ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant, v. JUNE M. BETTS

CASE NO: 88-389

PLACE: WASHINGTON, D.C.

DATE: March 28, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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PUBLIC EMPLOYEES RETIREMENT :

SYSTEM OF OHIO, :

Appellant :

v. : No. 88-389

JUNE M. BETTS :

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Washington, D.C.

Tuesday, March, 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 o'clock p.m.

APPEARANCES:

ANDREW IAN SUTTER, ESQ., Assistant Attorney General of Ohio, Columbus, Ohio; on behalf of the Appellant.

ROBERT F. LAUFMAN, ESQ., Cincinnati, Ohio; on behalf of the Appellee.

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C., EEOC; as amicus curiae, supporting Appellee.

C O N T E N T S

P R O C E E D I N G S

(2:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-389, Public Employees Retirement System of Ohio v. June Betts.

Mr. Sutter, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW IAN SUTTER

ON BEHALF OF THE APPELLANT

MR. SUTTER: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents the following issue: Must age-based distinctions in benefits offered through a bona fide employee benefit plan be justified by age-related cost considerations?

The Sixth Circuit answered that question in the affirmative. The Public Employees Retirement System of Ohio, however, disputes that holding and believes that an age-related cost justification is inconsistent with the plain language of the Age Discrimination and Employment Act and, moreover, is inconsistent with the purposes of the ADEA, and in particular, Section 4(f)(2) of the act.

The facts are as follows. The Public Employees Retirement System of Ohio, which I will refer

to as PERS, was created by the Ohio General Assembly in 1933. It provides retirement benefits to Ohio public employees on the municipal, county and state level.

There are two types of retirement benefits available; age and service retirements benefits and disability retirement benefits.

There are three ways to qualify for age and service retirement benefits. A member of PERS may be -- must have at least five years of service credit, have attained the age of 60; or must have at least 25 years of service credit and be at least 55 years of age; or must have 30 years of service credit, irrespective of age.

In order to qualify for disability retirement benefits, a member of PERS must have at least five years of service credit, have not attained the age of 60, and be, or presume to be, permanently disabled.

June Betts -- I'm sorry. The actuarial assumptions that underlie both the disability retirement benefits and the age and service retirement benefits are intertwined. And all benefits, whether they be age and service or disability retirement benefits, are derived from a common fund.

June Betts, the appellee, was hired by the Hamilton County Board of Mental Retardation and

Developmental Disabilities at the age of 55. At the age of 61 she became disabled because of health. She submitted applications both for disability retirement benefits and age and service retirement benefits to PERS.

She requested that her age and service retirement application not be processed unless her disability retirement application could not be processed.

June Betts was more interested in the disability retirement benefits because they would have afforded her a higher monthly pension.

Because Ohio law contains an age 60 cutoff for eligibility to apply for disability retirement benefits, PERS could not process her disability retirement application. They did, however, process and approve her age and service application. She is currently receiving a monthly pension, as well as full health care.

June Betts initiated suit claiming that the age 60 cutoff under Ohio law for eligibility to apply for disability retirement benefits constituted a violation of the Age Discrimination in Employment Act.

PERS defended on the basis that its plan was protected under Section 4(f)(2) of the Act, which provides that it will not be illegal for an employer to observe the terms of any bona fide employee benefit

plan, such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of the Act, provided no such plan permits or requires involuntary retirement because of age.

The District Court granted June Betts' motion for summary judgment on two bases. First, the court held that PERS was not the type of plan contemplated under 4(f)(2) because the age 60 cutoff could not be justified by age-related cost considerations.

Secondly, the District Court found that the unavailability of disability retirement benefits to June Betts was the equivalent of constructive discharge and involuntary retirement because of age.

A divided panel of the Sixth Circuit affirmed on the basis that the age 60 cutoff under PERS could not be justified by an age-related cost consideration. It did not, however, reach the constructive discharge or the involuntary retirement question.

Now, PERS asserts that the Sixth Circuit was incorrect in its holding that 4(f)(2) requires a showing of age-related cost for three reasons.

QUESTION: What precise language in 4(f)(2) are you relying on, Mr. Sutter?

MR. SUTTER: Mr. Chief Justice, we are relying on the language that says quite clearly, any bona fide

employee benefit plan, such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of the Act.

The language clearly does not contain an age-related cost justification.

QUESTION: But then, how about the proviso that comes afterwards?

MR. SUTTER: In respect to involuntary retirement, Your Honor, or the subterfuge language?

QUESTION: Well, where in says, and no such employee benefit plan shall require or permit the involved, et cetera, et cetera.

Does that not have a bearing on it?

MR. SUTTER: Your Honor, the Sixth Circuit did not reach the question of involuntary retirement.

However, the -- the -- the -- the -- the concept, the notion that because June Betts was ineligible to apply for a particular benefit, that she was involuntarily retired because of her age is just not applicable here.

It was her health that required June Betts, that in fact motivated June Betts, to apply to retire. She wanted to retire. The only question is what kind of retirement benefit was she going to receive.

QUESTION: So you say all we have before us is

whether or not PERS has a bona fide employee benefit plan, such as a retirement, pension or insurance plan?

MR. SUTTER: Which is not a subterfuge to evade the purposes of the Act.

QUESTION: Which is not a subterfuge to evade the purposes --?

MR. SUTTER: Yes, Your Honor. The Sixth Circuit did not address the other question.

The other two reasons besides the fact that --

QUESTION: Mr. Sutter.

MR. SUTTER: Yes, Justice O'Connor.

QUESTION: May I ask about the operation of this plan?

I take it the benefits were the same for voluntary retirement or for disability up until 1976, was it?

MR. SUTTER: In 1976 the Ohio General Assembly instituted a minimum benefit under disability retirement benefits, a 30 percent minimum.

QUESTION: Well, they were the same until then. And then -- there -- then, in 1976 there was a 30 percent increase in disability benefits, is that right?

MR. SUTTER: Well, not a 30 percent increase. What the Ohio General Assembly did was they instituted a provision so that the disability retirant would receive

no less than 30 percent of his or her final average salary.

