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ATTORNEY GENERAL OPINION NO. 91- 115

Ted D. Ayres
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Kansas Board of Regents
Suite 609, Capitol Tower
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Topeka, Kansas 66603-3911

Re: State Institutions and Agencies; Historical Property--State Educational Institutions; Management and Operation--Reduced-Service Program for Faculty Members; Effect of Older Workers Benefit Protection Act

Synopsis: K.S.A. 76-746, the reduced-service program for regents' institutions' faculty members, discriminates against faculty members 65 years of age and older. Since it does not meet the "equal benefit or equal cost" test and is not consistent with the purposes of the age discrimination in employment act (ADEA), it is not excepted from the act pursuant to the older workers benefit protection act and would be found to violate the ADEA. Cited herein: K.S.A. 1990 Supp. 74-4925, as amended by L. 1991, ch. 237, § 2; K.S.A. 76-746; K.A.R. 88-12-1; 29 U.S.C. §§ 621, 623; 29 C.F.R. § 1625.10.

* * *

Dear Mr. Ayres:

You request our opinion regarding the validity of the reduced-service program established by K.S.A. 76-746 in light

of recent amendments to the federal age discrimination in employment act (ADEA), 29 U.S.C. §§ 621 et seq.

A chronology of events leading to your request may be helpful. The ADEA as enacted in 1967 provided in part:

> "(a) It shall be unlawful for an employer--
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> "(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 Act.
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> . . . .
>
> "(f) It shall not be unlawful for an employer, employment agency, or labor organization--
>
> . . . .
>
> "(2) to observe the terms of a bona fide seniority system or 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 act. . . ." 29 U.S.C. § 623.

Prior to 1989, these provisions were interpreted to allow certain benefit plans which differentiated based on age of the employee only if any age related reductions in employee benefits were justified by the increased cost of providing those benefits. See e.g. EEOC v. Mt. Lebanon, 842 F.2d 1480 (3rd Cir. 1988); International Brotherhood of

Electrical Workers, Local 1439 v. Union Electric Co., 761 F.2d 1257 (8th Cir. 1985); Cipriano v. Board of Education, 785 F.2d 51 (2nd Cir. 1986); 29 C.F.R. § 1625.10. In June of 1989 the United States Supreme Court in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 106 L.Ed.2d 134, 109 S.Ct. 2854 (1989) found that the federal regulation (29 C.F.R. § 1625.10) interpreting the ADEA to require cost-justification was beyond the scope of authority of the department of labor, and later the EEOC, to promulgate, and thus was invalid. The court held that subsection (f)(2) of 29 U.S.C. § 623 was "intended to exempt employee benefit plans from the coverage of the Act except to the extent plans were used as a subterfuge for age discrimination in other [non-fringe-benefit] aspects of the employment relation." Id. at 180. In response to this opinion, Congress enacted the older workers benefit protection act (OWBPA), Pub.L. 101-433 (Oct. 16, 1990). See Senate Comm. on Labor and Human Resources, Older Workers Benefit Protection Act, S.Rep. No. 263, 101st Cong., 2nd Sess. 4, reprinted in 1990 U.S. Code Cong. & Ad. News 1509, 1510 (1990). 29 U.S.C. § 623(f)(2) was amended as follows:

> "(f) Its shall not be unlawful for an employer, employment agency, or labor organization --
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> . . . .
>
> "(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section --
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> . . . .
>
> "(B) to observe the terms of a bona fide employee benefit plan--
>
> "(i) where, for each benefit, or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or
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> "(ii) that is a voluntary early retirement incentive plan consistent with

> the relevant purpose or purposes of this Act.
>
> "Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive 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 specified by section 12(a) [29 USCS § 631(a)], because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act. . . ."

Subsection (l) spells out exceptions to (f)(B)(i) and (ii). These provisions become applicable to the state in October of 1992. Pub.L. 101-433, Title I, § 105(c).

