IN THE SUPREME COURT
STATE OF FLORIDA

Case No: 65,214

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LUIS ACOSTA,

Petitioner,

v.

KRACO, INC., and CORPORATE GROUP SERVICE, INC.,

Respondents.

ANSWER BRIEF OF RESPONDENTS

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INTRODUCTION

The parties will be referred to as follows: Luis Acosta - petitioner; Kraco, Inc. and Corporate Group Service, Inc. - respondents. The letter "R" denotes the record on appeal.

STATEMENT OF THE CASE AND FACTS

The respondents hereby adopt the statement of the case and facts contained in the petitioner's brief.

POINTS INVOLVED ON APPEAL

POINTS I AND II

WHETHER F.S. §440.15(3)(b) 3.d. VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND CONFLICTS WITH: (A) THE FEDERAL AGE DISCRIMINATION AND EMPLOYMENT ACT, 29 U.S.C. §621 ET. SEQ. AND, (B) THE FEDERAL SOCIAL SECURITY ACT, 42 U.S.C., §402 AND §403,

POINT III

WHETHER F.S. §440.15(3)(b) 3.d. VIOLATES THE "ACCESS TO COURTS" PROVISION OF THE FLORIDA CONSTITUTION.

POINT IV

WHETHER F.S. §440.15(3)(b) 3.d. VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FEDERAL AND FLORIDA CONSTITUTIONS.

POINT V

WHETHER F.S. §440.15(3)(b) 3.d. CONFLICTS WITH F.S. §440.15(10).

ARGUMENT

POINTS I AND II

F.S. §440.15(3)(b)3.d. DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND DOES NOT CONFLICT WITH THE FEDERAL AGE DISCRIMINATION AND EMPLOYMENT ACT, 29 U.S.C. §621, ET.SEQ. NOR DOES IT CONFLICT WITH THE SOCIAL SECURITY ACT, 42 U.S.C., §402, 403.

A. THE SUPREMACY CLAUSE

Article VI, Clause 2, of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The basic text and applicability of the Supremacy Clause have been expanded and tempered by a wealth of federal and state case law. It is well established that, under the Supremacy Clause, the United States Constitution and federal law are the supreme law of the land within the limited sphere

of federal interests. Public Utilities Commission of State of California v. United States, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); In re: Briley's Estate, 155 Fla. 798, 21 So.2d 595 (1945). Indeed, the United States Supreme Court has held that a state law is valid so long as it does not invade a domain forbidden by the Constitution. Joseph E. Seagram and Sons, Inc. v. Hostetter, 384 U.S. 354, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966). The Supremacy Clause is applicable only if it is impossible to simultaneously enforce both the state law being challenged and the allegedly conflicting federal statute. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 249 (1963). If the state law can be enforced ". . . without impairing the federal superintendence of the field . . .," the challenged state law is valid under the Supremacy Clause. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217. Clearly, a state law can be held invalid only when it exercises those functions delegated exclusively to Congress and which are peculiarly amenable to only national supervision. If the subject matter is properly one of state supervision, the state law is valid. Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); Florida Lime & Avocado Growers, Inc. v. Paul, supra. The Supremacy Clause controls only where there is an irreconcilable conflict between federal constitutional rights and state law. If no clear conflict exists, the state police power must

be respected. Reynolds v. Sims, 377 U.S. 533, 583, 84 S.Ct. 1362, 1393, 12 L.Ed.2d 506 (1964); Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962).

In addition, the law presumes that a challeged state statute does not irreconcilably conflict with federal law and is, therefore, not violative of the Supremacy Clause. It cannot be presumed that a federal statute supersedes the exercise of state power unless there is a clear intention in the federal statute to preempt state law. New York Dept. of Social Services v. Dublino, 413 U.S. 405, 413, 93 S.Ct. 2507, 2513, 37 L.Ed.2d 688 (1972):

> This court has repeatedly refused to void state statutory programs, absent congressional intent to preempt them.
>
> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed. Schwartz v. Texas, 344 U.S. 199, 202-203, 73 S.Ct. 232, 234-235, 97 L.Ed. 231 (1952).

See also Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Company, 450 U.S. 311, 315-316, 101 S.Ct. 1124,

1130, 67 L.Ed.2d 258 (1981), holding that state law cannot be preempted unless Congress specifically intends such a result. This rule was more recently effectuated by an Illinois court in upholding Illinois's state aircraft guest statute, despite the tangential interests of the Federal Aviation Act. The llinois court decided that the federal act evinced no clear intention to supersede the state law. Praznik v. Sport Aero, Inc., 355 N.E.2d 686 (Ill. 1st DCA 1976).

