STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 10-84

Mandatory Retirement Provisions for Revenue Regulatory Agents

QUESTIONS

Prior to July 1990, the Division of Motor Vehicles was part of and administered by the Tennessee Department of Revenue. By Executive Order No. 37, which took effect on July 1, 1990, the Division and its related functions were transferred to the Tennessee Department of Safety. When the Division was transferred to the Department of Safety, the employees of that Division who were responsible for enforcing the provisions of Tenn. Code Ann. §§ 55-1-101, et seq., became commissioned officers of the Department of Safety and were included by Safety under the mandatory retirement provisions set forth in Tenn. Code Ann. § 8-36-205(a)(1). Thereafter, by Executive Order 36, which took effect on July 1, 2006, the Division of Title and Registration and all functions of that Division under the provisions of the Tennessee Motor Vehicle Title and Registration law were transferred back to the Department of Revenue. Some of the transferred employees included revenue regulatory agents, who were employed as commissioned officers when the Division was with the Department of Safety and were included under the mandatory retirement provisions. Since individuals employed with the Department of Revenue were not covered under the mandatory retirement provisions, the transferred employees also were not covered.

1. When the revenue regulatory agents were transferred from the Department of Safety to the Department of Revenue, were the employees' benefits improperly diminished by not including the employees under the mandatory retirement provisions?

2. Would the State be in violation of the federal Age Discrimination in Employment Act ("ADEA"), codified 29 at U.S.C.A. § 623, or other federal or state law by including within the mandatory retirement provisions those revenue regulatory agents who were transferred from the Department of Safety to the Department of Revenue on July 1, 2006, and by not including within the mandatory retirement provisions those revenue regulatory agents who were hired after July 1, 2006?

3. Do the duties of the revenue regulatory agents fall under what is commonly referred to as the law enforcement officer exception found in 29 U.S.C.A. § 623(j) and 29 U.S.C.A. § 630(k) so that the State will not violate the ADEA should it elect to include the revenue regulatory agents under the mandatory retirement provisions?

OPINIONS

1. No. The governor has the authority to transfer any functions between the departments created and established by Tenn. Code Ann. §§ 4-3-101, *et seq.*, except to or from the Department of Audit, in the interest of a more economical and efficient state service. Tenn. Code Ann. § 4-4-102(a).

2. No. The State would not be in violation of the ADEA or other federal or state law by including within the mandatory retirement provisions those revenue regulatory agents who were transferred from the Department of Safety to the Department of Revenue on July 1, 2006, and by not including within the mandatory retirement provisions those revenue regulatory agents who were hired after July 1, 2006. First, the duties of the revenue regulatory agents fall under the law enforcement officer exception found in 29 U.S.C.A. § 623(j) and 29 U.S.C.A. § 630(k) so that the State would not violate the ADEA should it elect to include the revenue regulatory agents under the mandatory retirement provisions. Second, a disparate treatment claim under the ADEA filed by a transferred revenue regulatory agent would fail for the following reasons: (1) the employee was already included in the mandatory retirement provisions in the Department of Safety; (2) the employee would still fall within the law enforcement officer exception of the ADEA; and (3) the employee's inclusion in the mandatory retirement provisions is based upon whether the member was employed by the Department of Safety as a commissioned officer and then subsequently transferred to the Department of Revenue on July 1, 2006, by executive order, not based on the employee's age. Likewise, there would be no equal protection violation as a result of such a change because the State would have a rational basis for including within the mandatory retirement provisions those revenue regulatory agents who were transferred from the Department of Safety to the Department of Revenue on July 1, 2006, and for not including within the mandatory retirement provisions those revenue regulatory agents who were hired after July 1, 2006. The rational basis is that, through this "grandfather clause," the General Assembly chose to continue to include the transferred regulatory agents in the mandatory retirement provisions they had been entitled to in the Department of Safety and is protecting these employees' expectation interests in their retirement benefits.

