IN THE SUPREME COURT OF FLORIDA

LUIS ACOSTA,	)	
Petitioner,	)	
vs.	)	CASE NO: 65,214
KRACO, INC., et al.,	)	DCA Case No: AT-7
Respondents.	)	
	)	

PETITIONER'S REPLY BRIEF

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Petitoner's counsel stands on his previosuly made statement of the facts.

ARGUMENT I

DOES SECTION 440.15(3)(b)3.d. FLORIDA STATUTES, 1979, VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CONFLICTS WITH 42 U.S.C. SECTION 403 (f) (3) AND 403 (f) (1) (8), 1983?

Respondents throughout their Brief misconstrue the factual situation present in Raskin v. Moran, 684 F.2d. 472 (7th Circuit, 1982), and the holding therein. Respondents infer that the Wisconsin Statute reduces Social Security retirment benefits and prevents receipt of Social Security Retirement benefits. (Respondent's Brief, p.p. 20, 22) The Statute in Raskin did not directly take away Plaintiff's social security benefits. The Wisconsin Statute reduced state salaries by an amount equal to the Social Security benefits received.

Plaintiff's preemption argument in Raskin was that Federal policy prohibiting reduction in Social Security benefits to persons over age 70 who continue to earn income extends to indirect reductions as those affectuated by the Wisconsin Statute. Analysis by the Court in Raskin indicated that the Federal policy evident from the Federal Statute was that persons over age 70 should receive the full federal benefit regardless of the source or amount of other income earned by the recipient. The Court stated:

> "That although the SSA does not expressly preclude the application of State law which might incidently affect some aspect of Social Security, we have no doubt that a State Statute which effectively denies benefits conferred by Section 203 would be suspect under the Supremacy clause".

The Court in Raskin construed the Wisconsin Statute as regulating the total income to be received as compensation or retirement benefits and therefore controlling total income by regulating salaries. One of the objectives to be accomplished by this Wisconsin Statute was to prohibit the practice of "double dipping".

The Court in Raskin next compared the purposes of the Federal and Wisconsin Statute in order to determine if the State Statute stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Since the Wisconsin Statute although not directly preventing or impeding Plaintiff's receipt of Social Security benefits, effectively deprived the recepient of those Federal benefits by reducing his salary in an amount precisely equal to the Federal benefits, the Wisconsin Statute was found invalid as being in direct conflict with the purposes and objetives of Congress. This decision was reached by the Court regardless of the State of Wisconsin's concern with double dipping.

Florida Statute 440.15(3)(b)3.d. also indirectly reduces the Social Security benefits attainable by your Petitioner. The Florida Statute attempts to control the amount of replacement income which can be earned by Petitioner and others similarly situated. The Florida Statute seeks to control total income by prohibiting your Petitioner from receiving replacement income in the form of wage loss benefits. Strictly construed Florida Statute 440.15(3)(b)3.d. does not contain statutory language connecting control over replacement income with entitlement or receipt of Social Security benefits. However, the Statute deprives your Petitioner, who is now over 70, attained maximum medical improvement, and sustained permanent impairment from receiving replacement income, in violation of 403(f)(3). The bar on receipt of this replacement income while Petitioner is older than 65 but younger than 70 conflicts with Petitoner's ability to supplement his income pursaunt to 42 U.S.C. Section 403(b)(1)(8). The Federal policy evident from 42 U.S.C. Section 403(f)(3) and 403(f)(1)(8)

is thwarted by Florida Statute 440.15(3)(b)3.d. This conflict exists even though the Florida Statute (unlike the Wisconsin Statute), does not reduce replacement income in an amount directly equal to Social Security. The control and limitation of replacement income in itself thwarts the protection of the Federal Statute. Part of the money put in Petitoner's left pocket is removed by Florida from the right pocket solely because of Petitioner's age. Said effect conflicts directly with Federal policy and accordingly the State Statute is invalid.

Florida Statute 440.15(3)(b)3.d. as construed by the First District Court in Sasso v. Ram Property Management, 431 So.2d. 204, modifies the statutory language of §440.15(3)(b)3.d. by limiting its affect only to those who are at least 65 and collecting Social Security retirement benefits. The Court in Sasso has therefore directly tied the bar to replacement income to receipt of Social Security Retirement benefits. An elderly worker over 65 not receiving Social Security retirement benefits can receive wage loss. When the worker retires and starts receiving Social Security benefits he then losses his wage loss benefits. Under these circumstances there is greater similarity between the Florida and Wisconsin Statutes. Said loss of replacement income due to receipt of Social Security retirement benefits violates Federal policy. Furthermore, as in Raskin, Florida's concern with double dipping (which the Statute does not prevent) is not sufficient to negate the fact that §440.15(3)(b)3.d. stands as an obstacle to the accomplishment and execution of the full powers and objectives of Congress.