In addition, the Supremacy Clause cannot be used to preempt a state statute unless there is a direct and positive conflict between the state and federal law, so that the two acts cannot be reconciled or consistently stand together. Joseph E. Seagram and Sons, Inc. v. Hostetter, supra; American Federation of Labor v. Watson, 60 F.Supp. 1010 (S.D. Fla. 1945). Yet, such conflicts are extremely rare because a state law is presumed not to conflict with federal constitutional or statutory law. American Federation of Labor v. Watson, supra. In fact, preemption of state law is not favored in the absence of persuasive reasons or that ". . . Congress unmistakably so ordained." Alessi v. Raybestos-Manhattan, 451 U.S. 504, 522, 101 S.Ct. 1895, 1905, 68 L.Ed.2d 402 (1981). In fact, federal law suggests that problems regarding conflicts between state laws and the Constitution should be resolved by construing the state statute to allow the state and federal functions to continue with minimal interference with each other. Merrill,

Lynch, Pearce, Fenner & Smith, Inc. v. Ware, 414 U.S. 1117, 1127, 94 S.Ct. 383, 397, 38 L.Ed.2d 248 (1973).

The federal law has also set forth a specific test to determine whether federal and state law are actually in conflict. The sole way to see if federal and state law conflict is to examine the subject matter of the state law to see if it concerns a matter peculiarly of state interest. Chicago R.I. & P.R. Company v. Hardin, 239 F.Supp. 1 (W.D. Ark. 1963), rev'd on other grounds, 382 U.S. 423, 86 S.Ct. 594, 15 L.Ed. 501 (1964). The exercise of a state's power is not to be interfered with if it is within the scope of state authority and within state discretion. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917). The fact that the state law may not provide the best conceivable remedy or exemplify the highest wisdom does not mean that a conflict exists. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949).

Further, if the federal statute occupies only a limited portion of the subject matter being regulated, the state may enact legislation covering other aspects of the subject or supplement the federal legislation in respect to local conditions. Hancock v. Train, 426 U.S. 167, 176, 96 S.Ct. 2006, 2013, 48 L.Ed.2d 555 (1976):

> Neither the Supremacy Clause nor the Plenary Powers Clause bars all state regulations which may touch the

> activities of the federal government.

The fact that state law may not be preempted simply because Congress has peripherally passed upon the area to be regulated was clearly set out by the United States Supreme Court in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443, 80 S.Ct. 813,815, 4 L.Ed.2d 152 (1960):

> In determining whether state regulation has been pre-empted by federal action 'the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state'. Savage v. Jones, 225 U.S. 501, 533, 32 S.Ct. 715, 725, 56 L.Ed. 1182. See also Reid v. Colorado, 187 U.S. 137, 23 S.Ct. 92, 47 L.Ed. 108, Asbell v. Kansas, 209 U.S. 251, 28 S.Ct. 485, 52 L.Ed. 788, Welch v. New Hampshire, 306 U.S. 79, 59 S.Ct. 438, 83 L.Ed. 500, Mauer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969. (Emphasis added).

Pursuant to the rule delineated in Huron Portland Cement, supra, the Supreme Court has also held that the con-

stitution recognizes the state's power to control its internal affairs and policy, and that state laws may even impose some burdens on the federal government. A state statute which incidentally bears upon a federal law is nonetheless valid. Penn Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943). In fact, a state's statute of limitations governing the time frame within which to bring an action under the federal Fair Labor Standards Act was upheld. Kendall v. Keith Furnace Co., 162 F.2d 1002 (8th Cir. 1947); Swick v. Glen L. Martin Co., 160 F.2d 483 (4th Cir. 1947). And a state's regulation of the number of cars owned by a welfare recipient was held valid, despite Congress's intent to delineate welfare eligibility requirements by federal law. Woodman v. Wisconsin Department of Health and Social Services, 292 N.W.2d 352 (Wis. 1980).

Clearly then, the Supremacy Clause cannot preempt state law unless the statute being challenged: (a) is in direct and irreconcilable conflict with federal law; (b) violates a specific congressional intent to totally supervise the area being regulated; (c) encroaches upon a matter peculiarly of federal or national interest; and (d) does not at all pertain to a matter amenable to state regulation.

The preceding decisions delineate the parameters within which the Supremacy Clause may be invoked. They may be used in showing that F.S. §440.15(3)(b)3.d.(1979) does not

conflict with either the federal Age Discrimination in Employment Act or the Social Security Act.

B. F.S. §440.15(3)(b)3.d.(1979) DOES NOT CONFLICT WITH THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act (ADEA) is found at 29 U.S.C. §621. The Act sets forth congressional declarations that older workers have found themselves disadvantaged to retain and regain employment; that the setting of arbitrary age limits has become a common practice and disadvantages older persons; that the incidence of unemployment is high among older workers and is increasing; and that the existence of arbitrary age discrimination burdens commerce and the free flow of goods in commerce. The Act also declares a congressional intent to promote the employment of older persons based on ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The First District Court of Appeal, in O'Neil v. Department of Transportation, 442 So.2d 961 (Fla. 1st DCA 1983), correctly perceived that there is no conflict between the age 65 restriction on wage loss benefits and the ADEA. The O'Neil decision recognizes that the ADEA deals with arbitrary age discrimination related to personnel practices in the labor market - the hiring, displacement, and promotion of

older workers. Hodgson v. First Federal Savings & Loan Association of Broward County, 455 F.2d 1818 (5th Cir. 1972); Macellaro v. Goldman, 643 F.2d 813 (D.C. Cir. 1980). Specifically, §621(a)(1) is directed toward the difficulty of older workers to retain and regain employment.