3. Yes. It appears that the duties of the revenue regulatory agents fall under the law enforcement officer exception found in 29 U.S.C.A. § 623(j) and 29 U.S.C.A. § 630(k) so that the State would not violate the ADEA should it elect to include the revenue regulatory agents under the mandatory retirement provisions.

ANALYSIS

1. When the revenue regulatory agents were transferred from the Department of Safety to the Department of Revenue, those employees' benefits were not improperly diminished by not including the employees under the mandatory retirement provisions. The governor has the authority to transfer any functions between the departments created and established by Tenn. Code Ann. §§ 4-3-101, *et seq.*, except to or from the Department of Audit, in the interest of a more economical and efficient state service. Tenn. Code Ann. § 4-4-102(a). The governor had the authority, through Executive Order No. 36, to transfer the Division of Title and Registration in the Department of Safety to the Department of Revenue "in the interest

of economy, efficiency and better coordination of the functions of state government." Executive Order No. 36. There is no element of the Department of Safety's mandatory retirement provisions that vests such that an agent acquires a property right that cannot be terminated; when an agent leaves the employment of the Department, the Department's mandatory retirement provisions no longer apply to that agent. Therefore, once transferred to the Department of Revenue, those agents, just like all Department of Revenue employees, were no longer included in the mandatory retirement provisions as they had been in the Department of Safety.

2. and 3. It is the opinion of this Office that the State would not be in violation of the ADEA or other federal or state law by including within the mandatory retirement provisions those revenue regulatory agents who were transferred from the Department of Safety to the Department of Revenue on July 1, 2006, and by not including within the mandatory retirement provisions those revenue regulatory agents who were hired after July 1, 2006.[1]

First, including the revenue regulatory agents in the mandatory retirement provisions would not violate the ADEA because the duties of the revenue regulatory agents fall under the law enforcement officer exception found in 29 U.S.C.A. § 623(j) and 29 U.S.C.A. § 630(k).

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[1] A bill filed in the 106th General Assembly would have extended the mandatory retirement provisions in just such a manner. Senate Bill 2740/ House Bill 2933 provides as follows:

> SECTION 1. Tennessee Code Annotated, Section 4-7-203, is amended by adding the following language as a new subsection (c) and redesignating the current subsection (c) as subsection (d):
>
> > (c) This part applies to commissioned members who were transferred from the department of safety to the department of revenue pursuant to Executive Order No. 36, which took effect July 1, 2006.
>
> SECTION 2. Tennessee Code Annotated, Section 8-36-205(a), is amended by adding the following language as a new, appropriately designated subdivision:
>
> > (4) Members who were employed by the department of safety as commissioned officers and who were transferred to the department of revenue pursuant to Executive Order No. 36, which took effect July 1, 2006; provided, that the mandatory retirement of those members does not violate the Age Discrimination in Employment Act, compiled in 29 U.S.C. § 621 et seq.
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> SECTION 3. All applicable employee benefits that were reduced to any commissioned officer transferred from the department of safety to the department of revenue pursuant to Executive Order No. 36, which took effect July 1, 2006, shall be reinstated to the date of the transfer and shall continue in force without interruption and shall remain applicable to any such commissioned officer. The service of any commissioned officer so transferred shall be considered to be continuous employment.
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> SECTION 4. This act shall take effect upon becoming a law, the public welfare requiring it.

The ADEA's law enforcement officer exception provides:

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

29 U.S.C.A. § 623(j).

29 U.S.C.A. § 630(k) provides as follows:

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

29 U.S.C.A. § 630(k).

According to the Job Performance Plan of revenue regulatory agents, the major job responsibilities of revenue regulatory agents are as follows: (1) performs arrests from overt and covert criminal investigations of violations into fraud, title and vehicle registration laws and related offenses; (2) writes reports of criminal investigations and makes appropriate recommendations; (3) assists district attorneys general in prosecuting criminal cases; (4) evaluates information received relative to alleged fraud and other violations of revenue laws; (5) conducts searches and seizures and participates in essential undercover activities as required; and (6) maintains assigned vehicles and investigative equipment and complies with policies and procedures, including complying with rules and regulations on use of firearms and other investigative equipment and the proper security of this equipment. It appears that revenue regulatory agents' duties are primarily "the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State." 29 U.S.C.A. § 630(k). Accordingly, it appears that revenue regulatory agents are "law enforcement officers" as defined in 29 U.S.C.A. § 630(k) and therefore fall under the law enforcement officer exception found in 29 U.S.C.A. § 623(j).