§440.15(3)(b)3.d. whether interpreted strictly per Sasso, conflicts with 42 U.S.C. Section 403(f)(3) and 403(f)(1)(8), and is therefore invalid.

ARGUMENT II

WHETHER THE PROVISIONS OF FLORIDA STATUTE 440.15(3)(b)3.d. 1979 AND VALID PURPOSES EFFECTUATED THEREBY VIOLATE THE FEFERAL SUPREMACY CLAUSE IN ARTICLE 6, UNITED STATES CONSTITUTION BY REASON OF CONFLICT WITH THE PROVISIONS, PURPOSE AND POLICY OF THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT 29 U.S.C., SECTION 621, et seq.

The United States Supreme Court in EEOC v. Wyoming, 103 S.CT 1054, 75L.ED 2d. 18 (1983) held that it is a valid exercise of Congress' powers under the Commerce clause of the Constitution (Art. I, §8, cl. 3) to extend the coverage of the Age Discrimination in Employment Act to State and local governments. Therefore, the State, like other employers, has to abide by the ADEA in structuring their integral operations. EEOC v. Wyoming, involved a State Statute which conditioned further employment for game and fish wardens who reached the age of 55 on "the approval of (their) employer". The United States Supreme Court in its decision stressed that,

> "...., it is unlawful for an employer to discriminate against any employee or potential employee on the basis of age, except 'when age is a bonified occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age'".

The State of Wyoming voiced no claim in their retirement policy other than assuring the physical preparedness of Wyoming game wardens to perform their duties. The Supreme Court acknowledged the fact that the State may still assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit.

Justice Brennan stated:

> "In this case, Appellees claim no substantial stake in their retirement policy other than 'assuring the physical preparedness of Wyoming game wardens to

> perform their duties'. .....under the ADEA, however, the State may still at the very least assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit. Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals or to abandon the public policy decisions underlining them. Perhaps more important, Appellees remain free under the ADEA to continue to do precisely what they are doing now, if they can demonstrate that age is a 'bonified occupational qualification' for the job of game warden".

Justice Brennan indicated that a State's goals and methods of achieving same are not absolutely overridden by the ADEA but must in comparison with ADEA survive a reasonable Federal standard.

A reviewing body when analyzing a State Statute to determine if the Statute survives the reasonbale Federal Standard must consider 29 U.S.C., Section 623(f). This Section states:

> "It shall not be unlawful for an employer, employment agency, or labor organization - 1) to take any action otherwise prohibited under Sections A, B, C, or E of this Section where age is a bonified occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentation is based on reasonable factors other than age".[1]

Respondents cite, Massachussetts Board of Retirement v. Murgia, 427 U.S. 307. The Massachussetts Statute required uniformed State police officers to retire upon attaining age 50. The State of Massachussetts sought to protect the public by assuring physical preparedness of its uniformed police.

The Massachussetts Statute in Murgia obviously survived the rational basis standard test pertaining to equal protection. Said

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[1]Attached in the Appendix of this Brief are p.p. 821 - 822 of 24 ALR Fed 808. Said ALR Section further define, clarify, and interpret the phrases "bona fide occupational qualifications" and "differentations based on reasonable factors other than age".

Statute would also appear to fall within §623(f) and therefore, meet the reasonable Federal Standard per the ADEA. Regulation of police officers seems to be a valid exception under §623(f).

Respondents cite Adam v. Leatherbury, 388 So.2d. 510 (Ala. 1980). This case deals with State regulation of pilots. The Court in Adams stated:

> "In imposing mandatory retirement under age 70, burden is on employer to show that bonified occupational qualification which it invokes is reasonably necessary to essence of its business, and that employer has reasonable cause, i.e., factual basis for believing that all or substantially all persons within class would be unable to perform safely and efficiently duties of job involved, or that it is impossible or impractical to deal with persons over age limit on individual basis."

Since pilots are within the purview of §623(f) the Alabama Statute did not violate the ADEA.

The State of Florida, like the State of Wisconsin in EEOC and Alabama in Adams can manage jurisdictional State functions including worker's compensation plans. Like the Wisconsin and Alabama Statute, the Florida Statute also has to survive the test of a reasonable Federal standard per the ADEA. §440.15(3)(b)3.d. unlike the Wisconsin and Alabama Statutes involve all elderly workers regardless of their occupation, physical preparedness, or ability to perform specific duties. The State of Florida cannot and has not shown that age is a "bonified occupational qualification," for all or most employments. The exception per §623(f) does not exist. §440.15(3)(b)3.d. allows a 65 year old worker to receive temporary total, temproary partial disability benefits. How then can §623(f) be applied to justify the baring of wage loss benefits? §623(f) cannot be applied nor can the State under §623(f) justify the baring of wage loss benefits.