The decision in O'Neil correctly notes that §440.15 (3)(b)3.d. does not relate to any subject matter governed by the ADEA. The statute does not impair Congress's right to deal with discrimination in the hiring and firing of workers or personnel practices in the open labor market. The subject matter governed by the ADEA is purely within the control of the employer, himself, and is properly subject to federal supervision. However, the age 65 restriction mentioned in F.S. §440.15(3) merely limits the receipt of state workers' compensation benefits. As the court noted in O'Neil, the receipt of state workers' compensation benefits is not a matter which is within the control of the employer.

In addition, §440.15(3) (b) does not pass on or regulate the job performance of elderly workers. The state statute also does not relate to the actual employment of elderly workers nor does it prohibit elderly workers from continuing to work or seek work. The subject matters governed by the ADEA and F.S. §440.15(3)(b) are entirely different. The federal statute governs the federal bailiwick of civil rights under the Fourteenth Amendment to the United States Constitution and age discrimination in industries engaged in

interstate commerce under the Commerce Clause of the United States Constitution. It purports to regulate personnel practices in the labor market. The state statute is clearly within the state's discretion to oversee and limit entitlement to state workers' compensation benefits created at the behest of the state legislature. The two acts do not irreconcilably conflict.

Nor does F.S. §440.15(3)(b) invade a province which is peculiarly of national or federal interest. In addition, the ADEA expresses no congressional intent to supersede state laws which regulate benefits based on age. In the absence of such congressional intent and a clear showing that §440.15(3)(b) invades a province which is peculiarly of national or federal interest, the Supremacy Clause cannot be invoked to preempt the state statute.

Further, the ADEA merely prohibits the setting of arbitrary age limits in employment. In Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), the court upheld §440.15(3)(b) against an attack based on the Equal Protection Clause of the United States Constitution. In holding that the statute withstood equal protection scrutiny, the court rejected any contention that the age 65 restriction was arbitrarily set. If, indeed, the court did deem the age 65 restriction arbitrary, it would have been compelled to hold the statute unconstitutional as violative of equal protection tenets. In re: Estate of Greenberg, 390 So.2d 80 (Fla. 1980).

The remaining provisions of the ADEA also pose no conflict with §440.15. Under 29 U.S.C. §623, employers are prohibited from engaging in age discrimination when deciding to hire or fire a worker or in setting his pay or conditions of employment. Section 623 also applies to employment agencies and labor organizations, but Congress made no mention of the statute's applicability to a state benefits plan such as workers' compensation. Section 623 applies purely to personnel practices in the labor market, not receipt of state workers' compensation benefits.

However, the ADEA, §623, does allow employers, employment agencies, or labor organizations to determine age as a bona fide occupational qualification to establish a seniority or retirement system, or to discharge anyone for good cause regardless of age. In fact, in Masschusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), the United States Supreme Court held that state laws which set a mandatory retirement age may be upheld regarding certain occupations, despite the effect of the ADEA.

Section 630 of the ADEA enumerates those persons affected by the Act. A state workers' compensation system is nowhere to be found in the definitions within the Act's regulatory scheme. In fact, a state pilotage commission was held not to be an employer under the ADEA since the commission was not engaged in an industry affecting interstate commerce.

Adams v. Leatherbury, 388 So.2d 510 (Ala. 1980). In addition, the Alabama Supreme Court in Adams held that regulation of state pilots and their retirement was an area reserved exclusively to the state. The ADEA did not specifically preclude the state from regulating the area. Thus, the ADEA was in harmony with the state statute governing the retirement age of state pilots. The decision in Adams may be extended to any state agency which administers a benefits plan promulgated by the state legislature.

Thus, in the instant case, the Florida Department of Labor, Divison of Labor and Employment Security, Division of Workers' Compensation, is not within the class of persons intended to be regulated by the ADEA.

Federal case law has also held that the ADEA does not exclusively regulate the use of age limits in setting the terms and conditions of employment. In fact, the states are permitted to regulate age limits on hiring if such limits are rationally related to a legitimate state purpose. Arritt v. Grisell, 432 F.Supp. 800 (N.D. W.Va. 1976), aff'd in part, rev'd on other grounds, 567 F.2d 1267 (4th Cir. 1977). Thus, the ADEA does not supersede state laws which pass upon age restrictions in employment if those restrictions relate to a valid state interest. Even assuming, without conceding, that the age 65 restriction relates to personnel practices in employment, the Sasso decision held that the restriction does relate to a legitimate state interest and is, therefore,

constitutional. Consequently, the ADEA does not supersede §440.15(3)(b)3.d.(1979).

Most importantly, there is no statement of congressional intent in the ADEA which bars the State of Florida from regulating receipt of state workers' compensation benefits based on age. The key decision which allows the State of Florida and any other state to regulate and set limits on the entitlement to workers' compensation benefits is Richardson v. Belcher, 404 U.S. 78, 92 S.Ct 254, 30 L.Ed.2d 231 (1971). In Richardson, the United States Supreme Court clearly stated that it was Congress's intent to leave the administration of workers' compensation programs to the states. Thus, the State of Florida was well within its power in passing §440.15(3)(b) 3.d. as a valid restriction on receipt of state workers' compensation benefits.

