PHILADELPHIA, WEDNESDSAY, DECEMBER 20, 2000

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

3rd Circuit Adopts Standards in Retirees' Age-Bias Claim

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Special to the Legal

In August, the 3rd Circuit Court of Appeals addressed whether a group of retired employees has the right to challenge their employer's selection of health-care coverage as discriminatory, in violation of the Age Discrimination in Employment Act (ADEA).

The opinion issued in the case of *Erie County Retirees Association v. County of Erie, Pennsylvania*, 220 F.3d 193 (3d Cir. 2000), has resounding consequences for older employees seeking to protect health-care benefits during retirement, as well as for employers trying to reduce the cost of health care within the confines of the law. In the Erie County case, the court strikes a delicate balance between these competing interests and creates a framework of analysis with consideration of changing demographics in the aging workplace.

In 1997, the County of Erie was faced with economic pressure to cut its budget. As a result, it departed from traditional forms of health-care coverage and adopted different insurance policies for its employees depending upon their active status. In particular, the county selected different plans for its medicare-eligible and non-medicare-eligible retirees.

The plan selected for medicare-eligible retirees required them to choose their treating physician through a primary-care physician (PCP), which resulted in the loss of individual choice of health-care providers. The plan which was adopted for all non-medicare-eligible employees provided greater freedom to its participants inasmuch as they would not be obligated to select a PCP prior to receiving medical treatment.

As a result of this disparity, the group of medicare-eligible retirees brought a class action suit against the County of Erie, claiming that it violated the ADEA by offering them inferior health-insurance coverage. The medicare-eligible employees claimed that they were placed in that plan solely on the basis of their medicare status (medicare eligibility begins at the age of 65) and that the selection of an inferior plan by the county constituted unlawful age-based discrimination.

The 3rd Circuit was presented with two questions:

- Whether the ADEA was applicable to this group of retirees
- And whether its prohibitions could serve as a basis to challenge an employer's selection of an inferior health-care plan for medicare-eligible retirees

'EQUAL BENEFIT OR EQUAL COST' STANDARD

Before answering these questions, the 3rd Circuit reviewed the legislative history of the ADEA and its amendments, as codified in the Older Workers Benefit Protection Act (OWBPA). Central to the court's analysis was an assessment of the "equal benefit or equal cost" standard of review.

The medicare-eligible employees argued that the county failed to comply with the ADEA by violating the "equal benefit or equal cost" standard, which would obligate the county to provide either the same benefits to older and younger workers or to incur the same costs on behalf of both groups. See 29 C.F.R. Section 1625.10 (1989).

In granting summary judgment in favor of the county, the trial court concluded that the legislative history of the OWBPA indicated that Congress intended that the "equal benefit or equal cost" standard should apply only to benefits for active employees. Thus, the trial court held that the county was entitled to summary judgment regardless of whether its health insurance plan satisfied this standard because the medicare-eligible group were not active employees.

The 3rd Circuit Court of Appeals rejected the conclusion of the lower court and reasoned that the OWPBA made several amendments to the ADEA for the express purpose of overruling the Supreme Court decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed. 2d. 134 (1989).

In *Betts*, the Supreme Court rejected the requirement that the employer comply with the "equal benefit or equal cost" principal as being inconsistent with the plain language of the law, which required an employee to show that an adoption of a benefit plan was a "subterfuge" to evade the purposes of the ADEA.

The standard, as interpreted in *Betts*, placed no burden on the employer to demonstrate that it satisfied the "equal benefit or equal cost" principle. Conversely, *Betts* placed a substantial burden on an employee seeking to challenge age-based

discriminatory employment practices.

According to the 3rd Circuit to combat the Betts decision, Congress enacted Section 102 of the OWBPA, which deleted the "subterfuge" language and replaced it with an express codification of the "equal benefit or equal cost" standard. This section additionally provided that the employer, and not the employee, maintains the burden of proving that this standard has been satisfied.

In answering the first question, the 3rd Circuit rejected any notion that Congress intended to make the ADEA inapplicable to retirees who seek to contest the validity of their employee benefits during retirement and concluded that the ADEA was applicable.

The court went on further to say that because a reference to medicare status was a "direct proxy for age" the county violated the ADEA by adopting a facially discriminatory health-care plan. Accordingly, the retirees could prevail if the "equal cost or equal benefit" standard could not be met by the employer.

In this regard, the County of Erie argued that it was entitled to an additional defense under the ADEA if it could show that a determination was made with respect to health-care benefits based on "reasonable factors other than age." The 3rd Circuit rejected this argument and concluded that the ADEA provided no safe harbor permitting them to "treat retirees differently with respect to health-care benefits based on Medicare eligibility."

Thus, the 3rd Circuit concluded that such a defense was inapplicable to a policy which explicitly discriminated against individuals on the basis of age, such as the policy adopted by the County of Erie with respect to medicare-eligible retirees.

Ultimately, the 3rd Circuit concluded that the safe harbor expressly codified in the "equal benefit or equal cost" principle was the applicable standard of review. The court concluded that such a standard should be applied when an employer makes an "age-based distinction for retirees." The 3rd Circuit opined that the rule "strikes a fair middle ground" between the interest of other retirees and the interest of the employer.

In this vein, the court acknowledged that an employer is not legally obligated under the ADEA to provide any benefits for older or younger employees. It is not obligated to spend more on behalf of older retirees. All that is required is that, if a plan is established, the employer "spends equally."

In sum, the 3rd Circuit reasoned that "... the rule avoids overburdening employers to such an extent that they will be tempted to throw up their hands and eliminate all benefits for retirees." The court reasoned that although some employers might choose that option, far more would continue to provide benefits in compliance with the ADEA's requirements.

The 3rd Circuit, therefore, reversed the decision of the trial court and ruled that the medicare-eligible retirees had demonstrated a cause of action for age discrimination against Erie County. Moreover, the court remanded the case back to the trial court to allow the county the opportunity to demonstrate that it was indeed entitled to a safe harbor under the "equal pay or equal cost" standard.

CHANGING DEMOGRAPHICS

The courts can expect to see more cases in the future filed by retirees against their former employers challenging health insurance plans and other benefits provided during retirement. Changes in the demographics of older employees will likely be the cause of this influx of litigation.

On a statistical basis, the percentage of the total population which is made up of persons 65 years of age or older has been increasing rapidly and will continue to do so into the future. In fact, the percentage of individuals 65 years of age or older was 8.1 percent in 1950 and 12.6 percent in 1990, and it is projected to be 17.5 percent of the total population in 2020. These changes will necessitate that employers' attention to the changing demographics of the aging workplace.

As one author has commented, "[t]he elderly are an increasing fraction of the population, life expectancy is increasing, and medical care for the elderly is expected to become even more expensive...all these facts indicate that the fraction of total healthcare expenditures that may go to the elderly is likely to rise, and perhaps rise significantly in the future." Elder L.J. 99, 108 (1995) at 134, citing, Richard A. Posner, Aging and Old Age, Chicago: Chicago Press (1995).

The 3rd Circuit, cognizant of the demographic changes taking place, answered the questions presented to it in a manner calculated to relieve the tension regarding healthcare benefits, between the employer, older employees and younger employees.