IN THE SUPREME COURT OF FLORIDA

CASE NO.: 64,809

MARY ELLEN O'NEIL,

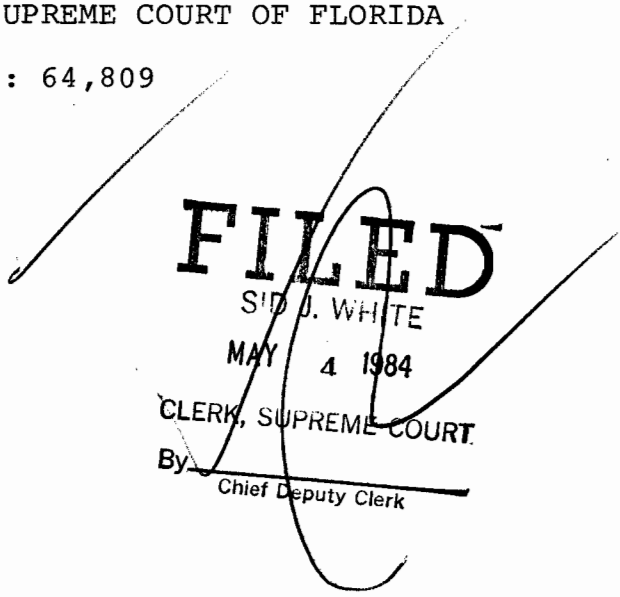
Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/



REPLY BRIEF OF PETITIONER

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POINT I

IS THE FAILURE TO ADJUDICATE CLAIMANT PERMANENTLY TOTALLY DISABLED IN CONFLICT WITH PREVIOUS DECISIONS BY THIS COURT WHERE THE ONLY MEDICAL TESTIMONY WAS THAT CLAIMANT WAS TOTALLY DISABLED FROM EMPLOYMENT, CLAIMANT'S EMPLOYER HEREIN AND PREVIOUS EMPLOYERS OF 27 YEARS CONFIRMED BECAUSE OF HER PHYSICAL INJURIES, THEY COULD NOT RE-EMPLOY HER, DIVISION REHABILITATION CONFIRMED THERE WAS NOTHING AVAILABLE, CLAIMANT SOUGHT UNSUCCESSFULLY EMPLOYMENT WITH OTHER EMPLOYERS AND NO EVIDENCE WAS PRESENTED AS TO ANY OWRK OF ANY NATURE AVAILABLE TO CLAIMANT NOR WAS ANY REHABILITATION PROVIDED TO HER BY RESPONDENT EMPLOYER?

In discussing jurisdiction of this Court, Respondents disregard re-hearing procedure, which was followed by opinion by this Court on re-hearing. This Court has accepted jurisdiction of the "decision." The certified question is only one part of the decision. However, in accordance with the applicable rules, it is the "decision" that is to be reviewed. Rule 9.030 (a)(2)(A) FRAP. As held in Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961) when this Court takes jurisdiction that jurisdiction attaches to review of the entire decision. It is established the Court should not pass upon constitutional questions unless necessary to disposition of the decision and if Petitioner's contention herein is accepted, it is unnecessary for this Court to pass upon the constitutional question.

Respondents, in their brief in connection with claimant's employability first state:

> Dr. Hofeld, the claimant's physician, testified at his deposition that the claimant had a numerous amount of pre-existing

> physical problems, two-wit: Arthritis, hypertension, colonic diverticular disease, varicose vains, and exogenos obesity. (Brief of Respondents P. 7).

With all of those problems, however, claimant nevertheless was employable with the employer herein for eight years preceeding her accident and with her previous employer for nineteen years. She then suffered a serious injury arising out of her employment causing serious impairment to her leg and back. Following discussion of the pre-existing non-disabling conditions, at least as far as employment with the employer (they said claimant following her accident was unemployable with them), the most supportive evidence to employability referred to by Respondents in their brief is:

> Finally, and most importantaly, Dr. Hoffeld, as previously stated, candidly testified that the claimant could, in fact, do sedentary work, albeit part-time or with some restrictions. (Brief of Respondents P. 7).

Thus, it is admitted, as it must, that this injured worker who worked for the employer herein for eight years and now, following her accident, at best can handle only sedentary position on at best a part-time basis. This employer admittedly had no such position for the injured worker. No evidence was presented by Respondents and there is none in the record as to any position available on any kind of a regular basis or any basis at all for this injured worker.