There is also nothing in the ADEA which prevents the states from administering operations which are within their bailiwick. In EEOC v. Wyoming, _____ U.S. _____ , 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), the Supreme Court held that the ADEA did not violate the Tenth Amendment by encroaching on matters reserved exclusively to the states. At issue was Wyoming's statute forcing retirement of game wardens at the age of 55. The statute was held not to be in conflict with the ADEA. The court noted that the ADEA did not impair the state's right to oversee its traditional govermental function, one of which included the management of state parks. The

court stated that the ADEA did not constitute a "federal intrusion" into the state's domain. Under the EEOC decision, the State of Wyoming was free to promulgate its mandatory retirement statute without fear of conflict with the ADEA. The statute, in effect, could co-exist with the ADEA since retirement of game wardens was peculiarly a state function. In addition, the court in EEOC noted that the ADEA does not prevent a state from using its ". . . discretion to achieve its goals in the way it thinks best . . ." 103 S.Ct. at 1062 (Court's emphasis).

The decision in EEOC is directly applicable to the instant case. The management of workers' compensation plans is also a function reserved to the states. Richardson v. Belcher, supra. Accordingly, the ADEA cannot intrude upon the state's right to oversee and limit entitlement to receipt of workers' compensation benefits. Under the EEOC decision, such an intrusion cannot be intended by the ADEA. F.S. §440.15 (3)(b)3.d. is a valid exercise of state power. Consequently, the ADEA and §440.15(3)(b) may co-exist.

The petitioner has argued that the ADEA conflicts with F.S. §44015.(3)(b)3.d. because the federal statute was intended to prohibit the retirement of elderly workers, while the court's decision in Sasso, supra, endorses compulsory retirement as one of the purposes of §440.15(3)(b). However, the petitioner has misconstrued the congressional intent of the ADEA. The ADEA was not intended to prevent younger people

from ever getting started in employment nor was its purpose to necessarily prevent retirement of elderly workers. In Brennan v. Paragon Employment Agency, Inc., 356 F.Supp. 286 (S.D.N.Y. 1973), aff'd, 489 F.2d 752 (2nd Cir. 1974), the court indicated that the ADEA was intended merely to prevent job discrimination against the elderly:

> The purpose of the Act was to prevent persons aged 40 to 65 from having their careers cut off by unreasonable prejudice. It was not intended to prevent their children or grandchildren from ever getting started. There is nothing in the Act which authorizes the Secretary of Labor to prohibit employers from encouraging young persons - whether or not in college - to turn from idleness to useful endeavor. I find such encouragement to be in the public interest . . . Id. at 288-289.

In the absence of an irreconcilable conflict between the ADEA and §440.15(3)(b), the federal statute does not supersede the state statute and the Supremacy Clause cannot be invoked. Since §440.15(3)(b)3.d. does not conflict with any of the provisions of the ADEA and governs matters which are peculiarly of state interest, the Supremacy Clause is inapplicable. The decision of the First District Court of Appeal must be approved and affirmed.

C. F.S. §440.15(3)(b)3.d.(1979) DOES NOT CONFLICT WITH THE FEDERAL SOCIAL SECURITY ACT

Under 42, U.S.C. §402(a), a person is entitled to old age and survivors' benefits (OASI) when he: (a) applies for the benefits; (b) has attained the age of 62; and (c) is fully insured. Clearly, §440.15(3)(b)3.d. does not at all interfere with that process. It merely suspends one class of state workers' compensation benefits at the age of 65.

In addition, any offset provision in 42 U.S.C. §402(k)(2)(B) is inapplicable to wage loss benefits for a 65 year old since wage loss benefits are automatically suspended at the age of 65. However, §440.15(3)(b) in no way limits or prohibits an employee's receipt of OASI. As the court noted in Sasso, supra, workers' compensation disability benefits are wholly different from Social Security retirement benefits and are not interrelated in any way. Sasso, 431 So.2d at 218. The Sasso decision also notes that the purposes of the two benefits are distinct and do not overlap. The fact that the two benefit systems have no commonality eliminates any potential conflict between the state workers' compensation system and the federal Social Security retirement plan.

Section 403 of the Social Security Act allows the deduction of earned income from Social Security benefits, but has no bearing on state workers' compensation benefits. In fact, the congressional intent of this reduction was to reduce the cost of the Social Security System and promote retirement.

Ludeking v. Finch, 421 F.2d 499 (7th Cir. 1970). According to the decision in Sasso, these are the same purposes served by §440.15(3)(b)3.d. Therefore, the intent of §403 of the Social Security Act is identical to the legislative intent of §440.15(3)(b)3.d. Thus, no conflict exists between those two statutory provisions.

