

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-3060 and 94-3291

TONY QUINONES,

*Plaintiff-Appellee,
Cross-Appellant*

v.

CITY OF EVANSTON

*Defendant-Appellant,
Cross-Appellee.*

Appeal from the United States District Court
for the Northern District of Illinois
No. 91 C 3291—**Paul E. Plunkett**, *Judge*.

I. JURISDICTIONAL STATEMENT

The jurisdictional statement submitted by the City of Evanston (Def.Br. 1-2) is complete and correct.

II. QUESTIONS PRESENTED FOR REVIEW

1. May an employer, consistent with the Age Discrimination in Employment Act, deny pension and disability benefits to an employee because of the employee's age?
2. Does the State of Illinois have a stake in the outcome of a lawsuit where the plaintiff does not seek to restrain or compel state action?

3. Did plaintiff's challenge to the refusal of the City of Evanston to provide him with disability coverage because of his age state a claim under the Equal Protection Clause?
4. Did plaintiff's challenge to the refusal of the City of Evanston to provide him with pension coverage because of his age state a claim under the Equal Protection Clause?

III. COUNTER STATEMENT OF THE CASE

The defendant City of Evanston hired plaintiff as a firefighter on October 5, 1989. (Short Appendix 1.) Plaintiff was then 39 years of age.

Before hiring plaintiff, Evanston advised him of a potential problem with pension benefits (Plaintiff's Appendix, *infra*, 1):

The Fire Pension Board . . . is governed by state law which currently restricts fire pension plan participation enrollment to those age 35 or under. In 1985, the state legislature amended the law slightly to allow municipalities to appoint Firefighters without participating in the Fire Pension Plan. In our opinion, this amendment does not go far enough. We believe that the age restriction imposed by the state law is discriminatory and conflicts with Federal law. We further believe that there will be attempts during the next legislative session to amend the Fire Pension Board law to conform to Federal law. Interestingly enough, the Police Pension Board law was amended this way several years ago.

I believe that this issue will be resolved either through legislative amendment or through court action in the near future.

After Evanston hired plaintiff, the Evanston Firefighters Pension Fund refused to admit plaintiff into the fund because plaintiff was over the age of 35.¹

After working for Evanston for nearly two years without any pension or disability benefits, plaintiff filed the present action on May 29, 1991. (Record Item No. 1.) Plaintiff alleged in his original complaint that Evanston's refusal to provide him with pension and disability benefits because of his age was contrary to the Equal Protection Clause of the Fourteenth Amendment. (Record Item No. 1, par. 15-16.)

Evanston moved to dismiss plaintiff's original complaint on the ground that Illinois law prevented it from providing plaintiff with pension or disability benefits.² (Record Item. No. 5.) The district judge accepted this argument and dismissed the complaint. (Short Appendix 1-5.)

1. The Fund relied on 40 ILCS 5/4-107(b), which provides as follows:

(b) Any person appointed as a firefighter in a municipality shall, within 3 months after receiving his or her first appointment and within 3 months after any reappointment make written application to the board to come under the provisions of this Article. Such person shall be eligible to participate provided (1) he or she has attained age 18 but not age 35 at the time of first appointment; and (2) he or she is found upon a medical examination by a duly license physician selected by the board to be then physically and mentally fit to perform the duties of a firefighter. (emphasis added)

2. Evanston relied on 40 ILCS 5/4-142, which provides as follows:

A home rule unit, as defined in Article VII of the 1970 Illinois Constitution or any amendment thereto, shall have no power to change, alter, or amend in any way the provisions of this article. A home rule unit which is a municipality, as defined in Section 4-103, shall not provide for, singly or as a part of any plan or program, by any means whatsoever, any type of retirement or annuity benefit to a firefighter other than through establishment of a fund as provided in this Article as now or hereafter amended.

After Evanston had convinced the district judge that state law prevented it from providing plaintiff with pension or disability benefits, Evanston began to make Social Security payments for plaintiff, as required by 26 U.S.C. §3121(b)(7)(F). (Record Item No. 54, Exhibit 4.)

On plaintiff's timely Rule 59 motion to reconsider,³ the district court permitted plaintiff to file an amended complaint and join the Illinois Attorney General as a defendant. (First Amended Complaint, filed December 4, 1991.) In response to an issue raised orally by the Illinois Attorney General, plaintiff sought and obtained leave to file a second amended complaint, adding the "Evanston Firefighters Pension Fund" as a defendant. (Second Amended Complaint, filed January 17, 1992, Record Item No. 23.)

On motions to dismiss the second amended complaint, the district judge rejected plaintiff's claims that he has been denied equal protection of law by Evanston's refusal to provide him with disability coverage and by Evanston's refusal to permit plaintiff to participate in any pension plan. The court below granted plaintiff leave to replead his challenge, on equal protection grounds, to the 35 year age requirement of Illinois law. (Mem. Op. July 13, 1992, Short Appendix 6-16.)

