

Age Discrimination: The Aging Workforce Faces the Recession

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I. How Are Older Workers Faring in the Recession?

A. The Employment Situation

- a. Until the recent crisis in the U.S. economy, most of the discussion surrounding older workers had turned to how smart employers should take steps to hire and retain older workers to address looming labor and skills shortages. Circumstances, however, can and do change rather quickly. In the words of the Equal Employment Opportunity Commission's (EEOC) outgoing general counsel Ronald Cooper, the aging demographics of the U.S. labor force combined with the ever-worsening economic crisis "create a perfect storm" for age discrimination to escalate. Kevin P. McGowan, *EEOC Official Sees Age, Disability Bias as Growth Areas in Commission Litigation*, DAILY LAB. REP. (BNA), at C-2 (Dec. 5, 2008). Indeed, the excitement about the value of older workers has already appeared to wane. In a recent article about how the "market meltdowns" would mean that older workers would *need* to remain in the workforce, the author commented that "With pensions and retiree health benefits largely things of the past – and financial markets devastating 401(k)s - companies are at risk of losing their competitive edge if they become *storehouses of embittered older employees who put in only the minimum effort to keep their jobs.*" Jessica Marquez, "Retirement Out of Reach," *Workforce Management*, at 1 (Nov. 3, 2008)(emphasis added).
- b. The current economic crisis has forced older workers at all economic levels to postpone plans for retirement and attempt to stay in or re-enter the labor force

- c. The unemployment rate for persons aged 55 and over increased to 7 percent in October 2009 from 6.8 percent in September. Until this year, the unemployment rate for the 55-plus age group had not exceeded 6 percent since September 1949. It has been well above 6 percent for much of 2009.
- d. The number of persons aged 55 and over who had jobs fell by 50,000 in October, erasing much of the 69,000 gain seen in September.
- e. Once unemployed, older workers tend to be out of work longer than their younger counterparts; this pattern continued in October 2009 as well. The average duration of unemployment for job seekers age 55 and older rose from 32.8 weeks to 33.5 weeks. Unemployed persons under age 55 were out of work for 27.2 weeks, on average, in October 2009, an increase from 26.4 weeks in September.
- f. The number of older persons who could be classified as job-seeking discouraged rose sharply in October after a sharp decline in September.

B. The Age Discrimination Situation

- a. Age discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) have hit a high – up 29% to 24,582 in fiscal year 2008 from 19,103 in 2007. This is almost double the increase in overall discriminations complaints for race, sex, etc.
- b. An AARP survey released last year found that 60 percent of those surveyed aged 45 to 74 reported that they had personally faced or had observed age discrimination in the workplace.
- c. Carrots and Sticks
 - i. Early Retirement Incentives or Voluntary Buyouts

1. The Older Workers Benefit Protection (Act) – 29 U.S.C. § 4(f)(2)(B)(ii)
 - a. Must be voluntary
 - b. Must be consistent with the relative purpose or purposes of the ADEA.

2. Waivers

- ii. Reductions-in-force/Involuntary Layoffs

1. Disparate Treatment
2. Disparate Impact
3. Waivers

II. Recent Developments in Age Discrimination Law

A. *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009).

a. **The Decision** – In a 5-4 ruling, the Court held that an age discrimination plaintiff must satisfy a higher standard of proof than a plaintiff suing for employment discrimination under Title VII of the Civil Rights Act of 1964. Specifically, the Court ruled that it was not sufficient to show that age was among the reasons for an employee's bad treatment. Instead, age had to be "the but-for" reason. In his dissent, Justice John Paul Stevens called the decision "unnecessary lawmaking." 129 S.Ct. at 2353.

b. **The Aftermath** – How *Gross* Being Interpreted?

i. Some courts have interpreted *Gross* as requiring an ADEA plaintiff to prove that age was the *sole* cause of the adverse employment action.

