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In the Supreme Court of Pennsylvania

Eastern District

No. 151 January Term, 1973

JOSEPH F. McILVAINE,
Appellant

v.

THE PENNSYLVANIA STATE POLICE

BRIEF OF THE PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICUS CURIAE

Appeal From the Order of November 10, 1972 *of the Commonwealth Court No.* 282 *C.D.* 1971.

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dismissed (lack of substantial federal question) 415 U.S. 4 S.Ct. 1583, 39 L.Ed. 887,

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COUNTER-STATEMENT OF THE QUESTION INVOLVED

Is the provision of the Administrative Code of 1929 which requires State Police Officers to retire at 60 valid in light of the Human Relations Act and Section 26 of Article 1 of the Pennsylvania Constitution?

COUNTER-HISTORY OF THE CASE

Appellant was dismissed from his position as a Captain with the Pennsylvania State Police solely due to the mandatory retirement provision of the Administrative Code of 1929. Following his dismissal he brought an action in mandamus in the Commonwealth Court. Commonwealth Court entered judgment in favor of Appellee on November 10, 1972. This is an appeal from that order.

INTEREST OF AMICUS

The Pennsylvania Human Relations Commission is the agency charged with the administration of the law proscribing discrimination in employment because of age. The mandatory retirement provision herein involved, if permitted to stand, would erode the protection from employment discrimination which the aged of the Commonwealth now enjoy. An affirmation by this Court of the decision of the Court below would leave the door open to further such in-roads.

Amicus believes that the Court below incorrectly construed the Human Relations Act and misapprehended its clear thrust.

This brief focuses on the invalidity of the mandatory retirement in the light of the Human Relations Act, leaving a discussion of other issues and nuances to the Appellant.

SUMMARY OF ARGUMENT

The Human Relations Act prohibits the retirement of Appellant because of his age which was mandated under Section 205(d) of the Administrative Code of 1929. The exemptions from protection of the Act set forth in Section 5(a)(1) are not applicable to the instant case. These exemptions pertain to a good faith effort by an employer to provide employee benefits, such as retirement and pension plans. The Legislature intended by the exemptions to avoid interference in such plans, provided any mandatory retirement involved was determined solely on actuarial grounds and was not, as here, the underlying purpose and design, to the achievement of which the retirement plan was really a means. Here, Appellant was retired not because of the terms of a retirement plan but because his employer, as reflected in the plain language of Section 205(d), desired it. Furthermore, he was not even afforded an opportunity to elect whether to participate in the Plan.

The forced retirement can not be upheld as a bona fide occupational qualification exemption. To qualify for such an exemption, the employer has the heavy burden of demonstrating that all or substantially all of a class could not satisfactorily perform. No effort was made by the employer here to demonstrate this. Indeed, the very terms of Section 205(d), which permits an officer who has less than 20 years of service at age 60 to continue at his job, vitiates that argument.

If Section 205(d) is construed as being intended to carve out an exception for State Police from coverage of the age provisions of the Human Relations Act, it has been implicitly repealed and is unconstitutional under Section 26 of Article 1 of the Pennsylvania Constitution. This Article prohibits the Commonwealth from denying to any person the enjoyment of his civil rights. Section 3 of the Human Relations Act expressly enumerates protection from employment discrimination because of age as a "civil right."

ARGUMENT

I. Section 205(d) of the Administrative Code of 1929, Which Requires State Police Officers To Retire at 60, Violates the Human Relations Act as Well as the Pennsylvania Constitution

Appellant was dismissed from active duty as a Captain with the State Police Force upon attaining his 60th birthday. It was stipulated by the parties that this dismissal was "solely due" to Section 205 of the Administrative Code of 1929, as amended. 71 P.S. 65, July 10, 1957.

Section 205(d) reads:

> Any member of the Pennsylvania State Police, except the commissioner and deputy commissioner, regardless of rank, who has attained or shall attain the age of 60 years, shall resign from membership in the said Police Force: Provided, however, That the provision of this paragraph shall not apply to members of the State Police Force who upon attaining the age of 60 years shall have less than 20 years of service. Upon completion of 20 years of service the provision of this paragraph shall become applicable to such persons.

On its face, this provision of the Administrative Code flies in the face of Section 5(a) of the Pennsylvania Human Relations Act, the Act of October 27, 1955, P. L. 744, as amended, 43 P.S. Sec. 955(a):

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . .:
>
> (a) for any employer because of the . . . age . . . of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.

The Court below, however, reconciled the apparent invalidity of the mandatory retirement provision in the light of 5(a) of the Human Relations Act by pointing to the exemptions from its coverage which the Act provides, the "bona fide occupational qualification" and "termination of employment by reason of retirement and pension plans and other like programs."

Although it is not clear, apparently the Court concluded that both categories of exemptions are present in the instant case.