QUESTION: Well, this discrepancy arose by action in '76?

MR. SUTTER: That is correct.

QUESTION: And that was post-Act action?

MR. SUTTER: It was post-Act action, however, Your Honor, it distinguished between disability and age -- between disability retirants and age and service retirants. It did not distinguish specifically on the basis of age.

The Ohio General Assembly made a decision to increase the benefits that would be available, a minimum benefit, to disability retirants. But it wasn't on the basis of age.

It affects all disability retirants and all age and service retirants the same, irrespective of age.

So it is PERS' contention that that particular amendment to Ohio law did not remove it from the preexisting plan status.

QUESTION: Well, do you -- it seems to me that it could be viewed as an attempt to use a pre-Act plan as a -- a subterfuge.

MR. SUTTER: Your Honor, the -- the only sort of impact that the provision would have in respect to

age is that it could have had a residual impact, because as you have noted, prior to 1976 the benefit was calculated the same.

QUESTION: Right.

MR. SUTTER: But the provision itself is neutral on its face and was intended to enhance the benefits of disability retirants.

Now, if the Court is approaching this from the -- the position that there was some sort of disparate impact; if we assume that under the ADEA that there is a disparate impact cause of action, and I am aware that there is some dispute in that respect, the point would still be that June Betts would have been obligated to introduce evidence, statistical data, to demonstrate that there was a disparate impact on older workers because of this 30 percent minimum.

In any event, the provision is age-neutral, and so it did not discriminate against older workers. And therefore, whether PERS is a pre-Act plan -- plan --

QUESTION: Well, the -- the -- the plan, viewed as a whole, is not age-neutral, is it?

MR. SUTTER: Your Honor, the -- that particular provision was, and therefore --

QUESTION: You are just saying the -- the addition in 1976 was?

MR. SUTTER: That is correct.

QUESTION: But if you look -- if you look at the whole plan as amended, it is difficult to see how it is age-neutral.

MR. SUTTER: But, we are not suggesting that the whole plan is age-neutral.

First, PERS would assert that it is a pre-existing plan; that all the provisions that discriminate on the basis of age, i.e., the age 60 cutoff, was in the plan well before the ADEA was passed, let alone made applicable to the states.

Moreover, --

QUESTION: Well, you can't just make any subsequent changes with impunity, can you?

MR. SUTTER: No, Your Honor.

QUESTION: Do we have to look at the subsequent changes and their effect to see if it's subterfuge?

MR. SUTTER: Your Honor, PERS's assertion is that under 4(f)(2), one must look to see whether the plan as a whole serves as a subterfuge to evade the purposes of the Act.

The question here is does the PERS plan as a whole serve to frustrate the employment of older workers or discriminate against them in respect to wages or

other terms of compensation or incidentals that aren't associated with employee benefit plans.

PERS is suggesting that in order to determine whether the plan is a subterfuge that one must look at how the plan as a whole operates. And PERS' plan operates on the whole as a retirement plan. It was created to offer retirement benefits to various individuals, to applicants, that could no longer work or chose to no longer work for the state of Ohio might have a retirement benefit available to them.

But the plan was not established, it was not created for the purpose of driving older workers from the work force or interfering with their hiring.

The very fact that June Betts was hired at the age of 55 and would have been permitted, would have been entitled to remain at her job, irrespective of her age, except for her health, indicates that the plan did not have the effect of driving this person from the job market.

QUESTION: But as you look at it in its effect now, as amended, it appears to be facially discriminatory.

MR. SUTTER: Yes, Your Honor, the fact that the age 60 cutoff was there made it facially discriminatory. And there has never been an assertion

by PERS that there isn't discrimination in not permitting people age 60 or older to apply.

PERS' defense is that under the 4(f)(2) exemption that sort of discrimination is permissible; that as long as the terms of the plan are observed, as long as the purpose of the plan is to provide an employee benefit -- employee benefits, as long as the plan isn't designed to frustrate the employment of older workers or to discriminate in respect to compensation that they would receive outside of an employee benefit plan, that PERS is bona fide.

I mean PERS is a retirement system; there is no other purpose behind it. It exists, I mean it pays substantial benefits.

QUESTION: Well, all -- all retirement plans are -- are discriminatory on -- on the basis of age, aren't they?

MR. SUTTER: That is correct, Your Honor. The age-related cost consideration creates an obstacle for employers --

QUESTION: Well, didn't -- the Court of Appeals didn't say this was a subterfuge, did they?

MR. SUTTER: No, Your Honor.

QUESTION: They -- they -- they went on the other -- they went on the cost differences.

MR. SUTTER: Yes. One of the interesting things about the age-related cost justification is the courts below can't seem to agree what portion of the exemption provides the statutory justification.

And -- and one might suggest that the type of plan argument was a development to circumvent this Court's holding in McMann v. United Airlines, or United Airlines v. McMann, because of the subterfuge --

QUESTION: What -- what -- what do the -- what -- what do the guidelines, so called guidelines rely on in -- in requiring this cost justification? Do they identify the language of the act they're construing?

MR. SUTTER: No, Your Honor, they don't. They don't point to any language. The appellee and the amicus -- the Solicitor General's Office would argue that -- and I use their terms, they say both, the such as language and the subterfuge language, can be read to accommodate the age-related cost justification.

But, it's such a clear statute, it just says any bona fide employee benefit plan such as a retirement, pension or insurance plan.

They had -- Congress had an opportunity to include an age-related cost justification; they could have said what they -- what they were trying to get at in a much more direct fashion.

QUESTION: Well, it may be, but -- but -- but, isn't it an argument that it's a subterfuge if there isn't an age cost justification?

MR. SUTTER: First, Your Honor, I would point the Court --

QUESTION: Isn't -- isn't -- at least it's an argument, isn't it?

MR. SUTTER: That's the argument posed; the question is: Is it reasonable in light of the language of the statute?

There is nothing on the face of this statute that qualifies the protection or the coverage of the exemption to a plan that can demonstrate that it has -- that the differences in benefits offered to older and younger workers is a result of age-related cost.