The comparison between §403 of the Social Security Act and F.S. §440.15(3)(b)3.d. is especially noteworthy in the instant case. Mr. Acosta draws Social Security retirement benefits and is working reduced hours so as to reap the benefits of both his Social Security and his wage. However, if his hours are not sufficiently reduced, he cannot be considered "retired" and may, at most, lose his Social Security benefits or have them reduced. Neither the loss of Social Security nor its reduction bears upon his entitlement to wage loss benefits or any other state workers' compensation benefits. As the District Court of Appeal correctly pointed out in the instant case, the age 65 restriction in §440.15(3) does not in any way reduce or eliminate Mr. Acosta's entitlement to Social Security benefits. And, at age 70, Mr. Acosta, as any other worker, may continue to earn wages and receive his full OASI benefits. 42 U.S.C. §403(f)(3). F.S. §440.15(3)(b)3.d. in no way reduces the entitlement of the 70 year old worker to receipt of full OASI benefits, as did the invalid state statute in Raskin v. Moran, 684 F.2d 472 (7th Cir. 1982).

The issues in this case are not concerned with the federal system of Social Security disability benefits. However, the statute governing that system evinces a congressional intent to allow the states to pass legislation directly bearing upon the Social Security system. In 42 U.S.C. §424 (a)(d) it is stated that the offset between Social Security disability benefits and state workers' compensation benefits may not be taken by the federal government:

> . . . if the law or plan described in subsection (a)(2) of this section under which a periodic benefit is payable provides for the reduction thereon . . .

The "law or plan" alluded to in the statute includes a state workers' compensation program. Thus, the federal statute allows the state to take an offset between federal Social Security disability benefits and state workers' compensation benefits. Accordingly, Congress intended not to exercise exclusive control over all matters pertaining to the receipt of Social Security benefits. Therefore, 42 U.S.C. §424a(d), evinces Congress's intent not to preempt the states from passing laws which may bear upon the federal Social Security system. In fact, it has been held that federal law does not preempt a state statute allowing Social Security cost of living increases to be offset against workers' compensation benefits. Dailey v. Industrial Commission, Colorado, 651 P.2d 1223 (Colo. App. 1982).

The petitioner places undue reliance upon the decisions in Cannon v. Moran, 331 N.W.2d 369 (Wis. 1983) and Raskin v. Moran, 684 F.2d 472 (7th Cir. 1982). Both of those cases deal with reductions of Social Security retirement benefits for workers age 70 or older who are still earning income. Both cases held that Social Security retirement benefits cannot be reduced by wages earned after age 70, noting that state laws which allow such reductions impede Congress's interest in overseeing and administering the Social Security system. The Raskin decision in particular invalidated a state statute which prevented receipt of Social Security retirement benefits, in clear violation of the intent of the Social Security Act.

The instant case has nothing to do with the reduction of the petitioner's Social Security benefits for income earned after age 70. Instead, this case merely concerns receipt of state workers' compensation benefits past the age of 65. The petitioner is not here challenging a reduction of his Social Security benefits. His challenge concerns an area governed exclusively by state law - receipt of state workers' compensation benefits. Thus, the Supremacy Clause of the United States Constitution, as well as the Cannon and Raskin cases, are inapplicable here. The State of Florida is obviously not preempted from passing legislation restricting entitlement to state workers' compensation benefits. The state workers' compensation system is a bailiwick reserved

exclusively to the State of Florida. Richardson v. Belcher, supra. State legislation concerning entitlement to benefits does not in any way affect an area of federal or national interest. No area of the Social Security Act is touched by §440.15(3)(b)3.d.

In addition, the petitioner incorrectly argues that the age 65 restriction in §440.15(3)(b) deprives a claimant of the partial replacement of his lost earnings, contrary to the intent of 42 U.S.C. §403. However, 42 U.S.C. §409(b) excludes workers' compensation benefits from its definition of "wages." Thus, state wage loss benefits cannot be likened to "lost earnings." Accordingly, §440.15(3)(b)3.d. does not conflict with the intent of the federal Social Security Act.

Finally, the petitioner has cited no authority to show that Congress expressed an intent in the Social Security Act to allow workers' compensation benefits without a reduction in Social Security benefits. Indeed, the Social Security Act expresses no congressional intent to prohibit the states from passing laws which touch upon the area of Social Security. In the absence of such congressional intent, no conflict between federal and state law can be demonstrated.

Clearly, the provisions of §440.15(3)(b)3.d. do not at all conflict with §402 and §403 of the federal Social Security Act. The two benefit systems serve different purposes and are administered in dissimilar fashion. In addition, §440.15(3)(b) does not purport to affect in any way an

elderly employee's receipt of OASI benefits. Nor does §440.15(3)(b) invade an area which is exclusively of federal interest. In fact, the state statute does nothing more than regulate entitlement to a class of workers' compensation benefits - an area which is peculiarly within the state's discretion. Richardson v. Belcher, supra. Clearly, F.S. §440.15(3)(b)3.d. does not conflict with any portion of the federal Social Security Act. Consequently, the Social Security Act does not preempt §440.15(3)(b)3.d. and the Supremacy Clause has not been violated.

POINT III

F.S. 440.15(3)(b)3.d.(1979) DOES NOT VIOLATE THE "ACCESS TO COURTS" PROVISION OF THE FLORIDA CONSTITUTION.

