, however?

MR. LEE: There is legislation pending at the present time, Justice Blackmun, that would resolve the inconsistency both ways. That is, there is one bill that would establish a BFOQ as a matter of law, and there is another one that would simply put the federal people under the Age Discrimination in Employment Act without the qualification, and periodically over this seven-year period Congress has returned to visit the problem. President Carter made a recommendation which was considered but never acted upon.

QUESTION: Where do those bills stand now, Mr. Solicitor?

MR. LEE: They have just been introduced. So far as I know, none of them is out of Committee, Justice Brennan.

Before I -- let me just mention this. The real significance in our opinion of the side by side existence of the civil service statute and the ADEA as an analytical matter is that if Congress had really intended to exempt non-federal firefighters on the same basis as federal firefighters and knew how to do so.

And even if there were room for reasonable doubt as to the correct interpretation, that doubt would have to be resolved as long as it is reasonable in favor of the consistent construction given to this statute by the EEOC, because under this Court's well established precedents dealing with statutory interpretations by the governmental agency that interprets and enforces the statute, the respondent has the burden of showing that its interpretation is the only reasonable one.

That is a burden that the respondents have not only not met, they have not even acknowledged. The most that can be said in criticism of Congress's performance in this area is that it has followed two different and arguably -- not arguably -- inconsistent approaches in two different statutes, and it has left the inconsistency in place for seven years, though it has periodically revisited the issue.

But consistent or not, the significant point from a legal standpoint is that each of those approaches is constitutionally available to Congress as this Court has squarely held. Congress has the power under Vance versus Bradley to employ an age stereotyping mandatory retirement program for its own employees.

And it also has the power under EEOC versus Wyoming to take exactly the opposite approach, requiring

employers engaged in commerce to base their retirement policies on individual merit rather than using age as an automatic proxy for ability.

And the fact that it exercises both of these powers at the same time for different sets of employees raises no questions of even the wisdom of what Congress has done. Whatever one may think about what is or is not wrong about treating federal and state firefighters differently, it is very clear that Congress has the power to do just exactly that.

See in this respect South Central Timber versus Wunicke.

Nothing more is involved than, in the language of Footnote 17 of EEOC versus Wyoming, the ebbs and flows of political decisionmaking, which are matters for Congress itself and those who vote for its members.

Now, finally, the great bulk of the respondents' arguments are properly addressed to two audiences, and neither of them is this Court. The first of those audiences is the Court of Appeals for the Fourth Circuit, which never reached the issues on which the respondent lost before the District Court and which it wants to argue here.

There are two such issues. The first is whether under all the facts and circumstances of this

case, age 55 is a bona fide occupational qualification. And the second is, what standard should be applied in making that determination?

And the second appropriate audience is the respondent itself. If the Mayor and City Council of Baltimore really believe that age 55 or under is essential for the safety of their firefighters, then the Mayor and City Council of Baltimore should adopt a mandatory retirement of age 55 for all firefighters rather than adopting it for some but excluding others for whom age is just as much a proxy for fitness as it is for these petitioners. Then we could get on with the issue of whether a real age 55 retirement qualification is a BFOQ.

But at the present time, none of those issues is now before this Court, and none is suitable for initial appellate review by this Court. The proper thing for the Court do to therefore is to reverse the judgment of the Court of Appeals and remand the case to that court for disposition of the remaining issues.

I would like to reserve the rest of my time, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Gawlik.

ORAL ARGUMENT OF L. WILLIAM GAWLIK, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GAWLIK: Mr. Chief Justice, and may it please the Court, the question presented today is whether Congressional action requiring the retirement of comparable federal employees establishes Baltimore's a reasonable basis for its mandatory retirement policies.

The employees we are talking about today are on the very cutting edge of public safety. These in this particular case are the firefighters that protect the citizens of Baltimore from the ravages of conflagration.

These are not the general clerks and bureaucrats and persons like myself who carry on the day to day business of city government. These are the people who are essential to our safety and to the safety of every citizen of Baltimore.

