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### Age Discrimination-Kentucky Retirement Systems v. EEOC by Kent Sezer

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During the closing weeks of the recent Supreme Court term, the Court issued major decision regarding such headline grabbing issues as gun control, the death penalty and the rights of detainees at Guantanamo Bay. Largely overlooked was a major decision that will have significant implications for employers who face potential liability based on claims of age discrimination.

In *Kentucky Retirement Systems v. EEOC*, the Court took up the case of Charles Lickteig, who worked in the Jefferson County, Kentucky, Sheriff's Office. Lickteig began working for the Sheriff when he was 43 years old. Eighteen years later, when he was 61, he became disabled and retired. Because he was past the normal retirement age for his position, 55, and was otherwise eligible to retire, he received regular retirement benefits. He received no additional benefits by reason of the fact that he was forced to retire because of his disability.

Lickteig filed a charge of age discrimination with the EEOC because, under the Kentucky system, many similarly situated, but younger workers who became disabled received receive additional, imputed years of service to give them the same amount of retirement benefits they would have received had they worked until they were 55. Under the system, a worker who became disabled at age 50, with 5 years of actual service, would receive 5 years of imputed service, and his pension would be calculated based on 10 years of service. A similarly situated co-worker, with five years of actual service, who became disabled at age 55 would receive no years of imputed service (because he would already be eligible for normal retirement), and would receive half of the pension benefits of the 50 year old because his pension amount would be based on only 5 years of service.

The EEOC found that the system was, on its face, discriminatory, and sued the Kentucky retirement systems. The District Court ruled in favor of Kentucky, but the Sixth Circuit Court of Appeals, sitting in Cincinnati, reversed. This set the stage for the Supreme Court decision.

In a 5-4 opinion, the Court ruled that the Kentucky retirement system does not violate the Age Discrimination in Employment Act (ADEA), despite the fact that it often gives more generous benefits to younger disabled workers. The key to the decision is the fact that

the ADEA makes it legal to require that workers reach a certain age before becoming eligible for retirement benefits. The Court held that discrimination on the basis of retirement status is not the same as discrimination on the basis of age, even if retirement status is explicitly linked to age. The Court said:

Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must then come forward with sufficient evidence to show that the differential treatment was “actually motivated” by age, not pension status.

Although the language used by the Court is very broad, this decision should not be seen as a license to go after workers who are nearing retirement age. First, the Court leaves open the possibility that the worker could prove that the employer’s reliance on “pension status” is just a subterfuge to go after older workers. Second, the Court lists five “circumstances” that make it clear that the differences in treatment in the Kentucky system were not based on age. Although the Kentucky system would most likely result in a better deal for younger disabled workers most of the time, it would not have to. The amount of imputed years of service would depend on the worker’s age when he started working and the total number of years of service. Moreover, the purpose of the disability plan was clearly not age-related. Kentucky was merely attempting to give all workers the kind of pension payments they would have received had they not been prevented from working until they could take a normal retirement.

Accordingly, employers should tread very carefully before taking any action based on pension status, where pension status is based on age. It is unclear exactly how far the principles articulated in the decision will be applied beyond the specific facts in this case. In addition, the Supreme Court decision explicitly overrules the position taken by the EEOC in its compliance manual. In the past, the Chicago District Office of the EEOC has accepted such decisions only grudgingly, and they may be looking for an opportunity to help narrow the decision by going after an employer who has a less sympathetic case.

Nevertheless, if the EEOC does come calling, this new decision gives lawyers for employers an important new defensive weapon. The fact that the Supreme Court has drawn a clear distinction between retirement status and age makes it more likely that employers will be awarded summary judgment in selected cases. Proof that an employer considered retirement status before making a decision will not be taken as per se proof of age discrimination, even where retirement status is based, in part, on age.

If you have any questions regarding a particular issue, you can contact Neal & Leroy’s labor and employment specialist, Kent Sezer, at (312) 641-7144.