Initially, it must be noted that this Court has already upheld the constitutionality of §440.15(3)(b) in Acton v. Fort Lauderdale Hospital, 440 So.2d 1283 (Fla. 1983). This Court's decision in Acton held that §440.15(3)(b) withstood a challenge based upon the "access to courts" provision of the Florida Constitution, among other challenges. Therefore, the petitioner's argument under Point III is futile and has no merit.

In addition, in Sasso v. Ram Property Management, supra, the First District Court of Appeal correctly recognized that the age 65 restriction on wage loss benefits does not preclude access to the courts for the petitioner since he is still afforded the right to claim and receive temporary benefits, permanent total disability benefits, and medical care. As the court observed in Sasso:

> The doctrine of precluding access to courts does not apply to statutes that limit the right of action to some extent and do not completely bar redress in a judicial forum. . . .

Accordingly, the Sasso decision echoed this Court's previous holding that where a statute does not completely abolish a

cause of action, but merely limits it, constitutional tenets are still satisfied. Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d 365 (Fla. 1981). As the Sasso opinion noted, the Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized right of action. Since the age 65 limitation did not abolish or totally eliminate the petitioner's right to file a workers' compensation claim, the restriction withstands constitutional scrutiny. Kluger v. White, 281 So.2d 1 (Fla. 1973).

In addition, §440.15(3)(b)3.d. does not preclude the petitioner from seeking redress before a deputy commissioner for temporary benefits, permanent total disability benefits, and medical care under the Workers' Compensation Law. The provisions of a claims procedure, a hearing before a deputy commissioner, and subsequent appellate review by the First District Court of Appeal are all that is needed to provide constitutional "access to the courts." Scholastic Systems, Inc. v. LeLoup, 307 So.2d 166, 169 (Fla. 1974):

> [4,5] . . . A party is afforded his 'day in court' with respect to administrative decisions when he has a right to a hearing and has the right of an appeal to a judicial tribunal of the action of an administrative body.[4]

* * *

> [6] Clearly, the right to a hearing is afforded by Ch. 440, F.S.; . . .

See also, The Bath Club, Inc. v. Dade County, 394 So.2d 110 (Fla. 1981). Clearly, the courthouse door remains open to this petitioner.

POINT IV

F.S. §440.15(3)(b)3.d.(1979) DOES NOT VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

A. DUE PROCESS

The petitioner asks this Court to consider the Due Process Clause in his attack on §440.15(3)(b)3.d. However, due process cannot interfere with the state's police power to limit entitlement to legislatively created benefits. Florida Canners Association v. State Dept. of Citrus, 371 So.2d 503 (Fla. 2nd DCA 1979). An example of the rule regarding the legislature's power to limit statutory benefits is seen in this Court's decision in Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974). In Lasky, this Court did not hesitate to uphold the termination of causes of action which did not meet the threshold amounts set forth in the Automobile Reparations Reform Act. Instead, this Court balanced this alleged deprivation against the swelling personal injury case load and the need to expedite existing personal injury claims. This Court in Lasky did recognize that such a limitation might cause some severe injuries to go uncompensated. However, this Court stated that a statute need not be "perfect" in order to be valid.

Such a legitimate limitation is exactly what is accomplished by §440.15(3)(b)3.d. The age 65 limitation is

merely one of four "caps" on wage loss benefits. The other three "caps" are: (1) termination of wage loss benefits at the end of any two year period after maximum medical improvement, unless wage loss benefits are payable to the claimant for at least three consecutive months during that period; (2) termination of wage loss benefits for injuries occurring on or before July 1, 1980, 350 weeks after attainment of maximum medical improvement; and (3) termination of wage loss benefits for injuries occurring after July 1, 1980, 525 weeks after maximum medical improvement. Such a "cap" is just as valid as any of the "caps" or "schedules" previously or currently used in the Florida Workers' Compensation Law. Indeed, this Court has upheld the constitutionality of these "caps" in Florida workers' compensation legislation. Mims & Thomas Manufacturing Co. v. Ferguson, 340 So.2d 920 (Fla. 1976).

There are several reasons why the age 65 limitation on wage loss benefits is consistent with the state's police power. In Sasso, supra, the district court of appeal discussed two legitimate goals which are reasonably connected to the age restriction. One objective - the decrease in productivity which corresponds with old age - has been supported by the Supreme Court of the United States in Massachusetts Board of Retirement v. Murgia, supra. The other objective discussed in the Sasso opinion concerns the fact that age restrictions might assist in creating an incentive for elderly employees to retire, thereby affording increased job opportunities to

younger workers. That goal is especially reasonable in light of the fact that an elderly employee's retirement does not preclude him from claiming benefits based on permanent total disability or from receiving the medical care afforded him by the Workers' Compensation Law.

The final objective discussed in Sasso - the reduction of premium costs - is both legitimate and reasonable considering the purpose of the 1979 amendments to the Workers' Compensation Law. Acton v. Ft. Lauderdale Hospital, supra.