QUESTION: Well, what evidence other than cost justification would ever be relevant in determining -- or proving that a facially discriminatory plan is not a subterfuge?

MR. SUTTER: I think, Your Honor, that the evidence that a court would have to scrutinize is whether the plan as a whole is intended to evade the purposes of the Act. So one has to look into the intent.

One of the problems with the age-related cost

justification is it takes a test that requires an inquiry into the motivation of the employer, and requires the employer to satisfy an objective rule. If you can't demonstrate age-related cost justification, then ipso facto, you are a subterfuge, no matter what the intent of the employer.

And the age-related cost justification is not present in the language. The Court -- the language that Congress --

QUESTION: Well, what would the employer intend or point to other than cost justifications?

MR. SUTTER: I think what the Court would require an employer to demonstrate is that his plan is not conceived with the intention of frustrating the employment of older workers.

For instance, if the plan made it difficult for an employer -- an older worker to be hired, or if it made it difficult for an older worker to advance within the employ of that particular company, specifically because of that person's age. Or if they tried to use the plan to reduce the wages or salaries of older workers.

That would mean it was a subterfuge to evade the purposes of the Act.

I think a good example might be in the Karlen

case out of the Seventh Circuit. Now, that court did find an age -- did rely on an age-related cost justification, but they found that the plan itself was bona fide; they just found that the plan may have been conceived with the purpose of forcing older workers from the job market.

That's the sort of inquiry that the Court would engage in. And the cost justification, which I think this Court at least rejected, in respect to -- to pre-existing plans in the McMann decision, and that -- I think Justice White's concurrence specifically rejects the -- if there is no economic or business purpose necessary, and age-related cost is certainly a type of economic or business purpose, it, too, would be the improper test.

And that's --

QUESTION: Isn't there some indication that Congress intended to overrule part of our McMann decision?

MR. SUTTER: Your Honor, Congress did overrule part of the McMann decision. It reversed this Court in respect to its holding that involuntary retirement, based on age, was legal within the 4(f)(2) exemption.

But the language passed by Congress says specifically that it -- it addresses itself exclusively

to the issue of involuntary retirement. There is nothing in the language of the '78 amendment to suggest that Congress was addressing anything other than the McMann position on involuntary retirement.

Now, the appellee may point to some language in the legislative history, but, first, that legislative history I think does as much to confirm that what Congress was concerned about was the issue of involuntary retirement and admonishing the courts that, whether that involuntary retirement provision came in before or after the passage of the ADEA made no difference; there was going to be complete restriction in respect to involuntary retirement on the basis of age.

But, because the -- the amendment in 1978 dealt only with the issue of involuntary retirement, any remarks in the legislative history involving what that '67 amendment meant, or what the '67 Act meant, is irrelevant.

You can't look to an older Congress -- or this Court has not looked to a Congress 10 years later to define the meaning of legislation passed in 1967.

Moreover, in their -- in the appellee's brief and the amicus brief, they now contend that the 1967 Act had more than one purpose. In effect, they are saying there were at least two purposes underlying the 4(f)(2)

exemption.

Well, the remarks in the '78 legislative history that they refer to say -- mention only age-related costs. It seems to me inherent in that position is that the people -- the Congress in '78, even they were misconstruing the scope of a 4(f)(2) exemption.

Now, I think as the Court is aware, that there are two portions that the courts below try to plug this age-related cost consideration in: the such as language and the subterfuge language.

Now, I have discussed at some length why it shouldn't fit in the subterfuge language. I would like to address why it can't fit into the such as a retirement, pension or insurance plan language.

The basic reason is that age-related cost is not the common thread that binds pension, retirement and insurance plans. In 1967 when the ADEA was promulgated, and even today, there are plans such as PERS' plan, such as defined contribution pension plans, or a profit sharing pension plan that cannot reflect age-related costs.

And when Congress passed this legislation, these were common types of retirement plans. They could have limited the scope of this exemption if they wanted to, but they picked very broad language. They said, any

bona fide employee benefit plan such as a retirement, pension and insurance plan.

But that was to emphasize the point that employers could not discriminate in respect to salary or wages or incidentals associated to coming to work and putting in a day's work for a day's pay.

So, the common thread between retirement, pension and insurance plans, however, is the fact that they do provide compensation of a kind outside of wages and salary.

Moreover, common sorts of aspects, or benefits within a particular plan -- for instance, in a defined benefit plan, there is no age-related cost justification for a set off for Social Security; there is no increase for an employer to provide benefits just because the Social Security is also providing benefits.

But that sort of provision would be illegal because it can't be justified by an age-related cost consideration.

Now, I think I have touched at length the fact that the language doesn't support the legislative history.

I -- I'd like to point out that -- and reinforce that at the time that Congress passed this legislation, and even today, there is a fairly common

understanding of what an employee benefit plan is. In fact, it's remarkable how legislation throughout the years has reflected a similarity in what industry, what Congress recognizes as an employee benefit plan.

And so these sorts of plans, just like PERS, was no stranger to Congress at the time they passed the legislation.

And I'd also like to point out that, in Justice White's concurrence in United Airlines v. McMann, Justice White enunciated the very same policy that we are enunciating here. I think it's also consistent --

QUESTION: How many votes did that get?

MR. SUTTER: It got one vote, but I thought it was a very good vote.

(Laughter)

MR. SUTTER: I think also that the McMann majority inherently reflected that position when they said explicitly that a pre-existing plan didn't have to show an age-related cost justification because it didn't have to show a business or economic purpose.

And the Court concludes, and whether one wants to consider it dicta or not, a majority of this bench still concluded that opinion by saying without qualification that an economic or business purpose is

not necessary to demonstrate that the employer falls within the perimeters of the Section 4(f)(2) exemption.

Now, much of the Appellee's case rests on this Court taking legislative history and trying to cram it in someplace to the 4(f)(2) exemption.

And they -- they contend that it's very clear in the 1967 legislative history that all Congress was talking about was age-related costs.

