

RENDERED: June 20, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000564-MR

H. DENNIS HALFHILL

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CI-00746

KENTUCKY RETIREMENT SYSTEMS,
BOARD OF TRUSTEES

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE¹
POTTER, SPECIAL JUDGE: H. Dennis Halfhill appeals from an
opinion and order of the Franklin Circuit Court holding that 105
KAR² 1:205 does not intentionally discriminate against
individuals 55 years of age or older; does not violate the
prohibitions against age discrimination as contained in KRS³

¹ Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

² Kentucky Administrative Regulations.

³ Kentucky Revised Statutes.

Chapter 344; and that Halfhill is not eligible for disability retirement benefits because he is qualified for an unreduced retirement benefit. For the reasons stated below, we reverse.

On December 23, 1991, Halfhill began work as a deputy sheriff for the Kenton County Sheriff's Department. On December 23, 1992, Halfhill suffered a work-related injury when a motorist ran a red light and hit his cruiser. His injuries were severe, and, as a result, on September 30, 1999, he was terminated because of his disability. At the time of his termination Halfhill had 94 months of service in the County Employees Retirement System.

On September 22, 1999, Halfhill applied to Kentucky Retirement Systems for disability benefits. At the time he filed his application Halfhill was 57 years old. On September 29, 1999, Kentucky Retirement Systems notified Halfhill that it was denying his application for disability retirement benefits because he was over 55 and entitled to an unreduced normal retirement allowance.⁴ Halfhill was specifically ineligible for disability benefits under 105 KAR 1:205, the regulation Halfhill challenges in this proceeding as in violation of KRS Chapter 344. Halfhill qualified for the unreduced allowance solely

⁴ In addition, as a member of the Kenton County Sheriff's Department Halfhill was employed in a hazardous position. Consequently, he was eligible for hazardous disability benefits. Under this benefit, if the injury is sustained in the line of duty, as Halfhill's was, retirement benefits are enhanced regardless of length of service. KRS 16.582; KRS 78.545(40).

because he was over 55; had he been younger than 55 years old, he would have been entitled to disability benefits. According to Halfhill, his unreduced normal retirement allowance is substantially less than the benefits he would have been entitled to under the disability benefits formula, and application of the disability benefit procedures would have resulted in a permanent enhancement of his retirement benefits.⁵

After the initial denial Halfhill sought an administrative hearing on his application for disability benefits. On April 18, 2000, the Hearing Officer entered a report and recommended order upholding the denial of Halfhill's disability retirement benefits. On May 24, 2000, the Administrative Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems adopted the Hearing Officer's report and recommended order denying Halfhill retirement disability benefits.

Halfhill subsequently appealed to the Franklin Circuit Court. On February 28, 2002, the Circuit Court entered an opinion and order holding that 105 KAR 1:205 does not intentionally discriminate against individuals 55 years of age and older; does not violate the age discrimination provisions of KRS Chapter 344; and that, consequently, Halfhill is not

⁵ Kentucky Retirement Systems does not dispute this allegation. See KRS 16.582(5) for the determination of the disability retirement allowance.

entitled to disability retirement benefits. This appeal followed.

The parties have presented this case here, as they did in the lower court and before the Retirement Board, to be one that turns upon a single legal issue. This Court will accept their characterization and decide the case accordingly. As phrased by the parties, this case turns upon whether 105 KAR 1:205, a regulation establishing qualifications for disability benefits, violates KRS 344.040, the Kentucky statute prohibiting age discrimination. Since the issue is a legal one this court may review it *de novo*. Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263 (1990).

Halfhill is a member of the County Employees Retirement System, the terms of which are generally covered by KRS Chapter 78. However, KRS 78.545(40) provides that members of the County Employees Retirement System in hazardous duty positions, such as Halfhill, are subject to the disability procedures of KRS 16.582.⁶ Prior to being amended effective July 14, 2000, KRS 16.582(2)(b) had provided that to be eligible to receive disability benefits the applicant "shall be less than

⁶ KRS 16.505 *et seq.* codifies the State Police Retirement System. KRS 61.150, *et seq.* codifies the Kentucky Employees Retirement System and contains provisions for disability retirement analogous to those discussed herein. See KRS 61.600; KRS 61.605; and KRS 61.607.

normal retirement age.”⁷ KRS 16.505(15) defines the normal retirement age as 55 years. As a result, disabled workers in Halfhill’s situation who were over the age of 55 were ineligible for disability benefits.

Classifying this exclusion as one “based solely on the basis of age,” thereby making it void under the Federal Age Discrimination in Employment Act (ADEA),⁸ the Board of Trustees of the Kentucky Retirement System enacted a corrective regulation, 105 KAR 1:205.⁹ That regulation, which became

⁷ As amended the statute provides that in order to qualify to retire on disability “the person shall not be eligible for an unreduced retirement allowance.”

⁸ We note that in Kimel v. Florida Board of Regents, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), the Supreme Court held that the United States Congress could not validly impose the ADEA upon the states pursuant to the sovereign immunity provisions of the Eleventh Amendment of the United States Constitution; therefore, the Board’s concern about the Federal Act was, ultimately, misplaced.