The Sasso interpretation regarding applicability of §440.15(3)(b)3.d. to those receiving Social Security retirement benefits adds additional fuel to the fire! How can the term "bonified occupational qualification", justify receipt of wage loss to a 65 year old worker not receiving Social Security Retirement benefits, but not to a 65 year old worker who is receiving Social Security benefits? It cannot! Furthermore, the Statute is not based on reasonable factors other than age. There is no individual situation, occupation, or fitness requirement. Florida Statute 440.15(3)(b)3.d. does not meet the reasonable Federal standard per the ADEA.

The purpose of the Florida Legislature in enacting §440.15(3)(b)3.d. was to avoid double dipping. The avoidance of double dipping does not fall within the statutory exceptions pursuant to §623(f). The purposes suggested by the District Court in Sasso, i.e.,

> "1) to cut the payment of employment related fringe benefits due to an old age related decline in productivity and physical abilities;
> 2) make room in the job market for younger workers by inducing retirement of older workers through a process of wage or fringe benefits reductions; and
> 3) to reduce the cost of insurance premiums to the employers",

all directly conflict with the purposes of Congress in enacting the ADEA. Since no exception pursuant to §623(f) exists the Florida Statute violates the Supremacy clause and is invalid.

Respondents urge that the ADEA does not apply to Worker's Compensation. Congress, by amending §623(g)(1) in 1983 has expanded the protection of the ADEA to group insurance. 29 U.S.C. Section 623(g)(1) states:

> "For purposes of this Section, any employer must provide that an employee aged 65 through 69 shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employees under age 65".

This modification in favor of more protection indicates Congress' intent concerning ADEA. Worker's Compensation is not group insurance but it is a condition of employment and provides insurance for workers (young and old). Per the ADEA coverage should be afforded under the same conditions to all workers.

The premium for Worker's Compemsation insurance coverage is not paid by the employee. The employer pays the premium. The control of payment of said premium is exclusively in the hands of said employer. If the employer cannot or choses not to pay the premium the policy is cancelled and the employee no longer has coverage. Furthermore, as indicated in our initial Brief, the employer has additional control concerning co-insurance (§440.38) and if he obtains coverage in the first place. Current Florida Law does not penalize an employer for not having coverage until after the harm is done, i.e., employee has his accident. Florida Law also allows the employer to waive the exemption pertaining to any employee not included in the definition of employee. (§440.04) Contrary to Respondent's allegations, the Employer does have some control. Further argument concerning the applicability of the ADEA to Worker's Compensation was made in our main Brief. Since there is no valid legitimate legislative purpose inherent in §440.15(3)(b)3.d. which meets the reasonable standard test pertaining to the ADEA, Florida Statute 440.15(3)(b)3.d. is invalid.

ARGUMENT III

WHETHER THE PROVISION OF CHAPTER 440.15 (3)(b)3.d 1979 IS UNCONSTITUTIONAL AS IT VIOLATES ARTICLE I SECTION XXI OF THE FLORIDA CONSTITUTION ENTITLED ACCESS TO COURTS

Respondents correctly state, 1) that a Statute does not violate access to the Courts if the Statute limits the right of action to some extent and does not completely bar redress and 2) that the Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized right of action. Worker's Compensation is a substitute remedy. Prior to August 1, 1979, this substitute remedy allowed injured workers to be compensated for 1) medical; 2) temporary disability; and 3) permanent disability. All three categories, individually and collectively, were an integral part of the alternative recovery which allowed Worker's Compensation to initially be found constitutional. A substitute remedy for a totally eliminated recognized right of action was provided!

The Florida Legislature in 1979 changed the alternative remedy as it applied to permanent disability. Wage loss and a minimum permanent impairment schedule replaced permanent disability. Worker's were again provided with an alternative remedy. However, §440.15(3)(b)3.d. bars Petitioner, since he was older than 65 on the date of his accident, from access to this alternative remedy. He cannot receive wage loss benefits. He cannot receive the substitute remedy for permanent disability. His right for redress for permanent injury has been abolished. His right to access to the Courts has been barred. §440.15(3)(b)3.d. is unconstitutional.