It is interesting to compare, Respondents above noted concession as to claimant's significant work limitations with the then later statement as to allegedly "the absence of substantial medical evidence showing that the claimant was unable to work..." (Brief of Respondents P. 8).

The medical evidence, as even summarized by Respondents, reflects substantial impairment and limitations in ability to work - at the most some sedentary work on at best a part-time basis. Notwithstanding such subtstantial medical evidence, Petitioner sought employment from her employer of eight years, previous employer of nineteen years, neither of whom had anything for her. She sought assistance from the rehabilitation department, but they could not assist her with her physical limitations. She sought the services of an employment agency and many various potential employers all without success. In fact, the walking conducting the job search was sufficiently stressful as to result in the need for hospitalization because of aggravation of her injury from the walking. (R. 69, Appx. 21).

Respondents then baldly simply state the conclusion claimant did not conduct a bona fide job search. We do not know what more could have been shown. As opposed to this bald conclusion, there is not any evidence in the record as to any positions of any nature whatsoever available to this injured worker with her serious impairments nor even the suggestion of any possibilities.

It is submitted the injured worker has established her entitlement to adjudication of permanent total disability, the decision herein denying said benefits to claimant cannot be harmonized with the numerous previous decisions by this Court dealing with the issue and directly conflict therewith. It is submitted this Court should determine claimant has satisfied without question her burden in that respect, This Court, in Acton v. Fort Lauderdale Hospital, 440 So. 2d 1282 (Fla. 1983),

contemplated as a part of upholding the constitutionality of the Act that a classification of permanent total disability is not just a plum dangling from an unreachable tree. Otherwise, there is zero quid pro quo allowed to the 65 year old injured worker who is called upon to give up common law right of suit against the employer in return for nothing allowable under the workers' compensation law.

It is submitted the Court should find claimant entitled to permanent total disability benefits and it then is unnecessary for the Court to reach the constitutional questions.

POINT II

IS SECTION 440.15 (3)(b) 3d, F.S. 1979 IN VIOLATION OF THE FLORIDA CONSTITUTION?

Respondents state in justification of the classification discrimination:

> A sixty-five year old who is receiving Social Security, is not in the same class as a younger person who does not qualify for these benefits. (Brief of Respondents P. 13, emphasis supplied).

However, the Act with which we are dealing and which is correctly cited by Respondents 440.15 (3)(b) 3d (1979), does not incorporate therein receipt of Social Security benefits. Without any reference to receipt of Social Security benefits, which was included in the Act the following year, the legislature determined simply by virtue of the individual's age no wage loss benefits are due.

It is suggested a Court cannot re-write legislation to add in a substantial provision to then attempt to make it constitutional. Respondents state:

> It is evident then that the legislature was attempting to avoid the situation where an individual, who was injured, receives duplicate benefits under workmen's compensation and Social Security. (Brief of Respondents P. 15).

If as Respondents argue that tie in to Social Security is necessary to support the constitutionality, then there being no such tie in found in the particular statute, the provision, based upon their own argument is unconstitutional.

It is noted that the District Court in Sasso did not uphold constitutionality on this double dipping argument, but rejected that as a legitimate basis. Rather, the Court postulated three other possible basis (1) reducing benefits because of decline in the older worker's productivity, (2) reducing benefits to get older workers out of the work force, (3) reducing costs at the expense of the 65 year old worker.

The expression of such grounds in today's day and age as being within legitimate legislative purposes is frightening. It is suggested those are hardly legitimate legislative purposes under the police power permitting the enactment.

It is noted, as discussed in Point III, that the very reasoning by the District Court in upholding the constitutionality of this provision is the very basis why Congress enacted ADEA - to preclude such reasoning as any legitimate basis to discriminate against older worker.

POINT III

DOES SECTION 440.15 (3)(b) 3d, F.S. 1979 VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CONFLICTS WITH THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT?

The Department of Labor's interpretation of this federal statute is referred to in the lower Court opinion and by respondents which it is suggested make significant omissions from the very sections to which we are referred. In view thereof and for ease of this Court in referring thereto, the entire regulations are attached hereto in a supplemental appendix.