3. The complaint was dismissed on November 6, 1991; plaintiff filed and served his Rule 59 motion ten working days thereafter, on November 20, 1991.

Plaintiff filed his third amended complaint on August 12, 1992, naming the Illinois Attorney General as the only defendant. (Record Item No. 38.) The Attorney General moved to dismiss; at the hearing on this motion, plaintiff advised the district judge of his intent to assert a claim under the Older Workers

Benefit Protection Act, ("OWBPA"), Pub.L. 101-433, which had become effective on October 10, 1992.⁴ The district court granted plaintiff 30 days in which to amend the complaint. (Order, December 7, 1992, Record Item No. 45.)

Plaintiff filed his "amended and supplemental complaint" on January 4, 1993, asserting a single claim under the ADEA, 29 U.S.C. §621 et seq, as amended by the OWBPA. The district court denied cross motions for summary judgment (Record Item Nos. 52, 60), ordered that plaintiff join the individual trustees of the pension fund as defendants, and identified one issue for trial: Whether Evanston would incur significant additional expense if plaintiff joined the pension fund. (Mem.Op., July 20, 1993, 10-11, Short Appendix 26-27.)

Following trial, the district judge concluded that "[n]othing in the ADEA as amended or in the regulations that implement it indicate that the total, blanket exclusion of a worker from benefits based upon age is anything but a *per se* violation of the law." (Mem.Op., July 28, 1994, 5, Short Appendix 37.) Accordingly, the district judge found in favor of plaintiff, ordered the trustees to admit plaintiff to the fund, and directed Evanston to fund plaintiff's membership in the

4. The OWBPA overruled the holding of *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), that the ADEA only applied to pre-ADEA plans that had been adopted as a "subterfuge" to evade the Act. The OWBPA sought to "restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Pub.L. 101-433, Section 101. See *Bell v. Trustees of Purdue University*, 975 F.2d 422, 424 n.2 (7th Cir. 1992).

fund from the effective date of the OWBPA. (Short Appendix 39.)

Evanston filed a timely notice of appeal; plaintiff filed a timely cross-appeal, seeking review of the district court's orders of November 6, 1991 and July 13, 1992. (A notice of appeal was also filed by the trustees of the pension fund, who subsequently voluntarily dismissed their appeal.)

IV. ARGUMENT

A. INTRODUCTION

Evanston is prosecuting this appeal in bad faith.

Before plaintiff accepted employment with Evanston, Evanston advised plaintiff about the age restriction on membership in the firefighter's pension plan and made the following representation (Plaintiff's Supplemental Appendix 1):

We believe that the age restriction imposed by state law is discriminatory and conflicts with Federal law.

Plaintiff has now been a firefighter with Evanston for more than five years. Although plaintiff has continuously put his life on the line for the City of Evanston and its inhabitants, Evanston now sings a different tune and vigorously defends the discriminatory age restriction.

Plaintiff argued in the district court that it is unconscionable for Evanston to argue that state law is valid. (Record Item No. 69 at 8.) It is even more unconscionable for Evanston to prosecute this appeal.

Evanston stands alone in opposing full pension and disability benefits for plaintiff. The trustees of the firefighters pension fund, who were parties below, have accepted the district court's judgment. No representative of the State of Illinois seeks to defend the state law. It is only Evanston who opposes plaintiff's

admission to the firefighter's pension fund and who seeks to support the discriminatory age restriction of state law.

Evanston, as required by 26 U.S.C. §3121(b)(7)(F), makes a social security contribution on plaintiff's behalf: in 1993, Evanston paid about \$2500 as its FICA contribution. (Record Item No. 54, Exhibit 4.) Evanston would incur an additional expense by including plaintiff in the firefighter's pension fund: Evidence at trial established that including plaintiff in the firefighter's pension fund would cost Evanston about \$6600 a year, an increase of \$4100 per year over its FICA contribution.

By prosecuting this appeal to save the yearly expense of \$4100, Evanston is violating the Equal Protection Clause of the Fourteenth Amendment. The ability to save \$4100 a year is an insufficient justification for denying plaintiff the same pension and disability benefits that Evanston provides to every other firefighter. Evanston's argument that state law prohibits it from providing any pension or disability protection to plaintiff (Def.Br. 39) is belied by Evanston's yearly FICA contribution, which is similarly precluded by state law.

This is an appeal about money, about a municipality trying to save \$4100 a year by denying one of its hardworking firefighters the same benefits that it provides to every other firefighter. The Court should not assist Evanston in attempting to deprive plaintiff of equal protection. Evanston's appeal should be summarily dismissed under Rule 38.