A fourth objective of the age restriction would be to prevent wage loss benefits from becoming a hybrid form of permanent total disability. Wage loss necessarily implies an ability to work and is even payable during periods in which the claimant is employed at a lesser wage than before his accident. However, the entire purpose of the wage loss provisions of the Workers' Compensation Law, i.e., the payment of benefits during periods in which an employee has returned to work at a lesser wage or is capable of doing so, would be destroyed if those benefits continued to an elderly, disabled employee. Obviously, the employability of a permanently impaired, elderly employee is minimal and perhaps nonexistent. To continue to pay wage loss benefits to such a claimant would be to support the fiction that such an employee is capable of returning to the open labor market. The proper classification of benefits in such a case would be permanent total disability for which there is no age restriction. It is reasonable to

assume that the legislature passed the age restriction so that wage loss benefits would not be paid ad infinitum to elderly employees.

The age 65 limitation on wage loss benefits is no different than any other legislatively imposed "cap" or "schedule" on workers' compensation benefits. The creation of such a "cap" is consistent with the state's power to limit entitlement to legislatively created benefits. Williamson v. Busch & LaFoe, 294 So.2d 641 (Fla. 1974); Lasky v. State Farm Insurance Company, supra.

Clearly, there are several legitimate legislative objectives linked to the creation of the age 65 restriction on wage loss benefits. If any legitimate legislative objective can be shown by the passage of the statute, the legislation must be upheld. Accordingly, §440.15(3)(b)3.d.(1979) is not violative of the due process clause of the federal or Florida constitutions. The statute must be deemed constitutional and the district court of appeal's decision must be approved.

B. EQUAL PROTECTION

The age 65 restriction on wage loss benefits is equally valid when measured against the tenets of the Equal Protection Clause. In essence, the petitioner has argued that §440.15(3)(b)3.d. invidiously discriminates against the class of persons age 65 or older. However, the state always has the broad discretion to delineate classification in legislation,

even under the Equal Protection Clause. Graham v. Ramani, 383 So.2d 634 (Fla. 1980). Indeed, the presumption of constitutionality applies even to statutes which treat some persons or things differently from others. Lewis v. Mathis, 345 So.2d 1066 (Fla. 1977); Northridge General Hospital v. City of Oakland Park, 374 So.2d 461 (Fla. 1979), appeal dismissed, 444 U.S. 1062, 100 S.Ct. 1001, 62 L.Ed.2d 744 (1980). In equal protection analysis, a statute need not be geometrically precise for it to be valid. In re: Estate of Greenberg, supra.

In the instant case, the petitioner has attacked a statute based on classification by age. Under Florida law, age is not a "suspect" classification which would warrant strict scrutiny of the statute. White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); Bryant v. State, 386 So.2d 237 (Fla. 1980). Since age is not a "suspect" classification, the "rational basis test" as opposed to the "strict scrutiny test" must be employed. This Court outlined the "rational basis test" in In re: Estate of Greenberg, 390 So.2d 40, 42 (Fla. 1980):

> [1] The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not

> result in its invalidity. . . .

This Court in Greenberg went on to state that a statute may be held unconstitutional only if it causes:

> [1] . . . different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary. . . . Id. at 42.

The polestar case on age classification is the United States Supreme Court decision in Massachusetts Board of Retirement v. Murgia, supra. In Murgia, the court upheld a state law requiring police officers to retire at age 50. In so holding, the court stated that statutes which allegedly discriminate on the basis of age are not subject to the "strict scrutiny test" and described the "rational basis test" as:

> . . . a relatively relaxed standard reflecting the court's awareness that the drawing of lines that create distinction is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. . . . Such action by a legislature is presumed to be valid. Id. 96 S.Ct., at 2567.

Since the Murgia decision, several courts of sister states have upheld various age limitations and restrictions on legislative benefits. In Cruz v. Chevrolet Grey Iron, Div. of General Motors, 247 N.W.2d 764 (Mich. 1976), the Supreme Court of Michigan employed the "rational basis test" to uphold that portion of Michigan's Workers' Compensation Law which incrementally reduced a claimant's wage loss benefits after age 65. The court stated, in reference to the age limitation, that ". . . it cannot be said that the lawmakers were totally arbitrary in their actions." Id. at 768. The court's reasoning is compelling:

> Age limits are necessary for practicality in many of our statutes. Many laws would be unmanageable if subjective assessments had to be made in each case. . . . The classification in which the statute placed Mr. Cruz included all workers who had been injured either before or after the sixty-fifth birthday and it provided the same rule for all.
>
> * * *
>
> The arguments pro and con age limitations are many.
>
> * * *
>
> We submit that these are matters for the legislature or contracting parties as the case may be. It is certainly not for this court to say at what age a general classification should be made or whether one should

> be made at all. If the classification falls unfairly upon some individuals, that alone does not permit a finding of unconstitutionality. It could well be a matter for legislative consideration, but not for the personal convictions of the seven of us.
>
> * * *
>
> The legislature probably considered the difficulty in anticipating on an individual basis the mental, emotional, and physical future of those 65 and over as well as projected retirement, productivity, and other less apparent concerns having to do with wage earning capacity. The method employed is grounded in reason. It is outside of our constitutional role to change judicially the legislative objective to compensate for loss of wage earning capacity and the legislative determination of a classification in which that capacity diminishes. Cruz, supra, at 769-770.