The lower Court states:

> 29 CFR §860.120 (e) addresses the relationship of employer-provided benefits and government-provided benefits. This subsection explicitly recognizes that the availability of government benefits, e.g., Medicare, maybe based on age. We see little distinction, for purposes of the ADEA, between governmental enactments which provide for benefits to be paid by the government, and governmental enactments which provide for benefits to be paid by others.

The section commences noting, "an employer does not violate the Act by permitting certain benefits to be provided by the government, even though the availability of such benefits may be based on age." (Emphasis supplied). However, the section is clear that the aged individual must receive equivalency in combined benefits. It is specifically stated:

> ...Medicare will not justify denying an older employee the benefit which is provided to younger employees and is not provided to the older employees by Medicare. (A-Appx. 11).

It is further pointed out:

> It should be noted that a total denial of

> life insurance, on the basis of age, would not be justified under a benefit --by benefit analysis. (S-Appx. 11).

What is permitted is only that an employer "carve out from its own health insurance plan those benefits actually paid for by Medicare.

The section then goes on to discuss long term disability. It is clear from that example specifically discussed that disability benefits are very much a part and parcel of the terms, conditions and privileges of employment. It is specifically noted in discussing disability benefits:

> Under such an approach, where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost-base justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. (S-Appx. 12).

The Florida compensation law does exactly what is prohibited --denies such benefits altogether. The law does not reduce wage loss benefits in terms of duration or amount, but totally denies them to the 65 year old worker. In connection with this aspect, the Department gives a specific example where based on cost data, where the level of benefits is not reduced, but the duration is, they would not assert a violation:

> With respect to disabilities which occur after age 60, benefits cease five years after disablement or at age 70, whichever occurs first. (S-Appx. 13).

Although some differentiation in disability benefits may be permissible, the attempted total exclusion of benefits to the older worker is clearly prohibited. The above example requires the worker over 60 years of age, when disability occurs, to at

least be allowed full disability benefits allowed to other workers for at least a period of five years from disability or until age 70, whichever occurs first.

It is specifically noted:

> It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a (permitted) differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. 29 CFR §860.103 (h). (S-Appx. 6).

The crux of the issue simply boils down to whether the clear intended purposes of ADEA can be circumvented by state enactment permitting the forbidden discrimination on the justification that a state enactment can permit the employer to do what he otherwise is prohibited from doing under federal law. If the lower Court analysis is correct, then the state, under the ostensible exercise of the police power can enact any legislation totally circumventing ADEA and similarly contend those policies are no longer "things which can be directly controlled by the employer."

The Court in Sasso ascribed to the legislature and upheld as a valid exercise of the police power under the Florida Constitution the right of the legislature to enact the admitted discriminatory legislation for the purposes of:

(1) To cut the payment of employment-related fringe benefits due to an old-age related to client in productivity and physical abilities.

(2) To make room in the job market for younger workers by reducing retirement of older workers to a process of wage or fringe benefit reduction;

(3) Reduce the costs of insurance premiums to the employer. Acosta v. Kraco, Inc., 9 FLW 752 (Fla. 1st DCA 1984)

Those purposes, of course, unquestionably would justify any similar enactment affecting any other:

> 'fringe benefits,' promotion, demotion or other disciplinary action, hours of work (including overtime), leave policy (including sick leave, vacation, holidays, career development program and seniority or merit systems...29 CFR §860.50 (c). (S-Appx. 2).

All of the foregoing by enacting discriminatory legislation affecting the older worker with the state simply contending since these are "prescribed by statutory law" they are no longer controlled by the employer and therefore not in violation of ADEA.

The question, of course, is simply whether ADEA can be circumvented by the states simply by a state enactment making permissible otherwise admittedly impermissible employer discrimination based on age. We think not and no authority in support of such a proposition is cited by Respondents.

As noted above, even if the provision challenged herein is viewed as correlated with receipt of Social Security benefits (not contained in, but read into the statute by the Court in Sasso) that does not permit the total denial of benefits to which younger workers would be entitled. If a younger worker is entitled to disability or wage loss benefits of $250.00 per week it is impermissible to say the older worker receiving $100.00 per week Social Security benefits is nevertheless barred totally from receipt of any supplemental disability or wage loss benefits. First, the Depatment of Labor's regulations above noted make it clear the total denial is impermissible. Second, as noted in the Acosta case, federal law allows a person over 65 to receive both Social Security benefits and earned income at the same time.