The Age Discrimination in Employment Act was directed at arbitrary discrimination on account of age. It was the unreasoned, unreasonable assumptions about persons which Congress sought to address in 1967 when it adopted the Age Discrimination and Employment Act.

Throughout the legislative history of the Act, it was very clear from the President's message that the Act must have a reasonable, bona fide occupational qualification or reasonable exception to the strictures which were placed upon employees.

In 1967, the employment relationship which was being regulated was the relationship between private employers and their employees. It wasn't until 1974 that the Age Discrimination in Employment Act was by amendment applied to federal government and state and local governments as well.

On April the 8th, 1974, the President signed the amendment into law. Sixteen days later, the Subcommittee began hearings on H.R. 9281, which was to become Title 5, Section 8335(b), the parallel federal provision.

The same sponsor, Senator Javits, for the original Age Discrimination in Employment Act was also the co-sponsor along with Senator Percy of the Senate version of the mandatory retirement provision.

It was brought to the attention of the Subcommittee which was dealing with the compensation for these federal employees that now the Age Discrimination in Employment Act was applicable to the federal government, and perhaps it should be addressed by BFOQ.

In fact, the Civil Service Commission sent a representative, and the civil service representative said that this is the appropriate way to deal with the problem.

It had no, it being the Civil Service

Commission, had no objection to legislating a BFOQ, a mandatory retirement age, in conjunction with maximum ages at hire for these employees because of the profound concerns for public safety which were being addressed on a day to day basis by these federal employees who were doing the same thing for the federal government that the fire and police employees of Baltimore City do for its citizens.

QUESTION: Mr. Gawlik, do you take the position that the federal requirement is absolutely determinative here of whether there is a BFOQ for the city?

MR. GAWLIK: No, Your Honor. Our position is substantially siilar to that of the EEOC's with respect to that requirement. We think that there should be a factual basis for the ordinance or the statute which is to act as a BFOQ.

QUESTION: Do you think it should be just some evidence, the federal policy? Should it be evidence of the reasonableness of the city requirement?

MR. GAWLIK: In this particular case, Your Honor, we think that it should serve as the factual basis. The BFOQ requirement --

QUESTION: Then you do take the position that the federal finding should be determinative?

MR. GAWLIK: Yes, Your Honor. And principally in this case as opposed to other cases in which statutes were argued before this Court as having a presumptive validity in this regard, such as Dothard versus Rawlinson, is that the legislative history of 8335(b) was available to the District Court and the Circuit Court, and also the legislative history of the comparable local provision was available to the District Court and the Circuit Court as well.

QUESTION: Did the District Court give the federal determinations any evidentiary weight?

MR. GAWLIK: Your Honor, at the end of our presentation we specifically requested that the District Court notice 8335(b), and we argued it thereafter. The District Court completely rejected any evidentiary value for 8335(b), and as I may point out, I don't think that there has been any court which has said that the comparable federal provisions are entitled to no weight whatsoever.

Indeed, the decisions relied upon by the EECC, such as Heiar versus Crawford County, say that this is not a traditional form of evidence, but the ADEA is not a traditional form of obligation, and as such it should be evidence of the reasonableness of the employer's position. It may not be disregarded.

In Heiar versus Crawford County I believe there is indication that if the legislative history of the local ordinance had been presented to the court, that it may very well have taken the approach that the Fourth Circuit did.

Unfortunately, what was done in that case was the same thing that was done in Dothard versus Rawlinson. The court was shown a copy of a state statute or an ordinance and said it is entitled to substantial deference without having the benefit of the knowledge of the particular facts which required that legislation.

QUESTION: May I interrupt with a question, please?

MR. GAWLIK: Yes, sir.

QUESTION: I am a little puzzled about the nature of the argument made to the District Court insofar as you relied on the federal government as a precedent for the BFOQ. The District Court seems to have treated your argument as the argument that age 60 was the correct age. Did you rely on the federal experience to establish age 60 as a BFOQ or just for the general proposition that some age was appropriate?