The court in Cruz dismissed any equal protection argument by noting that the age limitation applied to all persons age 65 or over just as the Florida law does. The court in Cruz also noted that a finding of unconstitutionality is unwarranted simply because the age limitation may affect some people unfairly. The unfair considerations should be taken up by the legislature, not the court.

In Brown v. Goodyear Tire & Rubber Co., 599 P.2d 1031 (Kan. 1979), the court upheld the constitutionality of Kansas's workers' compensation law requiring that disability payments terminate for persons attaining age 65 and receiving old age Social Security benefits. The statute was repealed at the time of the court's decision, but that repeal had no effect upon the court's analysis of the equal protection challenge. The court held that the age classification was legitimately related to a legislative objective and withstood equal protection analysis.

The court in Brown relied upon a previous decision in Baker v. List & Clark Construction Company, 563 P.2d 431 (Kan. 1977). In Baker, the court upheld that portion of Kansas's workers' compensation law which allowed an offset of Social Security retirement benefits against workers' compensation payments. The court held that the creation of such classifications is within the state's police power and that such classifications are not arbitrary. The Baker court also reasoned that after age 65 most employees retire. At that point, one's wage loss is not caused by injury, but by retirement.

The age classification in this case is just as valid as the age classifications upheld in Murgia, Cruz, Brown, and Baker, supra. The age 65 "cap" on wage loss benefits is neither wholly arbitrary nor unrelated to a legitimate legislative objective. The age classification in this case is designed to manage Florida's workers' compensation system so

that wage loss benefits are not paid indefinitely, a limitation which the legislature may impose as a matter of law. The age 65 restriction also recognizes the fact that aged claimants may eliminate themselves from the labor market for retirement purposes and guarantees that wage loss benefits will not be unfairly paid to those who voluntarily leave the labor market. Unfortunately, the "cap" may affect some people unfairly. However, a statute need not be perfect in order to withstand equal protection scrutiny. In re: Estate of Greenberg, supra.

The Supreme Court of the United States recognized the need for certain general rules in efficiently administering any large public benefit plan when it spoke of the government's Social Security system in Califano v. Jobst, 434 U.S. 49, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977):

> General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases. 98 S.Ct., at 99.

The petitioner has failed to sustain his burden of showing that the age 65 "cap" on wage loss benefits is wholly arbitrary or totally unrelated to a legitimate legislative objective. Accordingly, F.S. §440.15(3)(b)3.d. does not violate the Equal Protection Clause of the Florida and federal constitutions.

POINT V

F.S. §440.15(3)(b)3.d. DOES NOT CONFLICT WITH F.S. §440.15(10).

Under Florida law, a statute must, if possible, be construed to harmonize it with other provisions of the same act and to reconcile any apparent inconsistencies. Markham v. Blount, 175 So.2d 526 (Fla. 1965); Woodgate Development Corp. v. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977). The provisions of an act are to be read consistent with one another and not in conflict if there is any reasonable basis for consistency. State v. Putnam County Development Authority, 249 So.2d 6 (Fla. 1971).

The provisions of §440.15(3)(b)3.d. and §440.15(10) are completely consistent, especially under the circumstances of this case. The former statute merely precludes entitlement to one class of workers' compensation benefits after age 65 is attained. The latter allows an offset of Social Security benefits against workers' compensation benefits until the employee reaches age 62:

> This reduction of compensation benefits shall not be applicable to any compensation benefits payable for any week subsequent to the week in which the injured worker reaches the age of 62 years. F.S. §440.15(10)(a).

F.S. §440.15(10) eliminates the reduction in compensation exactly when eligibility for Social Security retirement benefits begins.

In Mr. Acosta's case, his age bars him from receiving wage loss benefits - only one class of compensation under §440.15(3)(b). But under §440.15(10), he may still receive all other forms of workers' compensation, plus his full Social Security benefits, unencumbered by any offsets.

The two statutes serve divergent purposes and are clearly not in conflict. They are presumed to be harmonious and should be read that way.

CONCLUSION

Based upon the foregoing argument and authorities, the respondents respectfully request that this Honorable Court uphold the constitutionality of F.S. §440.15(3)(b)3.d.(1979) and approve and affirm the decision of the First District Court of Appeal.

Respectfully submitted,

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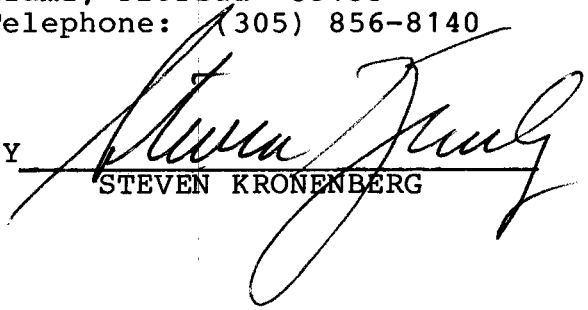
BY 
STEVEN KRONENBERG

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents was mailed this 29 day of May, 1984, to Richard Sadow, Esquire, 12550 Biscayne Boulevard, North Miami, Florida 33181; and Raymond Rhodes, Clerk, District Court of Appeal, First District, State of Florida, Supreme Court Building, Tallahassee, Florida 32304.

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BY _____
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