Well, one of the most principal pieces of legislative history in regard to the ADEA is the Secretary of Labor's report, that this Court noted in EEOC v. Wyoming, provided a great deal of guidance to Congress. And the Secretary of Labor provided more than just cost justification. In fact, the Secretary of Labor noted that that wasn't the principal hindrance.

What the legislative history demonstrates is that 4(f)(2) was a vital compromise. It represented a vital piece of the package in order to get the Age Discrimination in Employment Act passed.

Congress wanted to insure that older workers would be hired. They wanted to promote that. That was the consuming purpose of the ADEA. And the consuming purpose of the 4(f)(2) exemption was to protect employee benefit plans, which might serve as hindrances to the hiring of older workers, was to protect them from

disruption.

And the Age Discrimination -- the age-related cost justification certainly does disrupt bona fide plans. I would direct the Court towards the amicus brief submitted by the State of Pennsylvania, pages 29 and 30, in which Pennsylvania notes that at least 10 other states denied disability retirement benefits to people who are eligible for age and service retirement.

And they make reference to 25 other states that have plans that have some sort of distinction based on age in respect to disability retirement benefits.

I would also direct the Court to the amicus brief submitted by the Association of Private Pension and Welfare Plans, and direct the Court to page 24, where they indicate that the majority of retirement plans, just like the plan at issue here, apparently limit eligibility for disability benefits to those younger employees who are ineligible for regular early retirement benefits.

So, if Congress was trying to avoid the disruption of these employee benefit plans in order to insure that employers would hire older workers, then the age-related cost considerations does an injustice to that.

The last point that I would like to make,

moving on from the legislative history, is that the amicus, the EEOC, in the person of the Solicitor General's office, will argue to this Court that they should adopt the age-related cost considerations -- consideration because it's reflective of consistent agency policy. Well, I -- and agency interpretation.

I would just like to make note for the Court that when this legislation was first -- when the EEOC or the Department of Labor regulations were first published in 1969, they initially had one safe harbor. Then later in '69, they created two safe harbors. When the EEOC republished and revamped the regulations involving Section 4(f)(2), they went back to one purpose and one way to satisfy the exemption.

And now, again, in this appeal, for the first time in this litigation, they argue that there were really two purposes. Well, I don't see that sort of flip-flop as being consistent agency interpretation. If anything, it indicates that the agency has been inconsistent.

And unless the Court has any further questions, I would like to reserve my time for rebuttal.

QUESTION: Very well, Mr. Sutter.

Mr. Laufman.

ORAL ARGUMENT OF ROBERT F. LAUFMAN

ON BEHALF OF THE APPELLEE

MR. LAUFMAN: Thank you, Mr. Chief Justice, and may it please the Court:

When June Betts was disabled at age 61, she was denied disability benefits by PERS solely because of her age. And she was then forced to retire -- to apply for regular retirement rather than disability retirement.

But for the PERS age 60 rule in the person -- in the PERS plan, June Betts would have received $355 under disability benefits instead of the $158.50 per month that she received.

Now, it's undisputed that the PERS plan discriminates on the basis of age and would be in violation of the Act unless it is eligible for the 4(f)(2) exemption to the Act.

PERS has two arguments. The first of these arguments is that all pre-1967 plans are exempt in perpetuity. The second of these issues is that there is no requirement that employee benefit plans that discriminate on the basis of age must be justified by cost considerations.

I will focus primarily on the first issue, and Mr. Wright, on behalf of the United States will be focusing and addressing the second issue.

Turning to the first issue. As has been

noted, this is not a pre-AD Act plan; that in 1976, there were modifications. The lower courts are unanimous in holding that where there are substantial and relevant modifications to an employee benefit plan, that it loses its status as a pre-Act plan.

QUESTION: Was this point passed on by the Court of Appeals, Mr. Laufman?

MR. LAUFMAN: Your Honor, the Court of Appeals did not address this issue because it ruled that Congress had overturned McMann, and therefore it was unnecessary to reach that particular --

QUESTION: So you're arguing this as an alternative basis for affirming?

MR. LAUFMAN: This is -- that is correct.

We have also argued that the so called McMann issue is no longer viable.

QUESTION: May I ask on your point that it was new plan when they amended it? The age 60 cutoff for disability benefits was in the plan from the start, was it not?

MR. LAUFMAN: It was in the plan from the start, but when you take the age 60 and the only putting in a 30 percent floor for disability because it denies employees who become disabled after age 60, it discriminates between employees who are disabled before

age 60 and employees who are disabled after age 60.

QUESTION: But, that discrimination, although not as dramatic, was in the plan before though?

MR. LAUFMAN: That is correct.

QUESTION: And was it also true that -- I mean the discrimination between pre-60 and post-60 people?

MR. LAUFMAN: That is correct.

QUESTION: Was it also true before the change that disability retirees received a larger benefit than a -- a person with the amount of seniority that your client had?

MR. LAUFMAN: With the same amount of seniority, an employee who was disabled at the age of 59 would receive 30 percent. An employee who was disable at age 25 would receive 75 percent for life. And this is totally different than many of the plans that most people are familiar with.

QUESTION: Well, wait a minute.

MR. LAUFMAN: Yes.

QUESTION: Just -- I just want to be sure I understand.

MR. LAUFMAN: Go ahead.

QUESTION: Right before the '76 amendment, if your client had had the same age and the same seniority that she did have when she retired, if she had done that

in 1976, would she have -- would the same discrimination have been present? In other words, would she have made more by getting the disability pension than the retirement pension?

MR. LAUFMAN: I think I understand the question, but basically --

QUESTION: Well, the question is, now she gets three hundred -- she would have gotten $350; she gets about 160 now.

MR. LAUFMAN: Right. If you look at it before 1976 --

QUESTION: Yeah.

MR. LAUFMAN: -- she would have received approximately the same income under either plan.

QUESTION: I see. The disability -- the increase to 30 percent of salary was so great that -- before -- I mean there would have been no -- no -- basically no difference.

MR. LAUFMAN: That is correct.

Because of the way the regular retirement is -- is calculated, the 30 percent floor only affects employees with more than five years and less than 15 years, 13 to 17 years, and only those -- in that small group -- only those who become disabled after age 60.