MR. GAWLIK: There were multiple counts before the District Court. One was an equal protection

question relating to the difference in treating officers --

QUESTION: I understand. I am talking about the part of the opinion that deals with the BFOQ --

MR. GAWLIK: Yes, Your Honor. We used that for the age 55 retirement requiremnent. We -- for the new hires. It is clear that what the City of Baltimore was doing, Your Honor, was to establish age 55 as a mandatory retirement age, something the Solicitor General just suggested that we do.

That is in fact what happened. We have to remember, though, that Baltimore was going from a retirement system of which I am a member which allows an employee to work until age 70 and has done so since 1926 to a retirement system which requires retirement at age 55.

And so therefore there were several stepwise decreases to reach that bottom level. But please make no mistake about it. The mandatory retirement age which we advocate and which we have adopted is in fact age 55.

QUESTION: I am not questioning that. Obviously you are contending for that position. I am trying to understand the nature of the argument you made in the District Court in support of the proposition that your selection of the arbitrary age of 60 as a mandatory

retirement of Baltimore firefighters was proper, because I guess five of the six plaintiffs were --

MR. GAWLIK: Yes.

QUESTION: And were you saying -- I am just not sure how the federal precedent supported that argument. Or did it? Did you argue it in support of the 60 age which you also argued, of course?

MR. GAWLIK: Yes. The Appendix 1 draft, for example, in our brief was an exhibit which was introduced by the petitioners at trial, and that shows there is a remarkable stepwise increase in mortality and morbidity after age 55.

We certainly acknowledge that age 60 is an intermediate step. What we should be looking for, and what the statute envisions, is a mandatory retirement at age 55. If age 60 -- if I may, if the federal government has adopted age 55 on the basis of the particular hazards of federal firefighting, and if there is really no difference, and in fact federal firefighting may be substantially safer than state and local firefighting, then age 60 would certainly be warranted by any calculus.

QUESTION: So what you are saying is that if the federal government picks 55 as a matter of law a city can take 55 or any older age and be entirely

protected as a matter of law?

MR. GAWLIK: Yes, Your Honor.

QUESTION: I see.

MR. GAWLIK: Yes, Your Honor. And the reasoning for that goes back to the very essence of this case, and I must disagree with the Solicitor General in this regard. We are not talking about the average city employee or the average municipal employee. This is our particular group of employees upon which our responsibility to the people of Baltimore City rests.

And it is essential that these employees be fit and ready and capable, and there is no comparable parallel outside of our particular realm except a few very specialized areas, one being bus drivers, and that has been found in the cases which have been relied upon as precedent for the BFOQ, the Tamiami case and Hodgson versus Greyhound, and in the area of aviation, such as Hoefelman versus Conservation District and the various FAA age 60 rules.

Now, throughout its brief, or their briefs, the petitioners have talked about the necessity for a factual basis, and we agree that BFOQ's should be supported by facts. We disagree that each time a state or a local government attempts to create a retirement system with an age less than 70, that it must to go

trial before the District Courts, the Circuit Courts, and perhaps the Supreme Court of the United States to have its position validated.

We make decisions today regarding what happens to these employees 20, 25, and 30 years from now, and our pension system and the pension systems of the states across the nation cannot be subject to willy-nilly writing in and writing out mandatory retirement ages as different or new medical evidence becomes available.

QUESTION: It sounds like you ought to tell that to Congress.

MR. GAWLIK: Your Honor, we believe that Congress implicitly recognized, and one of the crucial factors between extending the ADEA to the federal government in 1974 and then 16 days later undertaking a mandatory retirement provision with the increased benefits the same as Baltimore put in, we see no conflict there. We see a harmony and a complete cohesion of purpose.

QUESTION: You just wouldn't subject these plans to any kind of judicial review in terms of Title 7 or any other federal law?