Disability wages or wage loss benefits are of course intended to replace earned income no longer able to be earned because of injury.

Respondents further argue even if workers' compensation benefits are covered under ADEA, they fall within the exception of a bona fide employee benefit plan. In connection therewith, this Court is referred to 29 CFR §860.120 (b) (1983). Therein, it is specifically stated:

> In such a plan, benefits for older workers may be reduced only to the extent and according to the same principles as applied to other plans under section 4 (F)(s). (S-Appx. 9).

The statutory language qualifies what is meant by such a plan stating, "such as a retirement, pension or insurance plan." What is meant thereby is a plan falling within that terminology which provides something reasonable to the older individual who is involuntarily terminated upon reaching a certain age as provided in said plan. Marshall v. Hawaiian Del. Co., 575 F. 2d 763 (9th Cir. 1978). Any benefit plan must at least provide some benefits and if not reasonable, it will not fall within that exception. Whether a Florida plan would fall within that exception upon providing some lesser benefits than due younger workers appears to depend upon some reasonable relation between costs of the older worker plan and extent of reduction in benefits, but need not be considered by the Court. That is because there is no attempt to provide anything at all - not even $1.00 of wage loss benefits. The Florida compensation scheme providing to this injured worker absolutely nothing is hardly within the frame work of the benefit plan exception under ADEA. It is not this

particular claimant that gets nothing, but the "plan" is that no claimant 65 years of age or older can ever get anything.

A further allowable exception under ADEA is where the differentiation is based on reasonable factors other than age. In connection therewith, it is specifically noted:

> all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it. 29 CFR §860.103 (e). (S-Appx. 5).

The pending statute makes no reference to any factor other than age. Although a Court can clarify an ambiguity in a statute, it is suggested a Court cannot properly re-write a statute to try to make it constitutional. Even if we read into the statute, correlation with receipt of Social Security benefits it is noted the Department of Labor does not refer to such receipt as any permitted example. In fact, it appears from the above quoted portions of the regulations that the mere receipt of some Social Security benefits with a total denial of plan benefits otherwise due would violate ADEA. It is specifically provided regarding medical benefits that although an employer plan can take a credit for Medicare, the plan must supplement such benefits so that the older worker from the combination receives the same benefits as the younger worker. We see no difference in a medical plan and a compensation plan. There is a specific reference to an individual receiving Social Security benefits with it being noted an employer may not lawfully give preference in hiring to an older individual solely because he is receiving Social Security benefits.

29 CFR §860.104. (S-Appx. 6). It would seem to equally follow that an employer cannot discriminate against an individual receiving Social Security benefits. In connection therewith, it is noted federal law allows a worker over 65 years of age to both obtain Social Security benefits and certain earned income.

Respondents state generally in quoting from cases noted in their brief that the question as to whether federal law pre-empts state law hinges on "whether that law stands as an obstacle to the accomplishement and execution of the full purposes and objectives of Congress." (Brief of Respondents P. 24, 25). Respondents also cite cases discussing whether the state law frustrates the operation of the federal law.

Petitioner set forth in the main brief purposes for enactment of ADEA and compared that with the reasoning in Sasso. (Brief of Petitioner P. 19). The very basis for upholding the provision under Florida law flies directly in the face of congressional intent in passing ADEA.

Florida law expresses a purpose for its legislation to get the older worker out of the work force to make room for the younger worker, to reduce benefits to the older worker because of alleged reduction in older worker productivity and to reduce cost by getting older workers out of the work force or paying them nothing for injuries because older workers cost more. It was to directly counter that very reasoning in every respect that Congress passed ADEA.

If the Florida legislation allowing discrimination by employers with regard to provision of workers' compensation benefits to the 65 year old worker is permissible then any state can withdraw

themselves from operation of this federal law by taking issue with the congressional intent and passing under their own police power an enactment totally vitiating said provisions - and say it is not within the operation of ADEA because the state is requiring employers to discriminate in a manner otherwise violative thereof. How greater can there be a frustration or obstacle to the accomplishment of the full purposes and objectives of Congress? Petitioner knows not.

Respectfully sumitted,

BY: _____
L. BARRY KEYFETZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above foregoing was mailed this 3 day of May, 1984 to: DOUGLAS J. GLAID, ESQUIRE, 510 S.E. 17th Street, Fort Lauderdale, Florida 33316.

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