ARGUMENT IV

WHETHER THE PROVISIONS OF CHAPTER 440.15(3)(b)3.d., 1979 IS UNCONSTITUTIONAL AS IT VIOLATES ARTICLE I, SECTION II AND ARTICLE I, SECTION IX OF THE FLORIDA CONSTITION, ENTITLED " BASIC RIGHTS (EQUAL PROTECTION) AND DUE PROCESS "

Respondents allege that §440.15(3)(b)3.d. functions as a cap and therefore is valid as any other "cap" or "schedule". However, §440.15(3)(b)3.d. as applied to Petitioner functions as a cap rather than as a bar. A cap assumes one is eligible to receive something and then limits what can be received. A bar prevents one from being eligible to receive something. Petitioner, 65 when he sustained his accident, never became eligible to receive wage loss. §440.15(3)(b)3.d. functions as a bar - not a limitation! Said bar is not consistent with the state's police power nor does §440.15(3)(b)3.d. bare a reasonable relation to the objectives of the Legislature in enacting the Florida Worker's Compensation Law.

Respondents cite, Massachussetts Board of Retirement v. Murgia, 427 U.S. 307, in support of the premise that a valid legislative objective is "the decrease in productivity which corresponds with old age". Murgia, involves a Massachussetts law which stated that a uniformed state police officer shall be retired upon attaining age 50. The Court indicated that a class of uniformed state police officers over 50 does not constitute a suspect class for purposes of equal protection analysis. Examining this particular Statute under the rational-basis standards the Court stated:

> "In this case, the Massachussetts Statute clearly meets the requirements of the equal protection clause, for the state's classification rationally furthers the purpose identified by the State. Through mandatory retirement at age 50, the Legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at age 50 serves to remove from police

> service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective..."

Therefore, since the classification rationally served the purpose the State was attempting to protect, said Statute was constitutional. Justice Marshall in his decent quoted the following text:

> "In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more that freedom from servitude, and the Constitutional guarantee is an insurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

This decent is more meaningful when one realizes that §440.15(3)(b)3.d. affects not just police officers, but the rights of every worker in the State of Florida. There is no comparison between the size of the class whose rights are being infringed.

There is no consideration in §440.15(3)(b)3.d. to the type of duties performed by a worker nor to the public's safety due to said job performance. There is no legislative formula decreasing benefits yearly pursuant to a decline in productivity such as in Cruz v. Chevrolet Gray Iron, Division of General Motors, 247 N.W. 2d.764 (Mich. 1977). The Legislative goal of §440.15(3)(b)3.d. is not to decrease compensation with an associated decline in productivity. If productivity was a concern of the Florida Legislature then all classes of compensation benefits would have been involved since the affects of productivity would be uniform and consistent throughout all classes of compensation. The Statute in Cruz states:

> "When an employee who is receiving weekly payments reaches or has reached or passed the age of 65, the weekly payments for each year following his 65th birthday shall be reduced by 5% of the weekly payment paid or payable at age 65, but not less than 50% of the weekly benefits paid or payable at age 65, so that on his 75th birthday the weekly payments shall have been reduced by 50%, which there shall be no

> further reduction for the duration of the employee's life. In no case shall weekly payments be reduced below the minimum weekly benefits as provided in the Act."

It is obvious from reading the Statute what the intent of the Legislature in Cruz was. The Statute is rationally related to the objective. This is not true concerning §440.15(3)(b)3.d.

The Legislative objective in §440.15(3)(b)3.d. was to avoid double dipping. The Statute is not rationally related to this objective, i.e., since retirement and disability are not duplicative. The Statute is not rationally related to non productivity of elderly workers. The Florida Statute, if examined concerning relationship to non-productivity assumes that the 65 year old worker is totally non-productive. This is not a valid assumption. The Florida Statute is totally arbitrary.

Respondent further attempts to justify §440.15(3)(b)3.d. by stating that Petitioner, and all permanently injured elderly workers are permanently totally disabled. This contention is without merit. There is no such presumption in the Florida Worker's Compensation Law. To contend such is a sham. Petitioner is permanently injured but is physically and mentally capable of performing work within certain physical limitations. At the time of his Hearing he was not permanently totally disabled nor would he purport a sham on the Court by alleging same. Every worker 65 who has a permanent impairment is not permanently totally disabled. There is something wrong with any legal system which encourages such action.

Respondents argue the applicability of Brown v. Goodyear Tire and Rubber Company, 599 P.2d. 103 (Kan. 1979). The Kansas Statute in Brown related entitlment to compensation for all classes of

benefits to receipt of Federal Old Age Social Security benefits. This Statute did not refer to a specific age, i.e., 60, 65, or 70. The Court found that said Statute was a legislative attempt to prevent duplication of benefits under the Worker's Compensation Act and the Social Security Act. Accordingly, said Statute was reasonable and constitutional.