There may be the potential for a transferred revenue regulatory agent who is included in the mandatory retirement provisions to complain about disparate treatment under the ADEA by the State because younger revenue regulatory agents hired after July 1, 2006, would not be included in the mandatory retirement provisions. However, such a disparate treatment claim under the ADEA would likely fail. The ADEA provides, in pertinent part, as follows:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C.A. § 623(a).

Such a disparate treatment claim as described above would likely fail for the following reasons: (1) the employee was already included in the mandatory retirement provisions in the Department of Safety; (2) the employee would still fall within the law enforcement officer exception of the ADEA; and (3) the employee's inclusion in the mandatory retirement provisions is based upon whether the member was employed by the Department of Safety as a commissioned officer and then subsequently transferred to the Department of Revenue on July 1, 2006, by executive order, not based on the employee's age. To once again include these

transferred employees under the mandatory retirement provisions would not violate the ADEA because it would not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" and would not "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C.A. § 623(a). Such an action would simply grandfather in members who were employed by the Department of Safety as commissioned officers and who were transferred to the Department of Revenue pursuant to Executive Order No. 36, which took effect July 1, 2006, and include those members within the mandatory retirement provisions of Tenn. Code Ann. § 8-36-205(a). Revenue regulatory agents who were hired after July 1, 2006, would not be included in the mandatory retirement provisions and would instead be included in the regular Tennessee consolidated retirement system. Accordingly, the State would not be in violation of the ADEA by taking such an action.

Returning these transferred employees to mandatory retirement may raise an equal protection issue because it would subject the revenue regulatory agents that were transferred from the Department of Safety to the Department of Revenue on July 1, 2006, to the mandatory retirement provisions while excluding the revenue regulatory agents hired after that date. The courts have construed the Equal Protection Clause of the Fourteenth Amendment and Article XI, Section 8, of the Tennessee Constitution as prohibiting the General Assembly from enacting legislation that applies only to certain citizens, or that excludes a class of citizens from the general law, unless there is a rational basis for the classification. *See, e.g., City of Chattanooga v. Harris*, 223 Tenn. 51, 56-57, 442 S.W.2d 602, 604 (1969) (observing that "the keystone in determining the constitutionality of a statute under this Section of the Constitution is reasonableness of classification"). Under this standard, if a rational basis can be found for the classification, or if any state of facts reasonably may be conceived to justify it, the classification will be upheld. *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); *Harrison v. Schrader*, 469 S.W. 2d 822 (Tenn. 1978). "Grandfather clauses – laws that like the proviso curtail the application of new rules to existing entitlements – protect expectation interests, which is enough to make them rational and so defeat challenge under the equal protection clause." *McCann v. City of Chicago*, 968 F.2d 635, 638 (7th Cir. 1992) (citing *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *New Orleans v. Dukes*, 427 U.S. 297 (1976)). Under the Fourteenth Amendment and Article XI, Section 8, of the Tennessee Constitution, if a rational basis exists, states need not treat all classes of persons identically; the State may classify its citizens for various purposes and treat those classes differently.

Here, the State would have a rational basis for subjecting the revenue regulatory agents that were transferred from the Department of Safety to the Department of Revenue on July 1, 2006, to the mandatory retirement provisions and not including revenue regulatory agents hired after that date. The rational basis is that, through such a "grandfather clause," the General Assembly would be choosing to continue to include the transferred regulatory agents in the mandatory retirement provisions they had been entitled to in the Department of Safety and thereby protecting these employees' expectation interests in their retirement benefits. Regarding the revenue regulatory agents hired after July 1, 2006, they are employees of the Department of

Revenue, and the State does not have any obligation to include those employees in the mandatory retirement provisions.

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