No. 06-1037

In the
Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

WHETHER ANY USE OF AGE AS A FACTOR IN A RETIREMENT PLAN IS "ARBITRARY" AND THUS RENDERS THE PLAN FACIALLY DISCRIMINATORY IN VIOLATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT?

I. The Sixth Circuit decision conflicts with the decisions of this Court.

The EEOC's argument incorrectly equates the blanket discrimination on the basis of race and gender addressed in Title VII to the prohibition against "arbitrary" age discrimination in the ADEA. This Court in *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158 (1989), *General Dynamics Land Systems v. Cline,* 540 U.S. 581 (2004) and *Smith v. City of Jackson,* 544 U.S. 228 (2005) has repeatedly recognized this distinction in its analysis of ADEA cases. The 6th Circuit Court's failure to do so places its decision in direct conflict with the decisions of this Court.

Utilizing this Title VII analysis, the EEOC places substantial reliance upon the decision of this Court in *International Union, United Automobile Workers v. Johnson Controls, Inc.,* 499 U.S. 187 (1991). Even assuming for the purposes of argument that the EEOC's analysis of the standard of discrimination is comparable, the facts in *Johnson Controls* and its impact on the decision by this Court support the position of the Petitioner. In *Johnson*, fertile women were excluded from certain lead exposed jobs because of their gender. The rationale given was the effect on childbearing despite the fact that male workers who contribute to the genetic equation were equally at risk. Utilizing the ADEA's

"arbitrary" standard for measuring age discrimination, the policy at issue was arbitrary. In other words, under the policy in *Johnson Controls,* no woman of childbearing age would ever have a job making batteries, despite the fact that men faced the identical fertility related risks.

In the statutory structure at issue in the present case, it is not automatic that the older workers fare less favorably than the younger. In his dissent, Judge Boggs notes three examples in which employees of differing ages would receive either the identical benefit or the older worker would fare better than the younger. Pet. App. 34(a)-35(a). These examples demonstrate starkly that age is not a controlling variable in the operation of the KRS plan. *Id.* at 35(a). Unlike the role of gender at issue in *Johnson Controls*, age is not automatically a barrier to the greater benefit in KRS.

The same analysis applies to the EEOC's reliance on *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702 (1978). In *Manhart*, all females were required to make larger contributions to the retirement plan than all males despite the fact that all females would not necessarily live longer than all males. *Id.* at 704. Gender was the sole basis for the challenged policy.

In the present case, however, it is the Kentucky Legislature's goal of ensuring an injured employee an opportunity to receive an unreduced retirement benefit which is at issue, not an arbitrary barrier based on age. Once an employee becomes eligible to receive an unreduced normal retirement, eligibility for disability benefits ends. A 38 year old employee with 20 years of service who becomes disabled is ineligible for a disability retirement because he or she has accumulated the requisite service to be eligible for an unreduced normal retirement. A 50 year old employee with

10 years of service would be entitled to 5 years worth of imputed service under the disability retirement provisions of the plan to meet the necessary requirements for an unreduced, normal retirement. The example of Charles Lickteig (Opp. 4) establishes the point. Lickteig was ineligible for disability because he was eligible for an unreduced normal retirement, not due to an arbitrary policy of discrimination on the basis of age.

The structure of the KRS plan, with its short vesting schedule, enables workers hired later in life to retire more quickly than those hired upon first becoming eligible to enter the adult work force. If the plan simply required 20 years of service to be eligible for an unreduced, normal retirement, employees over age 40, particularly those hired later in life, would be far less likely to receive a retirement benefit. The size of the benefit is a function of years of service, rather than merely age for its own sake. Disability retirement is simply intended, within certain limits, to place workers where they would have been had they been able to work until eligible for normal retirement. Age is relevant only in the context that it provides one of two measures in which one may qualify for a retirement benefit. Legitimate reasons for relying on age as a factor in the decision-making process must be distinguished from invidious reasons. *See, General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581 (2004).