⁹ The regulation was promulgated pursuant to KRS 61.645(9)(e) in response to a challenge raised by the Equal Employment Opportunity Commission against the state statutory scheme. The introductory annotations to the regulation stated as follows:

NECESSITY, FUNCTION, AND CONFORMITY: KRS 16.582 and 61.600 provide for long-term disability benefits for members of the Kentucky Employees Retirement System, County Employees Retirement System and the State Police Retirement System. 29 USC 623(i)(1)(A) and 29 CFR 1625.10(f)(ii) prohibit a pension system from limiting long-term disability benefits solely on the basis of age. KRS 61.645(9)(f) provides that the provisions governing the Kentucky Employees Retirement System, County Employees Retirement System and the State Police Retirement System shall conform to federal law. Because the enhanced benefits provided under disability retirement are intended to bridge the gap between the date the member becomes disabled and the date the member would have been eligible for a benefit without reduction, this administrative regulation establishes that members who are eligible for retirement without a reduction,

effective May 19, 1999, did two things. First, those who had in the past been denied disability retirement benefits under the statute could reapply for benefits without application of the offensive age restriction. 105 KAR 1:205 § 1. Second, in the future, those who were eligible "for a retirement allowance not subject to the reduction specified in KRS 16.577¹⁰ or 61.595(2)(a)"¹¹ were to be denied disability benefits. 105 KAR 1:205 § 2.

Under the new regulation there were two ways a retiring employee in Halfhill's situation was not subject to reduced retirement benefits. First, if he retired after the normal retirement age of 55, or second, if he retired after twenty years of service. In other words, under the new regulation the pool of ineligible retirees was enlarged; not reduced. No one over age 55 was eligible for disability retirement benefits, and, in addition, those who had 20 years of service were likewise barred.

regardless of age, shall not be entitled to disability retirement. This administrative regulation also establishes a procedure for individuals previously denied the right to apply for disability retirement because of age to submit an application for disability retirement.

The regulation was withdrawn after the 2000 revisions by the General Assembly incorporating the provisions of the regulation into the retirement statutes.

¹⁰ Reduction for early retirement under Kentucky State Police Retirement System.

¹¹ Reduction for early retirement under Kentucky Employees Retirement System.

As the Retirement Board had previously acknowledged the discriminatory effect of disqualifying only retirees over age 55 from disability benefits, the question becomes whether expanding the pool of excluded claimants from only those over normal retirement age to include those who have served 20 years transforms the exclusion from one "based solely on . . . age" into something more acceptable. We hold that it does not.

Kentucky's principal Civil Rights statute, KRS 344.040, provides, in relevant part, as follows:

It is an unlawful practice for an employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . age forty (40) and over . . . [.]

(2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of . . . age forty (40) and over . . . [.]

As previously noted, Halfhill was disqualified for disability retirement benefits merely because he was over 55 at the time he filed his application for disability benefits. Had he not yet turned 55 and all other aspects of his employment were otherwise the same, including years of service, he would have qualified for disability benefits resulting in retirement

earnings substantially greater than his normal retirement allowance. Moreover, the increased earnings would have been permanent, not just for a "gap filler" period as argued by the appellee and stated in the regulation itself.¹²

KRS 344.040, among other things, makes it unlawful for an employer to discriminate with respect to compensation, terms, or conditions of employment or to limit, segregate, or classify employees in any way which would deprive the individual of employment opportunities or otherwise adversely affect his or her status as an employee on the basis of the age of the employee if the employee is over 40. Because of the substantial and permanent detriment which would be incurred by Halfhill, under the circumstances of this case, we are persuaded that 105 KAR 1:205 does not comply with the standards as set forth in the statute. See Betts v. Hamilton Co., 897 F.2d 1380 (6th Cir. 1990); Trans World Airlines v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); and EEOC v. Chrysler, 733 F.2d 1183 (6th Cir. 1984).

The Board and the Franklin Circuit Court deferred to the regulation over KRS 344.040. However, an administrative regulation cannot supercede a statute. Whenever there is a

¹² While for some reason Halfhill failed to provide the calculations of the amounts at issue, Kentucky Retirement Systems does not specifically deny the appellant's allegation that application of the disability formula would result in a substantially greater retirement allowance and that the greater benefit would be permanent.

conflict between a statute and an administrative regulation, it is elementary that the statute controls. Franklin v. Natural Resources & Environmental Protection Cabinet, Ky., 799 S.W.2d 1, 3 (1990); see also KRS 13A.120(2). As such, the anti-discrimination provisions of KRS 344.040 must prevail over 105 KAR 1:205. We note, however, that the retirement statutes were amended in 2000 to incorporate the language previously found in the regulation. Consequently, KRS 344.040 will not impact this issue in the future. If two statutes are in conflict, the more recent and more specific controls. Troxell v. Trammell, Ky., 730 S.W.2d 525, 528 (1987).

In summary, the rationale, as set out in the regulation itself, for denying those over 55 enhanced benefits is that disability benefits are meant to be "gap fillers" to cover an employee from the time of his disability until the time when he could retire without penalty. However, the enhanced disability benefits, in fact, extend beyond the time full retirement accrues and result in a permanent advantage to those able to qualify for disability retirement benefits. Under these circumstances we believe that the anti-discrimination provisions of KRS 344.040 were violated. Halfhill was denied a substantial and permanent benefit solely because of his age. Further, adding another category to those excluded by the age exclusion does not make it less discriminatory. Therefore, to answer the

issue as posed by the parties, 105 KAR 1:205 does violate the age discrimination prohibitions of KRS 344.040, and Halfhill is entitled to disability benefits.

For the foregoing reasons the judgment of the Franklin Circuit Court is reversed and the case is remanded with directions to grant Halfhill's application for disability retirement benefits.

ALL CONCUR.

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