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Subject: Age Discrimination and Disability Retirement: Recent Developments

On September 19, 2005, the U.S. Sixth Circuit Court of Appeals ruled that disability retirement benefits paid to certain Kentucky state and county employees did not violate the Age Discrimination in Employment Act (ADEA) (*EEOC v. Jefferson County Sheriff's Dep't*, 6th Circuit, No. 03-6437, 9/19/05). The Sixth Circuit covers Kentucky, Michigan, Ohio, and Tennessee. The case is of interest because it examines two fundamentally different perspectives on what age discrimination means with regard to retirement and disability benefits.

The case stems from an Equal Employment Opportunity Commission (EEOC) claim filed by a deputy sheriff in Jefferson County. Upon applying for disability benefits from the Kentucky County Employees' Retirement System, the deputy was informed he was ineligible for disability benefits because he was older than the plan's normal retirement age. Under the plan's disability provisions, employees who become disabled after normal retirement eligibility receive normal retirement benefits based on actual years of service. However, those who are disabled before normal retirement eligibility receive additional years of service credit up to normal retirement age (or 20 years of service), but not more than the number of years already worked. As a result, younger workers who are disabled before becoming eligible for normal retirement can receive higher benefits than older workers who are eligible for normal retirement, even with the same final earnings and actual years of service.

In 1999, after investigating the deputy sheriff's claim and attempting conciliation, the EEOC filed suit in the U.S. District Court for the Western District of Kentucky, alleging violation of the ADEA and naming the Jefferson County Sheriff's Department, the Kentucky Retirement Systems, and the Commonwealth of Kentucky as defendants. In deciding the case, the district court applied a previous "materially indistinguishable" Sixth Circuit Court of Appeals ruling (*Lyon v. Ohio Education Association and Professional Staff Union*, 53 F.3d 135, 6th Cir. 1995).

Lyon v. Ohio Education Association and Professional Staff Union

The *Lyon* case involved a retirement plan sponsored by the Ohio Education Association with an early retirement provision called "Option B." Although eligibility for normal retirement required attaining age 62 or having 32 years of service, under Option B an employee was eligible for early retirement at age 60 with 5 years of service, or after earning 20 years of service. Moreover, additional years of service credit were added to actual years, as if the employee has worked until age 62. As with the Kentucky disability plan, under the Ohio Education Association's early retirement plan an older worker who retired at normal retirement age could receive lower benefits than a younger worker who retired under the early retirement option, even with the same final earnings and years of service.

As explained by the *Lyon* court, there are essentially two forms of discrimination in employment. "Disparate treatment" discrimination occurs when an employer treats some employees less favorably than others because of their race, color, religion, sex, or national origin. "Disparate impact" discrimination

* The author of this memorandum is not an attorney and the information provided is not intended as legal advice or opinion. Qualified legal counsel should be consulted regarding questions about applicable laws and regulations.

occurs when an employer applies practices that appear to be neutral in their treatment, but are disproportionately more burdensome to one group than another. Evidence of discriminatory motive is necessary to prove disparate treatment discrimination, but is not required to prove disparate impact discrimination. After reviewing the case, the *Lyon* court found that the plaintiffs had “failed to advance a *prima facie* case of disparate-treatment or disparate-impact discrimination” and upheld the plan.

In applying *Lyon* to *EEOC v. Jefferson County*, the district court held that the EEOC had failed to show how the Kentucky disability plan’s age elements were discriminatory, “either facially or through disparate treatment combined with intent.” The EEOC appealed the district court’s ruling. After review, the Sixth Circuit Court of Appeals affirmed the district court’s ruling, finding that the Kentucky plan’s use of age was “indistinguishable from the use of age in the early retirement plan in *Lyon*,” which was held not to violate the ADEA. The Sixth Circuit went on to say that the *Lyon* court concluded that Option B did not have the effect of disadvantaging older workers *because of age*. “Thus, any disparity merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age...” The Sixth Circuit also agreed with the district court that the EEOC had failed to demonstrate discriminatory intent.

Public Employees Retirement System of Ohio v. Betts

The Sixth Circuit also compared *EEOC v. Jefferson County* with other related cases, including *Public Employees Retirement System of Ohio v. Betts* (492 U.S. 158, 1989). Under the Public Employees Retirement System (PERS) of Ohio’s retirement plan, disability benefits were guaranteed to be at least 30 percent of the employee’s final salary. However, employees who became disabled after reaching normal retirement age were only eligible for normal retirement benefits, based on years of service. For June Betts, who became disabled one year after reaching normal retirement age, normal retirement benefits amounted to about half the benefits she would otherwise have received under disability retirement.

In *Betts*, the U.S. Supreme Court found that the PERS plan was facially discriminatory because it “renders covered employees ineligible for disability retirement once they have attained age 60.” However, the Court concluded that the plan would not violate the ADEA unless subterfuge could be proved. Under ADEA Section 4(f)(2) as it existed in 1988, the Court observed it was not unlawful for the 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 this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such ... employee benefit plan shall require or permit the involuntary retirement of any individual ... because of the age of such individual.”

The EEOC’s Perspective

Congress disagreed with the Supreme Court’s interpretation of the ADEA and, in 1990, passed the Older Workers Benefit Protection Act (OWBPA). The law was intended to overturn the Supreme Court’s decision in *Betts* by prohibiting discrimination against older workers in all employee benefit plans except when age-based reductions are justified by significant cost considerations.

The EEOC’s Compliance Manual provides an example of how it applies these rules to disability retirement benefits. In the example, two employees become disabled on the same day. Employee A is age 30 with 10 years of service, and Employee B is age 55 with 10 years of service. Under the employer’s disability retirement plan, disabled employees receive payments based on the number of years they would have worked had they worked until normal retirement age (i.e., age 60). The Manual explains that Employee A will receive a disability benefit based on 40 years of service, while Employee B will receive a disability retirement pension based on 15 years of service.

Given that A's disability retirement pension would be almost three times the size of B's, even though they worked for the employer for the same number of years, the Manual concludes that the benefits are unequal. Since the benefits are unequal, the Manual goes on to say that the employer would have to show that it costs as much to pay disability retirement to 55 year olds based on 5 additional years of service as it does to pay disability to 30 year olds based on 30 additional years of service. If an employer cannot make this showing, it is liable for a violation of the ADEA.¹

Summary: Fundamental Differences

As discussed earlier in this memo, the *Lyon* court held that a benefit based on credit for unworked service to normal retirement age did not have the effect of disadvantaging older workers because of age. Moreover, the court held that any resulting disparate impact reflects the fact that employees who start work at an earlier age accumulate more years of service in reaching normal retirement age. The EEOC disagrees with the *Lyon* analysis, stating: "Where a benefit plan ties the amount of benefits provided to the number of years it will be before an employee reaches normal retirement age, it is explicitly age-based. This is facial discrimination that does not require additional proof of intent."²

In concluding its analysis of *EEOC v. Jefferson County*, the Sixth Circuit observed that the case might have had a different result if the *Lyon* case was not controlling in the circuit, but added that a different result would have troubling aspects. "Assuming that each worker desires to accumulate a working-life's worth of retirement benefits, an employer might reasonably want to provide employees with assurance that such a 'working life's worth' will be accumulated, against the risk that the employee will become disabled during his or her period of employment."

The Sixth Circuit Court's opinion is at: <http://www.ca6.uscourts.gov/opinions.pdf/05a0397p-06.pdf>

¹ U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual, Chapter 3, Section IV, D. October 23, 2000.

² EEOC Compliance Manual, Chapter 3, footnote 36.