So we're dealing with a very, very small group

of people. And the total dollar effect that require -- taking away this age 60 requirement would have, would be like dropping a pebble in a pond.

It's our position that the changes in 1967 caused PERS to lose any pre-Act exemption that it might have had.

Now, we don't agree that there is any such thing as a pre-Act exemption anymore. We believe that that's limited to involuntary retirement systems, and we believe that it's clearly no longer the law, following 1967 -- or 1978.

According to the --

QUESTION: If we agreed with your submission that, because of the amendment this is not a pre-Act plan, we wouldn't have to deal with the question of whether the '78 amendment is limited, as your opponent suggests, or more broad as you suggest?

MR. LAUFMAN: That is absolutely correct.

QUESTION: But -- but we would have to deal with the question in the future as to how much of an amendment is too much?

MR. LAUFMAN: That is correct also.

QUESTION: Do you have some suggestion as to -- as to how we would answer that in the future?

MR. LAUFMAN: I think it's going to --

QUESTION: Or how the people who run these plans are going -- are going to figure out -- figure it out before they go making any amendments?

MR. LAUFMAN: You're talking about the amendments to the plans --

QUESTION: The states. Right.

MR. LAUFMAN: -- not the amendment to the statute?

QUESTION: Right. Right. Right, right, the plans.

I mean, I assume, if -- if we were to come out the way you want us to, it'd be a big problem for anyone who is contemplating a change in a -- in a plan that -- that currently qualifies for the -- for the -- for the McMann exemption.

MR. LAUFMAN: That is correct.

And the lower courts are unanimous in holding that when you make substantial and relevant changes. And I suggest -- submit that the test for substantial and relevant is going to be the same kind of a -- a test that the courts are used to applying all the time.

If they change some thing such as allowing the police officers to buy one -- one year of extra time or buy service credit, it probably would not be significant and relevant.

QUESTION: Uh-huh.

MR. LAUFMAN: But when you start changing things that directly affect -- impact on the age discrimination factor, then I submit that it is a significant and relevant factor, and clearly is in this case.

The approach the PERS takes, that pre-existing plans are exempt, in effect, is saying that Congress granted them a perpetual exemption -- the perpetual right to continue to violate the law until somehow Congress says we were wrong and changes the law. What they've done is created two classes. You have a pre-1967 and a post-1967. The pre-Act are free to discriminate at will --

QUESTION: Suppose you're right on that, the '78 amendment, does -- then, that just destroys the argument that -- that because it's an old plan, it's not a subterfuge?

MR. LAUFMAN: That is correct.

QUESTION: Well, but, you'd still have to show it's a subterfuge.

MR. LAUFMAN: You'd still have to show it's a subterfuge.

QUESTION: And then you'd do that by -- on the cost benefit basis.

MR. LAUFMAN: You'd do that on the cost benefit basis. And I think --

QUESTION: So you have to get to that eventually.

MR. LAUFMAN: And I submit that that's -- there's a -- there's a basis for that. It's important to note, I think, that this 4(f)(2) is an exception to a remedial statute. And so, our position that this should be interpreted narrowly.

Now, the burden -- and -- and first, in this Court, has said that that's an affirmative defense. And so the burden is on PERS to show that it qualifies.

Now, it has the burden of proving that there is no subterfuge. Now, if you --

QUESTION: Is -- is this the language you rely on in 4(f)(2) that -- that there has to be a cost justification, otherwise it's a subterfuge?

MR. LAUFMAN: There's two different ways of approaching --

QUESTION: Yes.

MR. LAUFMAN: -- the cost justification. That's correct.

QUESTION: But that's one of them.

MR. LAUFMAN: That's one of them.

The employers, having the burden of proving

something is not a subterfuge is a very difficult task of proving a negative, especially where you have a state legislature in Ohio which keeps no legislative history, So that it's almost impossible to determine what the intent was when they amended or passed an act.

QUESTION: I don't know, all he has to do is convince a court that it's just contrary to the words of the Act to -- to -- to require a cost-benefit.

MR. LAUFMAN: Well, that is -- that is --

QUESTION: I mean a cost justification.

MR. LAUFMAN: That is precisely why the -- the EEOC regulations, which provide --

QUESTION: Aren't they just guidelines?

MR. LAUFMAN: They are just guidelines. They're -- they're -- they call them interpretations. We submit that this Court should give it some deference because they have been consistent over the years. They've been in effect 20 years, and, in the whole, the employers in this country have been adhering to those regulations.

QUESTION: Have they changed?

MR. LAUFMAN: The regulations have changed, but they have been totally consistent.

In 1969 the regulations came out with what amounted to an equal cost, equal benefits approach.

That is, if the plan paid equal benefits, there was no discrimination. On the other hand, if the plan cost the same amount, even thought it provided smaller benefits, there was no discrimination.

And the example are given in the EEOC regs is that it's perfectly all right for an employer to pay $100 for life insurance for all its employees. And if it turns out that the younger employee gets twice as much life insurance, while that might have been a violation of the Act, it's permitted under the 4(f)(2) exemption.

QUESTION: Mr. Laufman, what the -- what the Appellant says to that, and I think the language seems to me to support him, is -- is that those regulations were safe harbors. They -- they were offering the -- the person who wanted to set up plans a -- one way to be perfectly safe and to know that -- that -- that it -- it could not possibly be held to be a subterfuge. But, that -- that that didn't set forth a -- a requirement in order -- in order to get the exemption. It was just a safe harbor.

MR. LAUFMAN: That's true. And --

QUESTION: If you did this, you could get it for sure. But there may be other ways of getting it.

MR. LAUFMAN: That's true. But --

QUESTION: Well, if that's so, then what --

MR. LAUFMAN: But -- but, at this point, and I think it's important to note that PERS produced absolutely no evidence of any kind of a justification. Their entire approach was: we existed; therefore ,we are; that because of their existence, they don't have to do anything.

They have produced absolutely no evidence of any kind of justification. So if there are other types, no one has come forward with another type.