1. *Culver v. Birmingham Bd. of Education*, 2009 WL 2568325 (N.D. Ala. August 17, 2009). Culver claimed that his employer

"either discriminated against him because of his age or because of his race, or for both reasons." Relying on *Gross*, the court ordered Culver to either abandon his age claim or his race discrimination claim because "*Gross* h[eld] for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact that he is over 40 years old was the only or the "but for" reason for the alleged adverse employment action." 2009 WL 2568315 at *1. The court continued, "The only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was any other proscribed motive involved. For this reason, the court required Culver to choose between his ADEA alternative, which would require him to prove age as the only reason for the adverse employment action, and his Title VII claim." *Id.*

2. *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890 (E.D. Pa. Aug. 11, 2009). The court's interpretation of *Gross* in this case is outrageous. Specifically, the court made this troubling conclusion of law: "An employer defending an ADEA claim does not need to show why its conduct was not discriminatory until plaintiff first presents evidence that she suffered at least some employment discrimination relating solely to her age." 2009 WL 2461890 at *4, citing *Gross*, slip op. at 12. Plaintiff's allegations that she was treated less favorably because she was an "older female" were relied upon by the court to conclude that her age was not the "but-for" case of the

discrimination she complained of. According to this court, "The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the *only* reason for discrimination." *Id.* at *7 (emphasis added). The court continued, "Even if Wardlaw's assertion that the City's motion for summary judgment rests solely on unsubstantiated evidence is correct, the City has no burden to refute her claim until she presents direct evidence that her age was the sole reason for the discrimination Because she cites multiple bases for her discrimination claim, including her gender, race, and disability, Wardlaw is foreclosed from prevailing on a claim for age-related discrimination." *Id.*

3. *Sebring v. AutoZone, Inc.*, 2009 WL 2424204 (D. Utah Aug. 6, 2009). Plaintiff claimed he was wrongfully terminated because of his age. The court began by noting that prior to *Gross*, an ADEA plaintiff could prevail in a discharge case by establishing "that age was a determining factor in the decision to terminate his employment. . . [and] the plaintiff was not required to show that age was the sole reason [but was only] required to show that age 'made the difference' in the adverse employment action." 2009 WL 2424204 at *2. However, in granting the employer's motion for summary judgment, the court stated that, "The *Gross* case trumps and eliminates the 'determining factor' and 'made the difference' standards," and "mandates that [age discrimination plaintiffs] must prove . . . that age was 'the but-for' cause of the challenged adverse employment action." *Id.*

4. *Martino v. MCI Communications Services, Inc.*, 547 F.3d 447 (7th Cir. 2009). The court granted summary judgment for the employer in a termination case. This case is replete with evidence that the court takes age discrimination quite lightly. The decision starts with the court noting that “[The plaintiff] wasn’t exactly a spring chicken when he started working for MCI. He was 54.” 574 F.3d at 450. And, the fact that the plaintiff’s supervisor referred to him as an “oldtimer” did not “strike [the court] as inherently offensive –between friends it’s often a term of endearment . . .,” *id.* at 452 and “just isn’t that egregious.” *Id.* at 453. The court concludes its summary dismissal of the plaintiff’s claim by noting, “if there were any doubt that Martino cannot survive summary judgment, it evaporates completely in the wake of the Supreme Court’s decision in *Gross* . . . The Court held that in the ADEA context, it’s not enough to show that age was a motivating factor.” *Id.* at 455 (emphasis in original).

ii. *Gross*’ holding that age must be “the but for” cause of the adverse employment action has been interpreted by several lower courts to impose a heightened standard to shift the burden under the *McDonnell Douglas v Green* framework for age discrimination victims.

1. *Bell v. Raytheon Co.*, 2009 WL 2365454 (N.D. Tex. July 31, 2009). In granting summary judgment for the employer, the court glosses over the facts, leaves out and twists evidence, and shockingly suggests that it is acceptable under the ADEA for an employer to harass a group

of older employees relentlessly and deliberately due to their age. The district court takes the *Gross* decision and turns it into the "silver bullet" for courts who want to freely, pre-*Reeves* style, grant summary judgment in ADEA cases for docket control. After first noting that *Gross* "questions whether the *McDonnell Douglas* approach should be applied in ADEA cases," 2009 WL 2365454 at *5, the court applies it but rendered it useless by holding that "the court will not shift the burden to the defendant to articulate a legitimate nondiscriminatory reason unless the plaintiffs show that age was the but-for cause of any adverse employment actions." *Id.* at *5.