§440.15(3)(b)3.d. refers specifically and solely to age 65 and older. The statutory section does not contain language tieing into the Social Security Act. Therefore, prevention of duplication of benefits is not a valid purpose. This remains true even when applied to the construction per Sasso, i.e., to individuals 65 years old and older who are receiving Social Security benefits. Individuals 65 years old and older can only receive Retirement benefits. Said benefits are not duplicative with Worker's Compensation benefits (disability). The Florida Statute does not prevent double dipping and does not accomplish its intended objective. There is no valid legislative objective in enacting §440.15(3)(b)3.d. Said age classification is arbitrary.

The interpretation given §440.15(3)(b)3.d. in Sasso treats individuals of the same age differently. The 65 year old worker who reaches maximum medical improvement with a permanent impairment can receive wage loss if he is not collecting O.A.S.I. The same aged worker receiving O.A.S.I. cannot receive wage loss. The only purpose supporting such differential treatment is the prevention of double dipping. However, double dipping is not involved since Florida Worker's Compensation and O.A.S.I. benefits are not duplicative. Justification for treating two 65 year old workers differently cannot be biased on a productivity argument. Both workers have the same productivity. §440.15(3)(b)3.d. is unconstitutional.

ARGUMENT V

WHETHER SECTION 440.15(3)(b)3.d. FLORIDA STATUTES 1979, IS IN CONFLICT WITH SECTION 440.15(10) FLORIDA STATUTES, 1979

Respondents state that §440.15(3)(b)3.d. and §440.15(10) are "completely consistent" since the former Statute merely precludes entitlement to one class of worker's compensation benefits after age 65 is attained while the latter allows an off-set of social security benefits against worker's compensation benefits until the employee reaches age 62. §440.15(10) does not involve a social security off-set but rather pertains to reductions in all classes of Florida worker's compensation benefits. No reduction is allowed after the injured worker reaches the age of 62. This statutory prohibition applies to all classes of compensation! §440.15(3)(b)3.d. totally reduces a class of worker's compensation benefits to Petitioner and to other similar workers. The prohibition concerning reduction of any class of compensation per §440.15(2) has been directly violated by §440.15(3)(b)3.d. Furthermore, §440.15(10) eliminates the reduction in any class of worker's compensation benefits exactly at the age when eligibility for retirement benefits begins and eligibility for disability benefits end. Reducing a class of Florida worker's compensation benefits pursuant to §440.15(3)(b)3.d. at this critical time conflicts with §440.15(10) and the intent of the Legislature in enacting said section. Reducing compensation benefits prior to age 62 is justifiable since it prevents double dipping. Reducing said benefits after 62 does not prevent double dipping since worker's compensation benefits (disability) and Social Security Retirement are not duplicative. Therefore, said reduction of non-duplicative benefits was prohibited by subsection §440.15(10). The Statutes conflict!

We must construe the Statute so that they harmonize with other provisions and purposes of the Florida Worker's Compensation Act. The Florida Worker's Compensation Act is intended to be liberally construed as to affectuate the purpose for which it was enacted, i.e., provide equity in compensation and to provide for injured workers in such a way that the burdern may fall on the industries served, not on society. We are obliged to construe statutory pronouncements in such a manner as to affectuate their constitutionality, Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So 2d. 981 (Fla. 1981). We are also obliged to adopt the statutory construction which is most favorable to the employee, Kerce v. Coca Cola Foods Division, 389 So 2d. 1177 (Fla. 1980). The Statute has to be construed to allow Petitioner to receive his compensation benefits. Said construction allows the accomplishment of the purposes of the Florida Worker's Compensation Act in total. It allows equity in compensation. It places the burden for compensation on the industry served rather than on the individual or society. §440.15(3)(b)3.d. must be stricken.

CONCLUSION

§440.15(3)(b)3.d. prohibits Petitioner from supplementing his Social Security benefits and does not pass the Federal reasonable standard test concerning the ADEA. Therefore, it is violative of the Supremacy clause. Furthermore, §440.15(3)(b)3.d. violates equal protection and due process since it is based on arbitrary age descrimination. Access to the Courts is also violated due to the Statute not affording a substitute action for the bar to recovery for permanent impairment. §440.15(3)(b)3.d. conflicts with §440.15(10), since it totally reduces compensation to those over 62. The Statute is unconstitutional.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF was mailed this the 11 day of June, 1984 to STEVEN KRONENBERG, ESQUIRE, 2699 South Bayshore Drive, Miami, Florida 33133.

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