**B. THE DISTRICT COURT CORRECTLY UPHELD PLAINTIFF'S
CHALLENGE UNDER THE ADEA**

1. Standard of Review

The district court's construction of federal law is reviewed *de novo*.

2. The Age Restriction of State Law Is Contrary to the ADEA

Following the effective date of the Older Workers Benefit Protection Act, ("OWBPA"), Pub.L. 101-433, plaintiff challenged the age limitation of the Illinois statute as contrary to federal law.⁵ As the EEOC persuasively demonstrates in its amicus brief, the Illinois statute that bars plaintiff's membership in the firefighter's pension fund is facially invalid under the ADEA. (EEOC Amicus Brief, 7-9.)

Evanston's arguments on the ADEA issue are frivolous.

First, Evanston asserts that plaintiff did not "attack the provisions of the Firemen's Pension Fund statute which imposes the age limitation at issue here." (Def.Br. 27.) This is precisely the statute that plaintiff attached in his ADEA claim. Plaintiff's argument (Plaintiff's Memorandum in Support of Motion for Summary Judgment at 5, Record Item No. 69):

The ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such

5. Congress recognized that the OWBPA would supersede state law and postponed the effective date of the Act against municipalities for two years. Pub.L. 101-433, Section 105(c). This postponement, though, did not authorize discrimination after October 16, 1992, the effective date of the Act against municipalities. See *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) ("A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent that the employer continued to engage in that act or practice, it is liable under that statute.")

individual's age." 29 U.S.C. Section 623. The age requirement of paragraph 4-107 [40 ILCS 5/4-107(b)], has such an [un]lawful effect and the statute may not, consistent with the ADEA, be used to bar plaintiff from joining the pension plan.

Second, Evanston argues that it is the Board of Trustees of the Firemen's Pension Fund who control and manage the fund and that Evanston is powerless to require plaintiff's admission into the fund. (Def.Br. 29.) The district court did not, however, order Evanston to "admit" plaintiff to the fund. The district court ordered Evanston "to fund Plaintiff's membership in the fund, including the amount it would have contributed for him to the effective date of the OWBPA." (footnote omitted) (Short Appendix 39.)

Third, Evanston supports its misreading of the record with miscitation of authority. There is no merit in Evanston's claim (Def.Br. 30.) that *Dalton v. Mercer County Board of Education*, 887 F.2d 490, 492 (4th Cir. 1989) supports the contention that an employer who follows state law cannot violate the ADEA. *Dalton* involved a law requiring that seniority be weighed in hiring decisions. Following a bona fide "seniority system required by state statute" does not give rise to an ADEA violation. 887 F.2d at 492. A seniority system has nothing to do with a rule that limits membership in a pension plan because of age.

Nor is there merit in Evanston's reliance (Def.Br. 30) on *EEOC v. Boeing Services International*, 968 F.2d 549, 553 n.3 (5th Cir. 1992). At issue in *Boeing Services* were action that had occurred in 1983, which were challenged in a complaint filed in 1989. 968 F.2d at 552, 553 n.3. The ADEA claim in this case was filed in January of 1993, and sought a remedy for actions occurring on and after October 16, 1992, the effective date of the OWBPA.

Evanston is equally at sea in its reliance on cases following the rule of *Hutto v. Finney*, 437 U.S. 678, 699 (1978) that attorneys' fees may be awarded against a state, even when the state is not a party to the lawsuit. *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990) (Def.Br. 32) is a straightforward application of this rule. There, Mississippi "although not a named party to the suit, represented the public defendants through the Mississippi Attorney General's office." 909 F.2d at 797.

Evanston's citation to *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) (Def.Br. 32) makes no sense. *Briscoe* was a lawsuit against several state officials, a county, and a school district. The plaintiffs prevailed against the state officials and the school district, who were each held to be "actually responsible for plaintiffs' attorney's fees." 619 F.2d at 406.

One of the cases cited by Evanston, *Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992), makes plain the frivolity of Evanston's argument (Def.Br. 39-44) that the State of Illinois is a necessary party in this lawsuit. In *Scott*, this Court observed that to determine whether the state is the real party in interest, "we are required to evaluate more generally whether a suit would interfere with public administration, or otherwise restrain or compel government action." *Id* at 372, citing *Jensen v. State Board of Tax Commissioners*, 763 F.2d 272, 277 (7th Cir. 1985). Here, the district court's recognition of the supremacy of federal law has no impact on the State of Illinois, which has never expressed any interest in enforcing the discriminatory requirement of state law.

Plaintiff's ADEA claim involves a simple application of the supremacy clause to a state statute that denies pension and disability benefits on account of age. Evanston's scorched earth defense of the discriminatory statute has

unreasonably protracted this litigation and should not be tolerated. The district court correctly concluded that the "blanket exclusion of a worker from benefits based upon age is . . . a *per se* violation of the law." (Short Appendix 37), and its decision on plaintiff's ADEA claim should be affirmed.