2. *Love v. TVA Board of Directors*, 2009 WL 2254922 (M.D. Tenn. July 28, 2009). This is a failure to promote claim where the plaintiff alleged both race and age discrimination. In earlier proceedings, the court had denied the defendant's motion for summary judgment on both claims. A bench trial was held resulting in this decision. Both the race and the age claims were based on circumstantial rather than direct evidence. The plaintiff satisfied the prima facie case for both claims. However, the court explained that after *Gross*, the *McDonnell Douglas* analysis was different for age than for race claims. Whereas under Title VII, a plaintiff could prevail "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence," 2009 WL 2254922 at *9, "[f]or his ADEA claim, Plaintiff must prove that his age was *the* reason for his nonselection." *Id.* at *10 (emphasis in original) citing

Gross, 129 S.Ct. at 2350, 2351. As a result of the disparity in burden of proof between his race and age claims, the court found for the plaintiff on his race claim and awarded him backpay and retirement benefits. His age claim was dismissed with prejudice.

3. *Holowecki v. Fed. Express Corp.*, 644 F. Supp. 2d 338 (S.D.N.Y. 2009). The Plaintiffs brought age discrimination claims under the ADEA and the New York State Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.* The court ruled that the *Gross* decision changed the way the *McDonnell Douglas* burden shifting framework applies to the ADEA. 644 F. Supp. 2d at 353. Specifically, the court ruled that to demonstrate an employer's non-discriminatory reason for the complained of adverse employment action is pretextual, a plaintiff must show that discrimination is the "but for" cause for the adverse employment action rather than only a contributing factor. *Id.* Even more disturbing, the court stated that, "Whether *Gross*, by implication, also eliminates the *McDonnell Douglas* burden-shifting framework in ADEA cases was left open by the court. . . ." *Id.* However, the court did not address this issue because in its opinion, the plaintiffs failed to make a "colorable case of age discrimination" under the "*pre-Gross* legal standards, which were more favorable to plaintiffs than those set forth in *Gross*." *Id.*
4. *Fuller v. Seagate Technology, LLC*, 2009 WL 2568557 (D. Colo. Aug. 19, 2009). In granting summary judgment for employer, the district court notes that, "Although the Tenth Circuit Court of Appeals has not addressed it, this Court

interprets *Gross* as elevating the quantum of causation required under the ADEA. After *Gross*, it is no longer sufficient for Plaintiff to show that age was a motivating factor in Defendant's decision to terminate him. Instead, Plaintiff must present evidence that age discrimination was the 'but for' cause of Plaintiff's termination." 2009 WL 2568557 at *14 citing *Gross*, 129 S.Ct. at 2350.

5. *Wagner v. Geren*, 2009 WL 2105680 (D. Neb. July 9, 2009). "While it is unclear whether the *McDonnell Douglas* Title VII evidentiary analysis applies to discrimination claims under the ADEA . . . this Court need not address that issue, because Wagner has not presented sufficient evidence from which a reasonable finder of fact could conclude that his age was the 'but-for' cause of any adverse action." *Id.* at *5. This case seems similar to *Bell v. Raytheon* in that the court would not consider requiring the defendant to provide an explanation unless the plaintiff had produced evidence that age was the but-for cause of the alleged discriminatory action.

iii. After *Gross*, age discrimination claimants, and by implication claimants under many other statutes, may no longer prevail by proving that an impermissible factor was "a" motivating factor in the action complained of.

1. *Woehl v. Hy-Vee, Inc.*, 637 F. Supp. 2d 645 (S.D. Iowa 2009). Discussing *Gross*, the court states, "The Supreme Court held that the burden of persuasion does not shift to the employer 'to show that it would have taken the action regardless of age, even when plaintiff has produced

some evidence that age was one motivating factor in that decision." 637 F. Supp. 2d at 651 quoting *Gross*, 129 S.Ct. at 2352. Later, the court noted, "Thus, if *McDonnell Douglas* were not applicable in this matter, the burden would not shift to [the defendant] at any point in the analysis." *Id.* at 656.