This conclusion, as will be shown, was erroneous, since neither is applicable.

A. The retirement and pension plan exemptions of the Human Relations Act are not applicable here.

Section 5(a) of the Human Relations Act, which proscribes discrimination in employment because of

age, provides three exemptions from coverage, which relate to retirement, pension and insurance plans. The exemption pertinent here provides:

> "The provision of this paragraph shall not apply to (1) termination of employment because of the terms or conditions of any bona fide retirement or pension plan;"

These exemptions were added to the Human Relations Act by the Act of March 28, 1956. Legislative history is silent regarding the purpose underlying this enactment and they have not been interpreted by our Courts. However, the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, contains exemptions comparable to and clearly patterned after the thrust of the Human Relations Act.

The recent case of *Hodgson v. American Hardware Insurance Co.,* 329 F. Supp. 225 (D. Minn. 1971), which interprets the Federal Act, supports and confirms the result in this case which would appear evident from the plain meaning of the language and a rational and logical consideration of the problem in all its respects.

The language of the exemptions in the Federal Act reads:

> (f) It shall not be unlawful for employer—
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employment benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual.

In *Hodgson,* the employer established in 1930 a retirement plan providing compulsory retirement of plan members, at age 62 for females and 65 for males. (The coverage of the Federal Act extends to age 65.) The employer established identical compulsory retirement for employees who elected not to be plan members. The Court upheld the contention of the Secretary of Labor that the mandatory retirement provision as to nonmembers was prohibited by the Act.

The *Hodgson* court noted that the retirement ages for members were determined actuarily and were "part and parcel" of the plan.

> "However," it pointed out, "retirement of nonmembers is not done because the *plan* compels it, but because the *employer desires to do so.* American probably has many sound business reasons for doing so—encouraging plan membership, Plan member morale, etc.—but Section 4(a) of the Act is a clear, congressional determination that the overall economic interests of the country, as served through older worker employment, override such parochial interests of employers." (Emphasis supplied.)

This is precisely what is involved in the instant case and it is submitted that this analysis of *Hodgson* should be dispositive of the instant case.

Appellant was obviously not retired because of the terms or conditions of the Retirement Plan. He was retired, just as the non-members in *Hodgson* were, because his employer desired it. There can be no dispute about that. The parties have stipulated that he was retired solely due to Section 205(d). (10a

of Record). Nothing in the Act makes reference to a pension or retirement plan and the only reference to such a plan in the entire record of this case is paragraph 7 of the stipulation of facts, which adds that as a result of his mandatory retirement Appellant will "receive less retirement benefits than he would otherwise receive if he were able to pursue his employment for additional years."

There can be no doubt that Appellant was forced to retire because of a determination, presumably proposed by State Police officials but in any event finally reached by the Legislature, that policemen as a class when they reached that age were no longer fully fit, were in fact "superannuated." (This is the very word used by the Court in *Boyle v. Philadelphia,* 338 Pa. 129 1940), and included in the lengthy quote from *Boyle* cited by the Court below. *Boyle,* of course, was written well before the Human Relations Act, which removed the discretion from an employer, whether private or governmental, to "superannuate" a class. Instead, as will be shown below, the heavy burden was placed on the employer to demonstrate that all or substantially all members of a class could not perform the necessary duties.)

In the absence of an express statement of legislative intent, it may be readily inferred by considering the purposes of the Act as a whole, and with the aid of the light thrown by *Hodgson* and comparable provisions in the laws of other states. The intent that thus becomes apparent is: "To permit an employer who is not attempting to evade the age provisions but rather is desirous of providing employee benefits consistent with enlightened social policy, to establish

such a benefit as a retirement or pension plan, subject to the limitations that any mandatory retirement entailed in the plan be based only on actuarial considerations, and that any employee who elected not to participate in the plan would not be required to retire at the age dictated under the Plan." It would, of course, follow from this that an employee must be afforded an opportunity to make an election whether to participate. Clearly, the employer here has not met any of the conditions to qualify for the exemption.

How can it be argued that the exemptions in the Human Relations Act were intended to cover such a ~~stipulation~~ Situation which so clearly has the effect, not of enabling a plan to continue to operate which will benefit workers but to injure Appellant and those in his class in the very manner which the thrust of the Act was intended to protect against, that is, by injuring him financially and, equally if not more important, by stripping him of his dignity and his right to contribute meaningfully in society by declaring him superannuated and shipping him out to pasture? What we have here, instead, amounts to a subterfuge to evade the purposes of the Act, although good faith no doubt is involved.

The phrase, "subterfuge to evade the purposes of the Act" is, of course, the key to an understanding of the purposes of these exemptions.