The Justice -- the EEOC regulations have been in effect for years, they have been consistent, and they provide an objective way of meeting a very complex problem. There are a multitude of employee benefit plans, and even within retirement plans there are profit-sharing plans, there are defined benefit plans, and there are variations.

QUESTION: Under the EEOC regulations, if you can produce a cost justification, does that take out the question of intent?

MR. LAUFMAN: Well, I don't think we really get into intent. The intent is to discriminate and that has already been established. The question then is whether or not it's a subterfuge, and if they could produce cost-based justification, then they have

dispelled the argument that there is a subterfuge.

QUESTION: So you couldn't go behind the cost justification and say, well, really at a conference committee in the Ohio Legislature, someone said let's pass this because we don't like old people?

MR. LAUFMAN: That's correct. That's correct.

QUESTION: May I ask, Mr. Laufman? Does everyone agree -- I guess they must, that the burden of proof on the subterfuge issue is on the proponent of the plan rather than the person who claims it's a subterfuge?

MR. LAUFMAN: I believe this Court said that in Thurston that the Section 4(f)(1) and 4(f)(2) are affirmative defenses, and that the burden would always be on the defendant.

QUESTION: Well, I -- it can still be an affirmative defense to show that it's a bona fide seniority system and then, say, the president of the company gets on the stand and says it's not a subterfuge, we didn't adopt it for any -- any age-related reason; we like old people.

Would that -- and then the burden shifts.

MR. LAUFMAN: Well, I think --

QUESTION: I mean, what I'm really asking, I suppose is, assuming the cost is an issue, who has to get into proving costs are non-costs?

MR. LAUFMAN: In our position and in the regulation position, it's the employers, because they're the only one that have the -- the evidence of cost considerations. They're the ones that --

QUESTION: Well, but you just a moment ago said that it's only going to cost them a penny to -- I mean that there's -- you said in this case, it's perfectly obvious that there's no cost defense. You said that earlier.

MR. LAUFMAN: I said that there is no cost defense because they made no effort to put on any evidence to suggest a cost justification.

QUESTION: Oh, I thought you indicated that -- that -- that there really wasn't any cost here because the 60 -- 60 age thing was perfectly obviously an arbitrary --

MR. LAUFMAN: I'm sorry?

QUESTION: I thought you -- I may have misunderstood you. I thought earlier in the argument, you had said that it was perfectly obvious that it would cost them a penny -- or something like that -- to remove the -- the age 60 cutoff.

MR. LAUFMAN: Oh. I think what I was referring to is the impact on this plan -- on the PERS plan --

QUESTION: Right.

MR. LAUFMAN: -- is that if this Court ruled that the plan was in violation of the Act, there are so few employees who fit into this very narrow window where it has any effect, that the 50 to 100 employees that would be added to a plan that pays something like $400 million a year in benefits, would be insignificant.

That was my -- the point I was making.

QUESTION: I see.

QUESTION: The court below said this wasn't a subterfuge, didn't they?

MR. LAUFMAN: The court below essentially quoted Judge Posner in Karlen, who said that where an employer cannot produce actuarial costs to justify age discrimination in employee benefits, he'd better be able to prove a close correlation between age and cost if he wants the shelter of the safe harbor of Section 4(f)(2).

QUESTION: And so, is that equivalent to saying, without costs, it's a subterfuge or no?

MR. LAUFMAN: That is -- I believe is the --

QUESTION: Is that what the Court of Appeals meant to say?

MR. LAUFMAN: -- is the position that the court has taken, yes.

I would like to point out that PERS says that

-- essentially, that all employee benefit plans are covered. Essentially, they are throwing out all of the EEOC regulations that have been in effect for 20 years. And, in particular, the regulation that has been in effect for 10 years pertaining to disability plans, which PERS clearly violates.

The plan -- the disability section of the regs says that where employees who are disabled at a younger age are entitled to long-term disability benefits, there is no cost justification for denying such benefits altogether to employees who are disabled at older ages.

Essentially, PERS would read Section 4(f)(2) out of the statute. If all employee benefit plans are exempt, as they maintain, then supplemental unemployment benefits, severance pay, prepaid legal services, would all be exempt. None of these has any age-based cost justification.

Now, this Court today, in Davis v. Michigan, said that the statutory language cannot be examined in a vacuum. Words of a statute must be read in their context with a view to their place in the overall statutory scheme.

Congress passed Section 4(a)(1), which says that it shall be unlawful to discriminate in the terms and conditions of employment. And then they set up an

exception, on the other hand, which says that it shall be lawful to discriminate in certain types of employee benefit plans.

The EEOC regulations is a careful harmonizing of these two conflicting parts of the statute. It provides and it recognizes that Congress, when it passed the law in 1967, recognized that there were certain problems -- that certain types of employee benefit plans were more expensive for older workers than for younger workers.

And in intended that employers would be allowed to reduce the benefits to the extent that they did not cost more.

And so this -- this regulation balances --

QUESTION: Why didn't they say that? I -- you have to admit that's a very, very queer way to say that, if that's what they had in mind. I mean -- if -- I mean, they could have said to observe the terms of bona fide seniority system or any bona fide employee benefit plan where the discrimination is cost-based, or something like that.

MR. LAUFMAN: Justice Scalia, I will admit that this is a poorly drafted statute. I think that we are -- we have a statute --

QUESTION: If -- if they meant to say what you

say they meant to say, it's poorly drafted.

MR. LAUFMAN: If -- if you want what I think, I think at the time they recognized there was a problem, and there is absolutely nothing in the legislative history that indicates that they considered how to resolve the problem.

Instead, they said we expect the Secretary of Labor to write comprehensive regulations. They said that in 1967. They said it in the statute, and they said it in 1979 again.

And this is exactly what has happened. The Department of Labor, and later, the EEOC, which have expertise in handling comprehensive employee benefit plans, wrote regulations which clearly provide a balancing between discriminating against the employee unnecessarily and depriving or penalizing the employer who hires older workers.

I believe that this is a harmonizing of the two statutes; the purposes of the Act, along with the purpose of the exemption.