2. *Geiger v. Tower Automotive*, 579 F.3d 614 (6th Cir. 2009). The Sixth Circuit affirmed the grant of summary judgment for the defendant in this reduction-in-force case in which the plaintiff alleged that he was terminated because of his age (62) in violation of the ADEA and Michigan's Elliott-Larsen Civil Rights Act. Citing footnote 4 of *Gross*, 129 U.S. 2343, 2352 n. 4, the court found that "with both direct and circumstantial evidence, the burden of persuasion remains on ADEA plaintiffs to demonstrate 'that age was the 'but-for' cause of their employer's adverse action.'" 579 F.3d at 621. The court found that in *Gross*, "the Supreme Court specifically held that the 'burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.'" 129 S.Ct. 2352." *Id.* Therefore, the court concluded that "[t]hus, *Gross* overrules our ADEA precedent to the extent that cases applied Title VII's burden-shifting framework if the plaintiff produced direct evidence of age discrimination." *Id.*

- c. **The Proposed Fix** - The Protecting Older Workers Against Discrimination Act (S. 1756/H.R. 3721)
 - i. Overturns the holding of *Gross* to clarify that an ADEA plaintiff prevails if he e factor behind an allegedly discriminatory employment decision.
 - ii. Covers all claims filed since the *Gross* decision (June 18, 2009).
 - iii. Makes clear that this “motivating factor” framework applies to all anti-discrimination and anti-retaliation laws.

B. The Supreme Court’s Unprecedented 2007-2008 Session – “The ADEA Term”

- a. In the year immediately following the ADEA’s 40th anniversary, the Supreme Court decided **five** age discrimination cases.
- b. The Decisions
 - i. ***Meacham v. Knolls Atomic Power Laboratory***, 128 S. Ct. 2395 (2008) – The ADEA’s “reasonable factor other than age” provision is an affirmative defense on which the employer bears both the burden of production and burden of persuasion.
 - ii. ***Sprint/United Management Company v. Mendelsohn***, 128 S. Ct. 1140 (2008) – Ellen Mendelsohn sought to support her age discrimination case with testimony from coworkers suggesting that the adverse treatment she alleged, culminating in her dismissal during a reduction-in-force, was not benign but rather based on her age. The employer argued that such testimony should be excluded simply because the proposed witnesses had different supervisors from Mendelsohn. The trial court excluded the

evidence but the Tenth Circuit reversed and criticized the trial court for applying a *per se* rule of exclusion. 466 F.3d 1223, 1230 (10th Cir. 2006).

The Supreme Court reversed the Tenth Circuit but not as the employer and its *amici* had hoped it would. The unanimous decision held that although the district court had not applied a *per se* exclusionary rule, in general, *per se* evidentiary rules are inappropriate. Stressing the importance of context, the Court directed that trial judges must decide, under the circumstances, what evidence should go to the jury in each case. 128 S.Ct. 1140, 1147.

- iii. ***Federal Express v. Holowecki***, 128 S.Ct. 1147 (2008). A federal trial court had dismissed an ADEA claim as untimely because the individual had failed to file an EEOC charge within the time required by the ADEA. Instead of a "Form 5," a formal charge of discrimination, she had filed a "Form 283," an intake questionnaire. The EEOC failed to send the filing to the employer or to initiate talks with the employer as it is required to do with a charge of discrimination. See 29 U.S.C. § 626 (d). By a 7-2 vote, the Court rejected the employer's call for a strict rule that a worker's ADEA claims in an EEOC submission are forfeited, and may not be considered a charge, if the EEOC fails to forward the submission to the employer for a response. Instead, to qualify as a charge, the Court explained, a submission must allege employer misconduct and name the charged party and "must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." 128 S. Ct. 1147, 1157-58. An affidavit submitted by the individual in this case demanding that the EEOC "force" the employer

to stop discrimination was found to be determinative. *Id.* at 1159-60.

