



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

September 23, 1975

ATTORNEY GENERAL OPINION NO. 75-374

Mr. W. Keith Weltmer, Secretary
Department of Administration
2nd Floor - State Capitol Building
Topeka, Kansas 66612

Re: Highway Patrol--Minimum Age for Appointment

Synopsis: The statutory age maximum of thirty-five years for appointment to the position of trooper of the Highway Patrol cannot be justified purely as a matter of law as supporting a bona fide occupational qualification, and hence, may not be enforced to deny applications from persons within the protection of the Age Discrimination in Employment Act of 1967 as amended.

* * *

Dear Secretary Weltmer:

K.S.A. 1974 Supp. 74-2113(c), as amended by ch. 401, L. 1975, states in pertinent part thus:

"No person shall be appointed as a trooper unless such person is a citizen of the United States; is at least twenty-two (22) years of age and not over thirty-five (35) years of age at the time of such person's appointment"

Title 29, U.S.C.A., § 623(a), of the Age Discrimination in Employment Act of 1967, as made applicable to the state in 1974, commences thus:

Mr. W. Keith Weltmer, Secretary

Page Two

September 23, 1975

"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"

You inquire whether the statutory maximum age for appointment as a trooper violates the foregoing in its denial of equal employment opportunity to persons within the protection of the Act solely because the applicants' age exceeds that of thirty-five years. Under § 4(f)(1) of the Act, 29 U.S.C. § 623(f)(1), an employer may differentiate as to age without violating the Act if age is shown to be a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."

So far as we are advised, the principal justification for this restriction on appointments is to permit retirement in accordance with K.S.A. 1974 Supp. 74-4957(a), which fixes the "normal retirement date" as

"the first day of the month coinciding with or following the attainment of age fifty-five (55) and the completion of twenty (20) years of credited service."

As pointed out in a letter from the Superintendent of the Patrol on July 23, 1974, to this office, the class of applicants between the ages of 22 and 35 are generally considered to be in their prime period of physical fitness, and if properly trained upon their entry into the Patrol during that period, are likely to complete their career with the Patrol through normal retirement age. Physical fitness is, of course, a justifiable occupational qualification. Age is not, however, and age may not be taken as a general assurance of such fitness based on stereotyped assumptions of correlation between age and general fitness.

Mr. W. Keith Weltmer, Secretary
Page Three
September 23, 1975

The burden of proof which the employer must meet to justify such age restrictions on appointment or entry into the field is discussed in *Hodgson v. Greyhound Bus Lines*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122. There, the court contrasted two varying measures of the burden of proof which the employer must meet to establish that a particular restriction is a bona fide occupational qualification. One view was stated thus, quoting from *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971):

" . . . [W]e apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. (Emphasis in original.) 442 F.2d at 388." 499 F.2d at 862.

Thus, in *Hodgson*, the court held that Greyhound must "establish that the essence of its operation would be endangered by hiring drivers over forty years of age." Regarding the safe transportation of passengers as the "essence" of Greyhound's intercity bus operations, the court held that to the extent that elimination of the hiring restriction might "impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations." 499 F.2d at 863.

The court chose not to adopt the burden of proof as defined in another case, *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), in which the court stated thus:

"[W]e hold that in order to rely on the bona fide occupational qualification exception an 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." 408 F.2d at 235.

We certainly cannot conclude as a matter of law that elimination of the statutory maximum age for appointment to the Patrol would

Mr. W. Keith Weltmer, Secretary
Page Four
September 23, 1975

in any way undermine or affect adversely the essence of the operation of the Patrol and the discharge of its mission. Certainly, there is no factual basis for believing that this entry restriction bears any relationship whatever to the ability of members of the Patrol to perform safely and efficiently the duties of their respective assignments.

I must conclude, then, that there presently exists no legal ground for enforcement of the statutory maximum appointment age of thirty-five years, and that this statutory restriction violates the duties and responsibilities of the state as an employer under the Age Discrimination in Employment Act, as applied to those persons within the protection of that Act, being those persons who are at least forty years of age but less than sixty-five years of age.

Accordingly, it is my opinion and recommendation that in recruiting applicants for the position of trooper with the Kansas Highway Patrol, that the Division of Personnel may not regard any applicant as disqualified solely for the reason that such person is forty years of age or older, and thus is beyond the statutory maximum age for appointment.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

cc: Mr. Lowell Long, Director
Division of Personnel
Department of Administration
801 Harrison
Topeka, Kansas 66612

Colonel Allen Rush, Superintendent
Kansas Highway Patrol
State Office Building
Topeka, Kansas 66612