Many of our states have acts barring employment discrimination because of age. Some of these do not have exemptions—comparable to those in the Pennsylvania Act, but many do. California is typical. Its

act provides: "This section shall not be construed to . . . affect bona fide retirement or pension plans." Section 2072, Chapter 9 of the Unemployment Insurance Code, July 14, 1961.

Many of the State acts which include these retirement and insurance plan exemptions contain the phrase of the Federal Act quoted above, that the plan may not be a "subterfuge to evade the purposes of the act." Georgia, Michigan, Nebraska, Montana, and North Dakota are among those in this category.

The New York Act grants the exemption only to those plans established prior to the effective date of its Act.

(It should also be noted that the Georgia Act permits an employee to elect not to participate in the plan and thereby not to subject himself to mandatory retirement. Act of April 5, 1971. As previously pointed out, Appellant was not afforded an opportunity to make such an election. It is submitted that this concept of election is fundamental to any plan which would be sustained under these exemptions.)

B. Nor may the mandatory retirement be upheld under a bona fide occupational qualification exemption to the Human Relations Act.

The Court below suggests, without clearly holding, that the mandatory retirement of Appellant may be upheld on the ground that it is a bona fide occupational qualification.

> "Alternatively Plaintiff appears to assert, without any supporting proof in the record, that a mandatory retirement age for State Police Officers as a class is not a bona fide occupational qualification. To merely say so is not enough, particularly in the light of the Soltis and Boyle cases, supra. The fact that a particular police officer is physically fit and able to perform his duties or that minds may differ upon the particular mandatory retirement age selected by the Legislature is not proof of want of bona fides as to the qualifications otherwise applied uniformly and nondiscriminatorily to the selected class."

The Court below clearly has misapprehended the concept of the bona fide occupational qualification (B.F.O.Q.)

The leading case dealing with the B.F.O.Q. is *Weeks vs. Southern Bell Tel. & Tel. Co.,* 408 F. 2d 228, 235 (5th Cir. 1969), which held that the "employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

A B.F.O.Q. exemption to the mandate of equality in hiring should be interpreted narrowly. *EEOC Guidelines,* 29 C.P.R. Section 1604 1 (a).

The Pennsylvania Human Relations Commission's Guidelines on Discrimination Because of Sex sets forth the procedure an employer must follow to obtain the B.F.O.Q. These include writing to the Com-

mission requesting it and, inter alia, demonstrating that all or substantially all persons of the class cannot perform the functions of the job. Section 6(a)(2).

Thus, if the Court below placed the burden on Appellant to negate the existence of a B.F.O.Q., it was clearly in error. Similarly, the record is totally devoid of facts to demonstrate that a B.F.O.Q. should be granted for Appellant and his class.

C. Section 26 of Article 1 of the Pennsylvania Constitution resolves any possible doubt about the invalidity of Section 205(d).

Aside from the foregoing which has demonstrated that Section 205(d) cannot be reconciled with the Human Relations Act, the question may arise as to whether the Legislature could have intended by this Act, which was enacted subsequent to the provisions in the Human Relations Act prohibiting age discrimination, to carve out an exception for State Police as to age.

The simplest response to this is to note the enactment in 1967 of Section 26 of Article 1 of the Pennsylvania Constitution. It provided:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

When it is recalled that Section 3 of the Human Relations Act explicitly lists "age" as one of the civil

rights enforceable by the Act, it is clear that Section 205(d) was implicitly repealed by Section 26 of Article 1 and, in any event, unconstitutional as a result of it.

D. The precedents of Soltis Appeal and Boyle vs. Philadelphia do not support appellee's position.

The Court below relied heavily on *Boyle v. Philadelphia,* supra, and *Soltis Appeal,* 390 Pa. 416 (1957). *Boyle* is easily distinguishable. In any event, both cases have clearly been superseded, by law as well as by events.

Boyle supports Appellant, since it expressly qualifies a municipality's power to require retirement of police by recognizing the power ". . . in the absence of express statutory prohibition." Furthermore, *Boyle,* which was discussed above, was decided in 1940, 16 years before the Human Relations Act and 28 years before ~~Article~~ Section 26.

In *Soltis,* the Human Relations Act is not mentioned. It was apparently neither raised by the parties nor considered by the Court. Section 26 of Article 1 had not yet been enacted. Furthermore, the Court picked up and apparently relied upon a rationale in *Boyle* which has been thoroughly discredited by a change in social philosophy as well as by a change in law. The discredited concept was that policemen, upon reaching age 60 or 65, as a class become "too old for real service" and may be retired in the interest of economy. If *Soltis* cannot be simply bypassed it should be overruled.

CONCLUSION

For the above-stated reasons, Section 205(d) is invalid under the Human Relations Act and Section 26 of Article 1 of the Pennsylvania Constitution. Therefore, Appellant's mandatory retirement should be set aside and he should be reinstated and accorded appropriate remedies.

Respectfully submitted,

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