- iv. ***Gomez-Perez v. Potter***, 128 S. Ct. 1931 (2008). In *Gomez-Perez*, the Court rejected the governments efforts to construe the ADEA – unlike Title VII – not to permit claims of retaliation by federal employees. By a vote of 6-3, the Court declared that Congress intended the ADEA to prohibit retaliation against federal workers as part of the Act’s broadly worded prohibition against “any discrimination” in “personnel actions affecting [federal] employees” on grounds of age.
- v. ***Kentucky Retirement Systems v. Equal Employment Opportunity Commission***, 128 S. Ct. 2361 (2008) – In this 5-4 decision, the Court refused to hold a state retirement plan discriminatory even though the plan expressly takes age into account in setting disability pension benefit payments. The case presented a textbook example of age discrimination - the KRS plan denies an employee benefit based on age and thus is facially discriminatory. The Supreme Court had made clear that an employer’s reliance “upon a formal, facially discriminatory policy requiring adverse treatment of employees with that [protected] trait” establishes a prima facie disparate treatment claim under the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

The KRS plan is facially discriminatory because it categorically excludes still-working employees over age 55 from an employment benefit *because of* their age. In order to be eligible for disability-retirement benefits, employees must become disabled before they reach age 55. Kentucky’s decision to make employees ineligible for disability-retirement benefits simply because they have reached

normal retirement age is a “formal, facially discriminatory policy” that discriminates on the basis of age.

Although the *Kentucky Retirement System* case involved a plan that denied older workers a benefit that was provided to younger workers, the Court wholly disregarded the OWBPA and announced a new rule that has potential to thwart the purposes of the ADEA. That rule reads: “Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was ‘actually motivated’ by *age*, not pension status.” 128 S. Ct. at 2370 (emphasis in original).

The Court cited six factors that caused it to conclude that the differences in treatment between older and younger employees “were not ‘actually motivated’ by age. 128 S.Ct. at 2367. These factors are:

(1) “age and pension status remain ‘analytically distinct’ concepts. . . one can easily conceive of decisions that are actually made ‘because of’ pension status and not age, even where pension status is itself based on age. *Id.*

(2) The case involved “not an individual employment decision, but a set of complex systemwide rules. These systemic rules involve, not wages, but pension – a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age.” *Id.*

(3) “[T]here is a clear non-age-related rational for the disparity. . . the whole purpose of the disability rules is . . . to treat a disabled worker as though he had become disabled after,

rather than before, he had become eligible for normal retirement benefits." *Id.* at 2368. "The disparity turns upon pension eligibility and nothing more." *Id.* at 2369.

(4) "[A]lthough Kentucky's Plan placed an older worker at a disadvantage in this case, in other cases, it can work to the *advantage* of older workers." *Id.* (emphasis in original).

(5) "Kentucky's system does not rely on any of the sorts of stereotypical assumption that the ADEA sought to eradicate. It does not rest on any stereotype about the work capacity of 'older' workers *relative* to 'younger' workers." *Id.*

(6) "The difficulty of finding a remedy that can both correct the disparity and achieve the Plan's legitimate objective" *Id.*

The Court suggests that these are the factors a plaintiff "might show to provide that differential treatment based on pension status is in fact discrimination "because of" age. *Id.*

This decision opens the door for employers to not only deny benefits to older workers based on their age-based eligibility for retirement benefits but to justify all kinds of policies that discriminate based on age. As the dissent explains, "If the ADEA allows an employer to tie disability benefits to an age-based pension status designation, that same designation can be used to determine wages, hours, health care benefits, reimbursements, job assignments, promotions, office space, transportation vouchers, parking privileges, and any other conceivable benefit or condition of employment." 128 S.Ct. at 2376. The Court "create[d] a virtual safe harbor for policies that discriminate on the basis of pension status, even when pension status is

tied directly to age and then linked to another type of benefit program." *Id.* at 2375.

Under *Kentucky Retirement System*, an employer could offer an early retirement incentive plan that offers a cash incentive – say \$20,000 – but limit the incentive to those not already eligible for normal retirement benefits. They could also offer \$10,000 a year beginning say at age 58 – but that stipend would terminate once the individual became eligible for normal retirement – which is almost always going to be defined by age. An employee's only recourse would be to adduce evidence that the incentive was denied to retirement-eligible workers because of the stereotype that they would be retiring soon anyway – and that is if courts can be convinced that the assumption that retirement-eligible workers will be retiring soon anyway is a stereotype and not a "trueism" If not, it will be difficult to challenge a hiring policy where the employer refuses to hire individuals within 5 years of normal retirement age – on the theory that they won't be staying long anyway. Similarly, what would prevent an employer from refusing to promote retirement-eligible employees for the same reason - the decision not to promote them was not based on age – but pension status.