MR. GAWLIK: Your Honor, I would look towards the same concerns as the Court expressed in Dothard versus Rawlinson, a Title 7 case in which Alabama tried

to set forth the proposition that because what it considered was a BFOQ was included in a statute that it was entitled to deference.

QUESTION: So we just carve out an exception to Title 7 and say, except for municipal retirement plans?

MR. GAWLIK: No, Your Honor. The exception that we are endorsing, or the approach that we are suggesting that the Court take is to look at the reason behind the statute or the ordinance in question.

In Dothard versus Rawlinson, Alabama made no showing that its height and weight requirements were in any way related to the job of correctional counselor. In this particular case, the District Court had quite clear evidence regarding why the Mayor and City Council took the position it did.

QUESTION: That may be so, but he found against you on the facts.

MR. GAWLIK: He -- the District Court found that there was testing that was available, and of course we don't --

QUESTION: You don't challenge those -- Do you challenge those findings?

MR. GAWLIK: Oh, yes, we do challenge the findings of fact. As a matter of fact, those identical

findings of fact were held to be clearly erroneous.

QUESTION: So you -- they were found clearly erroneous by whom?

MR. GAWLIK: Yes, Your Honor, in EEOC versus Missouri State Highway Patrol.

QUESTION: Well, I know, but this Court of Appeals didn't find them --

MR. GAWLIK: Well, they really didn't rule one way or another, Your Honor.

QUESTION: So you think at the very least we ought to send the case back for them to review the facts?

MR. GAWLIK: At the very least, Your Honor. Our suggestion is, the position that we endorse is that when the reasonable federal standard, when that rational basis in fact is examined either by a District Court or by a Circuit Court, that great weight and care should be given to looking at the reasons why the legislature, the city council, or the state legislature did what it did.

After all, the purpose of the Age Discrimination in Employment Act was to eradiate arbitrary and unreasoned distinctions based on age. Certainly if the city council had before it the evidence which I believe we produced in the District Court, our actions were not arbitrary, were not unreasonable, and

were not in violation of the ADEA.

In point of fact, Baltimore asserts that the evidence regarding the legislative history should and would carry the day regarding a question of BFOQ. In fact, that is the reasonable and just way in which to deal with this problem.

As an example, it has been nearly five, now, going on six years since this case was litigated to this point. It took the mayor and city council about three years or half that time from the time it was first told that there was a problem with firefighting and law enforcement to the time when it created an entirely new pension system to address those problems.

And in fact what happened then was that the federal government in creating 8335(b), the bills which were to become 8335(b) then relied upon the various experiences which the federal -- excuse me, which the state and local governments had regarding mandatory retirement and regarding the most important factor of our retirement plan, which is increasing the annual benefit to counteract for the shorter working life.

And that is why there is such a close parallel between 8335(b) and the relevant provision in the Baltimore City Code. It wasn't simply a matter of creating a mandatory retirement provision. It was a

restructuring of benefits for these employees.

It was creating a pension plan predicated upon a shorter working life, but with increased benefits so that an employee in the ERS who worked for approximately half of his life with the mayor and city council would receive the same pro rata retirement benefit as a fire and police employee who also worked for half of that foreshortened working life.

What we tried to do in that case, in the case of the F&PERS was to make retirement feasible at age 50 for these employees, because the evidence which was adduced to us by the firefighters themselves and their union was that these employees were dying at age 59, which is earlier than the earliest elective age in the ERS, and that being age 60.

So, in order to preserve the safety and to take into account the concerns of the citizens of Baltimore, a new pension plan was created with a mandatory retirement age of 50 and an optional retirement -- a mandatory retirement age of 55, and an optional retirement age of 50, and in order to grandfather in the existing pension plan members, then the various ages were set up prediated upon length of service and rank.

There was evidence that when we created the

F&PERS that because of the imbalance in our age force a retirement at age 55 of everyone across the board would completely cut away our officers and the persons of rank in the police department and fire departments. So therefore it was essential that we created a staggered system of mandatory retirement ages and that we encourage retirement as early as age 50.