C. PRE-OWBPA DENIAL OF PENSION AND DISABILITY COVERAGE: A PRIMA FACIE DENIAL OF EQUAL PROTECTION

1. The Standard of Review

Review of the district court's dismissal for failure to state a claim is *de novo*.

2. Discussion

In his original complaint, plaintiff alleged that he was the only full time, permanent employee of the City of Evanston for whom the City does not provide pension benefits or disability coverage. (Complaint, par. 14, Record Item No. 1.) Plaintiff contended that he was treated in this disparate manner because he was over 35 years of age when hired. (Complaint, par. 15.)

Evanston did not defend this disparate treatment by arguing that it had a rational basis for excluding plaintiff from these benefits. Instead, Evanston argued that its hands were tied by state law that prohibits a municipality from providing "any type of retirement or annuity benefit to a firefighter other than through establishment of a fund as provided in this Article as now or hereafter amended." 40 ILCS 5/4-142.

Nothing in the statute, though, purports to prohibit a municipality from providing disability coverage to its firefighters separate from the firefighters' pension fund.

The district court correctly noted that one purpose of the firefighters' pension fund is to provide retirement and disability benefits. (Short Appendix 6, citing *Firemen's Annuity and Benefit Fund v. Municipal Employees' Officers' and Officials' Annuity Fund*, 219 Ill.App.3d 707, 579 N.E.2d 1003, 1004 (1991). The statute that prohibits municipalities from establishing alternative benefits programs, though, does not address disability benefits.

We recognize that state law may establish that age distinctions are sufficiently rational to pass muster on the equal protection clause. See, e.g., *EEOC v. O'Grady*, 857 F.2d 383, 388 (7th Cir. 1988). It is for this reason that plaintiff, in his original complaint, did not challenge on equal protection grounds the age requirement of Illinois law, i.e., the rule barring membership in the firefighters' pension plan of persons over the age of 35 at time of hire. 40 ILCS 5/4-107(b). Plaintiff's challenge was to Evanston's refusal to provide him with benefits because of his age.

The prohibition of alternative pension programs of 40 ILCS 5/4-142 is not an age based distinction. The statute prevents a municipality from providing its firefighters with a retirement or annuity benefit program to supplement the pension plan established by state law. The statute also prevents a municipality from providing pension benefits to a firefighter, like plaintiff who has been excluded from the firefighters pension plan. Such an exclusion, though, need not be on account of age: Under Illinois law, the firefighters' pension plan may deny admission to a firefighter who has a preexisting medical problem. *Gordan v. Board of Trustees of the Firemen's Pension Fund of the City of Joliet*, 77 Ill.App.2d 234, 222 N.E.2d 28, 30 (1966).

The age neutral prohibition of 40 ILCS 5/4-142 has nothing to do with disability benefits; with respect to alternative pension benefits, the statute does not contain the type of legislative finding that meets the rational relationship test of the Fourteenth Amendment. *Compare Vance v. Bradley*, 440 U.S. 93, 110-11 (1979) (mandatory retirement policies of the foreign service).

It was Evanston's burden to respond to plaintiff's equal protection challenge, to come forward with a "reasonable basis" for depriving plaintiff of pension and disability benefits. *Dandridge v. Williams*, 397 U.S. 471, 495 (1970), There was no reason for denying plaintiff disability benefits and Evanston has consistently been unable to articulate any rational basis for the prohibition of 40 ILCS 5/4-142 of alternative pension benefits. Plaintiff stated a claim in his original complaint and the district court erred in dismissing plaintiff's equal protection challenge to the pre-OWBPA denial of pension and disability benefits.

V. CONCLUSION

For the reasons above stated, the district court's order of July 28, 1994 should be affirmed; the district court's orders dismissing plaintiff's §1983 claim against the City of Evanston should be reversed and the case remanded for further proceedings.

December, 1994

KENNETH N. FLAXMAN
LESLEY A. REDMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603

(312) 427-3200

Attorneys for Plaintiff-Appellant

INDEX

I. JURISDICTIONAL STATEMENT	1
II. QUESTIONS PRESENTED FOR REVIEW	1
III. COUNTER STATEMENT OF THE CASE	2
IV. ARGUMENT	7
A. INTRODUCTION	7
B. THE DISTRICT COURT CORRECTLY UPHELD PLAINTIFF’S CHALLENGE UNDER THE ADEA	9
1. Standard of Review	9
2. The Age Restriction of State Law Is Contrary to the ADEA	10
C. PRE-OWBPA DENIAL OF PENSION AND DISABILITY COVERAGE: A PRIMA FACIE DENIAL OF EQUAL PROTECTION	13
1. The Standard of Review	13
2. Discussion	13
V. CONCLUSION	15