Post- KRS Decisions

EEOC v. Baltimore County, 593 F. Supp. 2d 797 (D. Md. 2009)

Under the challenged pension system, the percentage of salary that new hires pay into the pension plan varies depending on the number of years to retirement eligibility. Because participation was mandatory, the result was that older workers had lower take home pay than younger workers. The court ruled that the system did not violate the ADEA

because the fact that older new-hires had to pay more into the plan than younger new-hires was not “because of age” but instead was motivated by the permissible principle of time value of money.

Schultz v. Windstream Communications, Inc.,
2009 WL 1028175 (Apr. 16, 2009 D. Neb)

Defendant’s pension plan had a normal retirement age of 65. It also allowed unreduced early retirement for workers with 30 years of experience irrespective of age, or actuarially reduced pensions for workers at least 50 years old with 25 years of experience. Defendant amended its pension plan to allow employees (all under age 50 with more than 25 but less than 30 years of service whose employment was being terminated due to a reduction-in-force, and who were not eligible for but would have qualified for benefits had they been allowed to work until December 31, 2008, to receive unreduced pension benefits immediately upon their termination. The plaintiffs were all over 50 with more than 25 but less than 30 years of service which qualified them for a reduced pension benefit. Had each of the plaintiffs received the same enhancement, i.e., been presumed to work until December 31, 2008, they would have also qualified for an unreduced pension benefit.

Denying the plaintiffs’ age discrimination claims, the court held that “[a]t least four of the factors discussed in *Kentucky Retirement* weigh against the plaintiffs in this case.” For one, “[t]he eligibility provisions of the Plan and the Early Retirement benefits created and assigned [by the plan amendment] are not based on stereotypical assumptions that older workers have less work capacity. . . Rather, Windstream assumed all employees nearly early retirement eligibility, but release [as part of the reduction-in-force] would have

continued working until they were eligible for early retirement." Significantly, but ignored by the court, the plaintiffs were not given the benefit of the same assumption.

Walker v. Monsanto Co. Pension Plan, 636 F. Supp. 2d 774 (S.D. Ill. 2009)

Plaintiffs challenged the manner in which the employer converted its defined benefit pension plan to a cash-balance plan. Specifically, at issue was a section of the plan which directed that "interest credits" be awarded at a rate of 8.5% per year until the participant reached age 55, at which time the interest credit awards ceased. Defendant argued that interest credits did not cease "because of age" but because the early retirement discount had been fully restored which happened to coincide with the participant reaching age 55. Holding for the defendant, the court ruled that "Nothing in the record indicates the early retirement discount reversal designed to provide a fully subsidized early retirement benefit at age 55 was 'based on a 'prohibited stereotype' of older workers, produce[d] any 'attendant stigma' to those workers, [or was] 'the result of an inaccurate and denigrating generalization about age,'" the evils age discrimination statutes were designed to remedy." 636 F. Supp. 2d at 784 quoting *Kentucky Retirement System*, 128 S. Ct. at 2366-67.

Ellicker v. Borough of Forest Hills, 2009 WL 3756904 (W.D. Pa. Nov. 6, 2009)

The pension plan in question stated that a police officer qualifies for a normal retirement pension of 50% of his last 36 months' salary if he is both 50 years old and has 25 years of service. The date on which the officer satisfies both the age and years of service requirements is called the "superannuation" date. An officer

retiring due to disability receives a monthly pension benefit calculated at 100% of his average monthly salary during the last 36 months of his employment. However, the disability pension will "terminate automatically upon the date that the member would have satisfied all the requirements for superannuation retirement benefits," and then is recalculated to be 50% of the average salary. The court ruled that the case was governed by *Kentucky Retirement System*, and the plan was lawful.