K.S.A. 76-746 authorizes state regents' institutions to enter into reduced-service agreements with faculty members "who are at least 60 years of age but who are under 65 years of age." Since mandatory retirement age for faculty members currently is 70 [K.S.A. 1990 Supp. 74-4925(d), as amended by L. 1991, ch. 237, § 2], and since by January 1, 1994 there will be no mandatory retirement [Act of October 31, 1986, Pub.L. 99-592, § 6(b) (repealing 29 U.S.C. § 631(d) as of December 31, 1993)], this provision, by not offering the benefit to those 65 and older, discriminates with respect to "terms, conditions or privileges of employment" against such older workers. Thus, in order for the reduced-service program to survive the OWBPA it must be part of a bona fide employee benefit plan which either 1) meets the "equal benefit or equal cost" test, or 2) is a voluntary early retirement incentive plan consistent with the relevant purposes of the ADEA.

Under the "equal benefit or equal cost" test, an employer may reduce a benefit for older workers if the employer can show that the reduced benefit for older workers costs the same (i.e. the same amount is expended) as in providing the full benefit to younger workers. Based on the information we have, we do not believe K.S.A. 76-746 meets this test. Persons retiring after age 65 receive the same retirement benefits

whether or not they participated in the program. Further, under K.S.A. 76-746, it is not a case of reduced benefits so much as it is not offering the benefit at all to older workers.

You describe the reduced-service program as a "phased retirement plan." It allows faculty members 60-65 years of age to accept an appointment in a reduced position of at least 1/4 time with reduced pay but without losing full-time benefits. Upon reaching age 65, the employee must either return to full-time or retire. Thus, the program is an incentive to ease into retirement by age 65. In that sense, it is an early retirement incentive plan, and it is purely voluntary (at least on the face of the statute). See also K.A.R. 88-12-1 et seq. We assume that the program is part of a bona fide employee benefit plan. The question then becomes whether it is consistent with the relevant purpose(s) of the ADEA. The purposes of the act are stated at 29 U.S.C. § 621(b):

> "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

There are no published cases discussing the OWBPA's exception for early retirement incentive plans and whether certain plans are consistent with the purposes of the ADEA. However, two cases decided prior to the enactment of the OWBPA are instructive. As is the case with faculty members not eligible for the K.S.A. 76-746 reduced-service program, the court in Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51 (2nd Cir. 1986) found that "the older worker is not being deprived of continuation at his job or of pension benefits. He is being deprived only of the same opportunity to receive a bonus for early retirement as is accorded workers in the age bracket just below him." 785 F.2d at 59. Nevertheless, the court remanded the case for a determination as to whether the plan was a subterfuge to evade the purposes of the ADEA. In Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988) the court commented that "[t]o withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed." 837 F.2d at 320. Further, the senate report on the OWBPA noted that "[e]arly retirement incentive plans that deny or reduce benefits to older workers may

encourage premature departure from employment by older workers. This not only conflicts with the purpose of eliminating age discrimination in employee benefits; it also frustrates (rather than promotes) the employment of older persons. . . . Similarly, the purpose of eliminating arbitrary age discrimination in employee benefits is not served by denying or reducing benefits to older workers based on age-related stereotypes." S. Rep. No. 263, supra at 1533. The report then lists the types of early retirement incentive plans that would be consistent with the purpose of the ADEA:

> "Specifically, early retirement incentives that provide a flat dollar amount (e.g., $20,000), service-based benefits (e.g., $1,000 multiplied by the number of years of service), or a percentage of salary all were permissible before the Betts decision and would remain lawful under these amendments. Similarly, early retirement incentives that provide flat dollar increases in pension benefits (e.g. $200 per month), percentage increases (e.g. 20%), or that impute years of service and/or age would continue to remain lawful. . . .
>
> "In general, early retirement incentive plans may be considered lawful provided they are truly voluntary, are made available for a reasonable period of time, and do not result in arbitrary age discrimination." Id. at 1533.

The listed examples base eligibility for or amount of benefits on something other than age. These types of incentive programs appear to encourage a voluntary reduction in work force at all age levels, rather than encouraging a specific segment of the work force (older employees) to retire. As noted previously, K.S.A. 76-746, the reduced-service program, is offered only to employees between the ages of 59 and 65. By the terms of the statute, faculty members 65 years of age and older are not eligible to participate. Because this benefit is denied older employees based solely on their age, we do not believe it would be found consistent with the

purposes of the ADEA. Accordingly, it is our opinion that K.S.A. 76-746 violates the ADEA as amended by the OWBPA.

Very truly yours,

Robert T. Stephan

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RTS:JLM:jm