This is precisely what the federal government did in this regard.

QUESTION: May I ask in that connection, I understand the problems of adjusting your pension rights of people with different seniority and different ages made it appropriate to have exceptions from a mandatory retirement age of 55, and therefore your staggered system, but do you rely on the difficulties of arranging the pension rights of the various firefighters as a justification for the BFOQ at 55?

MR. GAWLIK: No, we don't rely upon that.

QUESTION: Merely as an explanation for the exceptions to it?

MR. GAWLIK: Yes, yes, but we also consider that the difficulty in arranging this pension system is one reason why when there are sound factual bases for an ordinance, we think that those bases in the ordinance should be accorded some deference when it comes to

judicial review.

QUESTION: But if it otherwise violated the federal statute, you wouldn't say you would get an exemption because it is kind of complicated to comply, would you?

MR. GAWLIK: No, no, that is correct. The position that we endorse is essentially the one that is warranted by the legislative history itself, that being that there should be a basis in fact for the employers' actions, but it need not prove to an absolute necessity that what it does is warranted by the conditions.

We feel that what we adduced before the District Court certainly should have carried the day with respect to the rational basis or the reasonable necessity, rather, of our plan.

And we assert that the Circuit Court when it looked towards the comparable federal statute was, of course, concerned with constitutional questions which are really no longer pertinent now, but what it did was look for a reasonable federal standard against which to measure our conduct and our behavior, and in this regard it found one.

It found the comparable federal statute, which was predicated upon an identity of concerns. It was again a pension system with increased benefits

predicated upon a shorter working life. It was done with full knowledge of the ADEA, the BFOQ, and it was endorsed by the agencies, and in fact in 1978 it was retrenched, put back into place by Congress, and I think the --

QUESTION: May I ask another question? Maybe I am not evaluating your argument properly. Are you not saying that the problems of taking into account the seniority of these people who were not required to retire until they were 60 or perhaps a year or two older outweighed the safety considerations that would otherwise mandate retirement at 55 for them?

MR. GAWLIK: No, Your Honor. The situation was that you are calculating a certain number of years of service with a particular mutliplier, and if you took someone from a plan in which a person had participated for 25 or 30 years, and you put him into a plan in which he would be mandatorily retired at age 55, the mathematics don't work out.

It is very difficult to deal with that employee fairly, just as 8335(b) recognizes. In virtually every plan where there is a mandatory retirement age, there is some means of dealing with an employee who in the case of the federal government is hired after the maximum age at hire requirements of the

federal government.

QUESTION: But would you say that in the airline industry, for example, that if an airline had trouble with people who they wanted to keep on until they were 73 or 74 years old as pilots, that they could say, well, we will just ignore the safety considerations for those people, because we have these problems on being fair to these people? Or would they just have to comply with the safety retirement age because at a certain age it becomes too hazardous?

MR. GAWLIK: Your Honor, the principle -- the problem with this case here is that there is no bright line determination. Even though the graph that we have at Appendix A-1 is remarkable, it certainly doesn't indicate that at age 55 or 56, that a light goes on and someone who previously was safe is now unsafe.

We would that it were that simple. It is not. It is a complicated matter, and it is one in which there is a certain amount of discretion and a certain amount of judgment which needs to be exercised.

That is one of the principal differences between age discrimination and other kinds of discrimination which were outlawed by Title 7. There comes a time when age is inherently related to ability, and that is a judgment which each state and which each

political subdivision must make in regards to public safey personnel, and the question, we think, part and parcel of this case is, when they do it, how is that judgment going to be viewed?

What does a state or political subdivision have to do to reasonably make plans for its public safety personnel? The principal concern must always be public safety, and that is what we have stressed from the beginning of the case, and that is what we stress now.

The fact that in the case of the fire officers whom we believe perform a different job from firefighters, and in fact that view was endorsed by EEOC versus St. Paul, where you have different kinds of persons, also the Little Rock case where if you have managerial people they are in a different category from the line officer or the front line firefighter.