QUESTION: May I ask another question about the language that I find very puzzling? It talks about a bona fide system, which is not a subterfuge. Does that indicate that there are some bona fide systems which are subterfuges?

MR. LAUFMAN: I don't have the answer to that. And the -- it's troubled the courts -- this is not the first time that it's --

QUESTION: It's baffling to me -- that.

MR. LAUFMAN: It's a poorly written statute; we all agree on that.

QUESTION: You don't -- do you -- what do you do about the language in McMann that you don't need a business purpose or any economic justification?

MR. LAUFMAN: I believe that McMann is limited to involuntary retirement, because it's clear that there was no cost-based justification in the intent of Congress when it was talking about permitting involuntary retirement; nor did the EEOC regulations -- or the ADEA -- I'll try it again -- the Department of Labor regulations. None of those had anything in there about a cost justification for involuntary retirement.

The regulations for employee benefits, back in 1969, did.

I believe my time is up. Thank you.

QUESTION: Thank you, Mr. Laufman.

Mr. Wright.

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT
AS AMICUS CURIAE, EEOC, ON BEHALF OF APPELLEE

MR. WRIGHT: Mr. Chief Justice, and may it

please the Court:

It's important to keep in mind, as Mr. Laufman just pointed out, that not only has Ohio failed to produce a age-related cost justification for its discrimination here, it's produced no justification whatsoever.

Both the Department of Labor, which administered the Act until 1979, and the EEOC, which has administered it since, have agreed that Section 4(f)(2) is not the wide-open authorization to discriminate that Ohio contends it is.

Rather, the agencies have agreed that the statute requires employees to justify discrimination, usually by showing that it costs more to provide benefits to older employees.

QUESTION: Well, you don't now take the position that the employer's defense is absolutely limited to cost-based justifications?

MR. WRIGHT: Not in the sense of the life insurance example. If, by age-related cost justification, you mean that the term life insurance example that was very much on Congress' mind in 1967, no, we think it extends beyond that. But, let me add that it has always been clear that it extends beyond that.

If I may digress briefly into the legislative history to answer your question. The 1967 legislative history, and let me make clear that it was in 1967, not 1978 that I'm talking about, there were clearly two problems on Congress' mind. One was benefits such as term life insurance, which do cost more to provide older employees than younger employees.

Congress wanted to allow employers to spend the same amount on older employees, even though they would be discriminated against in that they would receive a lesser benefit.

Also on Congress' mind, as is made clear by the colloquy between Senator Javits, who drafted section 4(f)(2), and Senator Yarborough, who was the sponsor of the bill, Congress wanted to make clear that vesting periods were permissible.

Now, vesting periods do not fall into the age-related cost justification except in, like, term life insurance.

QUESTION: Well, if you just look at the language of 4(f)(2), together with the basic prohibitions of (a)(1) and (a)(2) of the section 623, it looks more logical, doesn't it, to think that Congress just wanted to eliminate bona fide pension and benefit plans from -- from the scope of the prohibitions of the

Act?

MR. WRIGHT: We don't agree with that, Justice O'Connor. And while the language --

QUESTION: It certainly reads that way --

MR. WRIGHT: Well, what --

QUESTION: -- unless there is a subterfuge.

MR. WRIGHT: Well, let me -- let me point out that -- that the way Ohio reads it and the way you just paraphrased it, it end -- it -- the statute would have ended it, bona fide employee benefit plans. It does, of course, continue to say, such as retirement, pension or insurance plans, which are not a subterfuge to avoid -- to evade the purposes of the Act.

Let me -- let me turn to -- to the language of -- to that language. The first part of that language, the -- such as the retirement, pension or insurance plan, was emphasized by the Department of Labor in 1969 when it wrote the original regulations here.

Like the Court of Appeals in Westinghouse, it thought that the thread common to the sorts of plans that Congress had listed is that the cost of providing benefits often rises as -- as employees age. And it concluded that Congress wanted, by that language, to insure that discrimination was justified in that circumstance.

Now, I realize that they could have said it clearer, but I would like to point out that Ohio reads that phrase out of the statute, gives it no meaning whatever.

QUESTION: That -- that's true. I think there's another problem, too, Mr. Wright. The excepts don't make any sense, if -- if -- if what they are talking about is only cost-justified. I don't know how the failure to hire somebody, for -- it says, except that no such employee benefits plan shall exclude the failure to hire -- hire any individual. And then after the amendment, and no such seniority system shall require or permit the involuntary retirement.

I don't know how either of those two could possibly ever be justified on cost benefits. So you wouldn't have to say except that.

Can you think of how either one of those could -- could be justified on a cost basis?

MR. WRIGHT: I think Congress just wanted to make absolutely clear that neither refusals to hire, nor involuntary retirements were permissible. And it at least made that clear --

QUESTION: But, why would they even worry about that if -- if they thought they were enacting a cost -- cost justification thing? There is no way cost

justification could have -- could have validated either of those.

MR. WRIGHT: That's correct. But, remember that they also thought that they were allowing vesting periods. And -- and in allowing vesting periods, perhaps the original administration bill had -- had allowed involuntary retirement.

I think the end of the statute just spells those things out, fortunately, fortunately quite clearly.

On the subterfuge language, let me just -- just briefly say that discriminatory treatment of older employees that is not justified, is a subterfuge to evade the purposes of the Act, because a purpose of the Act, which Ohio ignores, is to prohibit arbitrary discrimination against older employees.

The Act does not only prohibit refusals to hire. And discrimination that is not justified is arbitrary.

I think that it's clear that this is a post-Act statute. Before 1976 --

QUESTION: A post-Act plan --

MR. WRIGHT: Excuse me?

QUESTION: A post-Act plan.

MR. WRIGHT: Yes, that's what I meant.

Before 1976, it is true that 60 year olds

could not apply for disability retirement in Ohio, but they weren't discriminated against as a result. They got the same amount that anyone else got.

QUESTION: If they got they same amount, I don't understand what the purpose of the cutoff was. It seems kind of improbable to me -- just a totally --

MR. WRIGHT: In fact, there's no --

QUESTION: -- they just -- somebody just dreamed it up, do you think?