In *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), this Court held the test of discrimination is clearly satisfied when an employer relies upon a "formal, facially discriminatory policy requiring adverse treatment of [older] employees." *Id.* at 610. There is nothing in KRS' policy that *requires* the adverse treatment of an older worker "because of such individual's age" as required in 29 U.S.C. § 623(a)(1). As the plan has no such requirement, there must then be proof

that age actually played a role in the employment decision. *Id.* at 609-610.

The "motivating factor" for the retirement policy at issue was the focus of this Court's inquiry in *Hazen Paper. Id.* at 609-610. It has not been suggested, nor does any case hold, that a governmental retirement plan may not require a worker to complete a specific number of years or attain a combination of age plus years of service to be eligible to retire. The KRS plan is simply designed to advance an injured worker to the first available date of eligibility to receive an unreduced, normal retirement to achieve the Kentucky Legislature's goal of ensuring that all injured workers are or will become eligible for an unreduced, normal retirement. The argument then returns to the question which the EEOC failed to address; that is, whether *any* use of age is prohibited by the ADEA and the OWBPA. Clearly it is not.

The EEOC's argument that all circuits are in accord on this issue is incorrect. Each of the circuit court decisions relied upon by the Sixth Circuit and recited by the EEOC in its response involved issues in which there was no circumstance in which a younger worker fared less favorably under the program at issue than an older worker. The dissent in the Sixth Circuit recognizes it is not true in the case of KRS and the EEOC fails to overcome this critical distinction.

In a disparate treatment case, it is the ultimate burden of the plaintiff to establish that the defendant intentionally discriminated on the basis of age. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Where there is no proof that age motivated the policy at issue, a prima facie case of liability does not exist. *Hazen, supra* at 610; *see also, Smith v. City of Jackson,* 544 U.S. 228 (2005). The EEOC presented no such proof in this case.

When it intentionally excluded governmental plans from coverage under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*, Congress decided to leave the design of state and local retirement plans to the states. 29 U.S.C. § 1003(b)(1). Virtually every one of the more than 2700 public employee retirement systems in the United States provides eligibility for unreduced, normal retirement employing some use of age. The essence of the Sixth Circuit decision is that any use of age automatically establishes an arbitrary and discriminatory policy. Nothing in the ADEA calls for such a conclusion and the Sixth Circuit's reasoning is directly contrary to that of this Court.

Accordingly, certiorari should be granted.

II. The case is ripe for determination.

The EEOC argues that the existence of a remand for trial should preclude the granting of certiorari. Opp. 17. The EEOC is mistaken. This Court has regularly granted review of cases in the current procedural posture. It is significant to note that the EEOC itself sought certiorari on a less developed record in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). In *Waffle House*, this Court granted the EEOC's petition for review on an interlocutory ruling that implicated a circuit conflict on a discrimination question. The present case is review of a final summary judgment based on the failure of the EEOC to establish a prima facie case of discrimination.

The procedural posture of a decision is not an impediment to certiorari where the Court of Appeals has "decided an important issue, otherwise worthy of review" where final resolution of that issue "may serve to hasten or resolve the litigation." *See generally*, Stern, *Supreme Court Practice* (8th Edition 2002) § 4.18, at 260.

The determination of the facial discrimination issue is "fundamental to the further conduct of the case." In such circumstances, this Court has not hesitated to grant certiorari. *United States v. General Motors,* 323 U.S. 373 (1945).

This is a disparate treatment case. Absent a finding of facial discrimination, given the admitted absence of any evidence of discriminatory animus, the litigation ends. Addressing the issue now spares both state government and the EEOC unnecessary litigation. The limited, legal issue before the Court warrants the grant of certiorari.

CONCLUSION

For these reasons, the Kentucky Retirement Systems, the Commonwealth of Kentucky, and Jefferson County Sheriff's Department ask that this Petition for Certiorari be granted so that this Court can define what constitutes facial discrimination under the ADEA in the context of a retirement plan.

Respectfully submitted on this the 15th day of June, 2007.

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