Now, in our case it is a little bit different, because the officers do ride on the trucks, and in some cases they act like firefighters. Nonetheless, the mayor and city council felt when the F&P system was adopted that there was a substantial difference with respect to the duties of those employees which warranted different treatment.

And that is why we can say that the case is

always a case of public safety, but when we deal with a problem which was first brought up to us in 1959 reflecting the mortality of firefighters and the particular difficulties with that, then we created a staggered system.

With regard to the Wunicke case, with all due respect, I believe that case is inapposite to the question before the Court. That involved a specific delegation or a requirement of a specific delegation of commerce clause authority before that delegation would be held valid.

And in the Wunicke case there was no specific delegation of commerce clause authority, and therefore the comparable Alaska statute did not create a federal standard or a standard cognizable under the commerce clause.

In this particular case there is no such requirement that Congress affirmatively delegate any particular power to the mayor and city council. On the contrary, the test is whether our standards are reasonably necessary, whether we have a reasonable basis in fact for our actions.

The petitioners assert that in no case can a BFOQ be established except where there is an evidentiary hearing and where a District Court would agree with the

particular political subdivision. This has led to a chaotic patchwork quilt of decisions across the nation.

For example, in EEOC versus Allegheny County, age is not a BFOQ for the police officers in that Pennsylvania county. For state police officers who may be called out of their cars to run next to the Allegheny County police officers, there is an age BFOQ.

So, what is anticipated apparently by the petitioners is a patchwork quilt, province by province, township by township determination, assuming that the townships can get that far, whether they can afford to endure an age discrimination case, and that patchwork quilt is what is going to cause great disruption to the purposes of the Age Discrimination and Employment Act.

On the other hand, the approach taken by the Fourth Circuit is reasonable and would lead to harmony throughout the various states. There are considerable concerns that the District Court or the Trial Court is not the proper place in which to address the BFOQ.

In that regard, I would cite to the Court the concurring opinion in the Tamiami case. The Chief Judge for the Fifth Circuit wrote the opinion for the court and then wrote a specially concurring opinion saying that the trial process is not the right way in which to create a BFOQ. It is essentially legislative.

QUESTION: And who was the judge?

MR. GAWLIK: That was Chief Judge Brown, I believe.

QUESTION: He no longer is Chief.

MR. GAWLIK: I am sorry. I didn't know.

In any respect, this is essentially a legislative process. Whether the District Court admits it or not, whether the Circuit Court admits it or not, this is essentially a process by which a BFOQ either will be legislated or will not be legislated, and recently the courts have not been too reluctant to create BFOQ's, finding that the actions are reasonable, the actions of the political subdivisions, rather, are reasonable.

The ADEA -- For the foregoing reasons, we would respectfully request that the decision of the Fourth Circuit be affirmed.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Solicitor General?

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITINOERS - REBUTTAL

MR. LEE: Only two very brief points, Mr. Chief Justice.

The first is that while interesting, much of Mr. Gawlik's argument simply went to the proposition that the age criterion is rational, and that, while interesting, is totally irrelevant under the ADEA.

The second point is simply that there are interesting questions in this case, and Mr. Gawlik has discussed them. One is whether the federal statute should constitute any evidence at all, and the other is whether under all the facts and circumstances of this case there is or is not a BFOQ.

But it is very clear and respondents do not dispute that that issue is not before this Court. If there was ever any question about it before, there certainly cannot be any question after Mr. Gawlik's argument that this case must be reversed and remanded for consideration by the Fourth Circuit of the issues that Mr. Gawlik wishes to present to them.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:50 o'clock a.m., the case in the above-entitled matter was submitted.)

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518 - ROBERT W. JOHNSON, ET AL., Petitioners V. MAYOR AND CITY COUNCIL OF BATILORE, ET AL.

#84-710 - EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner V. MAYOR AND CITY COUNCIL BALTIMORE, ET AL.

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BY Paul A. Richardson

(REPORTER)