MR. WRIGHT: Well, there was also -- there is also the fact that they -- after age 60 weren't allowed to be on a recall. I think -- I think that was really the only difference before 1976.

QUESTION: But if their benefits would be the same under the retirement plan or the disability plan, there is no reason to cutoff the disability benefit -- Tweedle Dum and Tweedle Dee.

MR. WRIGHT: Well, before 1976, it didn't matter. After 1976 --

QUESTION: But I'm -- I'm just suggest -- it seems improbable that it did not matter before 1976, if they had that cutoff. Because it was a totally purposeless --

MR. WRIGHT: It's undisputed that, in terms of amount of benefits, it didn't matter.

QUESTION: Well, except -- except the benefit of being rehired.

MR. WRIGHT: That is correct.

QUESTION: I think they are saying, once you're over 60, you can't come back, even if the collective bargaining agreement might -- might have provided that people who are out for illness automatically come back. Why isn't that a significant discrimination?

MR. WRIGHT: Well, there was that discrimination against employees here, and Mr. Laufman has made that argument that -- that, in fact, June Betts was involuntarily retired as a result.

As the Court of Appeals stated, despite having every opportunity to do so, Ohio made no attempt at all to justify its discriminatory treatment of the plaintiff here. It has insisted all along that Section 4(f)(2) authorizes any sort of age discrimination in the provision of employee benefits. The only exception, Ohio states at page 26 of its brief, is that a plan may not be conceived to avoid the statute's purpose of facilitating the employment of older workers.

That's no limit at all, and it ignores the Act's prescription of arbitrary discrimination against older employees in the terms of employment.

QUESTION: Well, I think they conceded if this plan were adopted today, it would be illegal. Don't they concede that?

MR. WRIGHT: No, they do not concede that.

QUESTION: Oh, they don't?

MR. WRIGHT: But, of course, that's correct; that if it were adopted today, it would be illegal.

(Laughter)

MR. WRIGHT: Contrary to Ohio, Congress did not intend to allow employers to discriminate at will in the provision of employee benefits. As Judge -- as Judge Posner stated in Karlen, Congress did not authorize employers to take away parking spaces or dental insurance or any other employee benefit for no good reason. Yet, it would be permissible, under Ohio's approach, for an employer to arbitrarily cut off benefits to older employees.

All we contend here is that Congress intended to outlaw such arbitrary discrimination.

If there are no further questions, thank you.

QUESTION: Thank you, Mr. Wright.

Mr. Sutter, do you have rebuttal? You have four minutes remaining.

REBUTTAL OF ANDREW IAN SUTTER

MR. SUTTER: Thank you, Mr. Chief Justice.

Two points right off the bat that I would like to address.

First, Justice Stevens, PERS is asserting that irrespective of whether it is a pre-existing plan, that is still satisfies the terms of the exemption. And the reason is, is that it is a bona fide employee benefit plan that is not designed to evade -- is not designed to be a subterfuge to evade the purposes of the Act.

The Act was, first and foremost, a mechanism for insuring the employment of older workers. And certainly, the Public Employees Retirement System of Ohio does not in any way interfere with the employment --

QUESTION: Well, it isn't just the employment, it also is to insure them equal treatment when they -- after they get employed. Isn't it? Isn't there --

MR. SUTTER: It insures them --

QUESTION: You can't put them all -- all the older people in the closet and say it's just because you're not being hired now --

MR. SUTTER: No, Your Honor. And certainly PERS does not do that. It doesn't affect in any way the salary, the employment, the every-day sorts of things than come with working. All it says -- all it does is it makes a distinction based on age in respect to

employee benefit plans.

And PERS freely admits that if it wasn't for the 4(f)(2) exemption, there would be a problem for PERS in terms of satisfying the terms of the ADEA.

But 4(f)(2) is an exception. It was intended to permit discrimination in the area of employee benefit plans.

Now, one of the big points that has been made here is that PERS didn't put on evidence. Well, as this Court might recognize, PERS -- Ohio is one of those states that doesn't have legislative history. So we can't go back and figure out exactly what the General Assembly was thinking in 1933, even if we could find anybody who was around who was in the Assembly at that time.

So, we would urge the Court, that for a public plan, it should go through the same kind of inquiry it would in analyzing the validity of any statute. It should look and see what sort of rational basis, what sort of legitimate basis that Ohio had.

And it's not shrouded in mystery. Ohio created a retirement plan, and they started off by figuring out that people were going to have to work a certain number of years and be a certain age before they can retire.

And then, as the District Court discovered and states clearly in its opinion, then what Ohio did was it provided a benefit for an employee, a disabled employee who wasn't old enough to satisfy age and service, they gave him a benefit.

Now, I don't know why that's arbitrary age discrimination. It wasn't intended to -- to affect the employment of older workers. It wasn't intended to affect their salaries. It just does what 4(f)(2) says. And I will tell you that, in Ohio, this piece of legislation would be considered a model of clarity.

We disagree with Mr. Laufman, that this is a poorly designed statute; we think it says what it says. And he's right, we --

QUESTION: Tell us what -- what can make it a subterfuge then? What --

MR. SUTTER: If -- if, for instance, in the Karlen case, we had a plan there that certainly was designed to provide retirement benefits, but the Circuit Court unearthed the possibility that it was designed to force older workers to leave their jobs.

That would be a subterfuge. Or if they reduced salaries, or they used it as a mechanism to reduce salaries. But, I think one has to look at what was it designed to evade; it was designed to evade the

restrictions on employment and on compensation other than compensation offered through an employee benefit plan.

And that's what PERS does, it's an -- it's a retirement plan. And we are waiting for Congress to do what it's done in the past, to express its will in legislation.

They came in in '74 and they passed ERISA to deal with the pension battle, as Jacob Javits -- I see my time is up.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutter.

The case is submitted.

MR. SUTTER: Thank you, Mr. Chief Justice.

(Whereupon, at 3:00 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-389 - PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant V.

JUNE M. BETTS

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BY Judy Freilicher

(REPORTER)