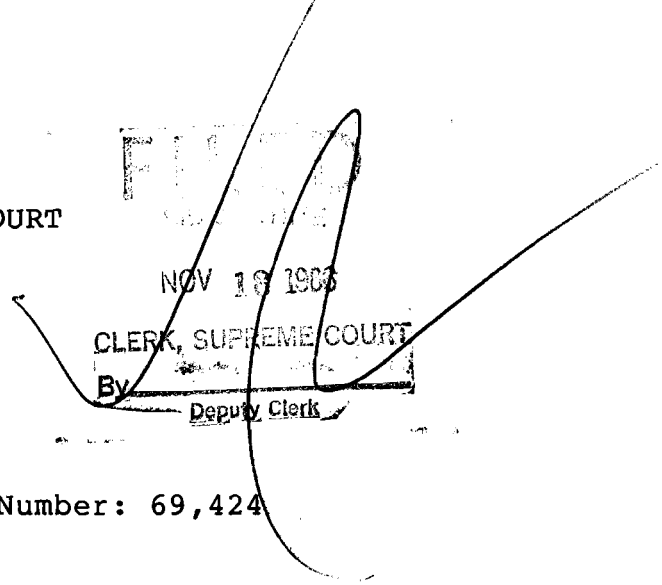
IN THE SUPREME COURT
OF FLORIDA



ROBERT P. MORROW,

Petitioner,

vs. Case Number: 69,424

DUVAL COUNTY SCHOOL BOARD,

Respondent.

DEPARTMENT OF ADMINISTRATION, ETC.,

Petitioner,

vs. Case Number: 69,430

DUVAL COUNTY SCHOOL BOARD,

Respondent.

DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF AMICUS CURIAE, FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSOCIATION (ON BEHALF OF PETITIONER, MORROW)

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STATEMENT OF THE CASE AND FACTS

This case is before the Court for discretionary review having been certified as a question of great public importance pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v). The question certified was:

> DOES A COUNTY SCHOOL BOARD HAVE THE RIGHT, BY VIRTUE OF THE PROVISIONS OF SECTION 231.031, FLORIDA STATUTES, TO REFUSE TO REHIRE A TEACHER ON AN ANNUAL CONTRACT ON THE SOLE BASIS THAT SUCH TEACHER HAS REACHED AGE 70?

Duval County School Board v. State of Florida, Department of Administration, Florida Commission on Human Relations, ___ So.2d ___, 11 Fla.L.W. 1901 (Fla. 1st DCA 1986).

Amicus, Florida Teaching Profession-National Education Association (FTP-NEA), believes the First District Court of Appeal described the case and facts well in its decision at Duval County School Board, ____ So.2d ____, 11 Fla.L.W. 1335 (Fla. 1st DCA 1986). As recounted by that court, this case arose on the complaint of Robert P. Morrow, a teacher in the Duval County Schools, to the Florida Commission on Human Relations (Commission) that the Duval County School Board (School Board) had committed an act of age discrimination by refusing to rehire him solely because he was over age 70. The Commission found in favor of Morrow. The School Board appealed this order to the First District Court of Appeal. The First District reversed the COMMISSION's order. Duval County School Board, ____ So.2d at ___, 11 Fla.L.W. at 1335.

Morrow began teaching in the Duval County Schools in 1962. He was tenured in 1965. Morrow's 70th birthday was in September, 1981. During the 1981-82 school year, school officials informed Morrow that, pursuant to Section 231.031, Florida Statutes, his employment status had changed because he had attained age 70 and that he would only be retained subject to an annual reappointment and only if the superintendent recommended such an appointment. Morrow was given an annual contract for the following year and continued teaching. However, he was informed the he would not receive a contract for the 1983-84 school year. Duval County School Board, ___ So.2d at ___, 11 Fla.L.W. at 1335.

Two important facts have never been in dispute. First, Morrow's performance evaluations, including that for his last year of teaching, were consistently high. Second, the School Board's sole reason for discontinuing his employment was his age. Duval County School Board, ___ So.2d at ___, 11 Fla.L.W. at 1335.

SUMMARY OF THE ARGUMENT

I.

FTP-NEA contends that the Florida Human Rights Act's age discrimination in employment prohibitions at Section 760.10(1)(a), (8)(a) and (b), Florida Statutes (1983), must be read into the teacher retirement age provisions at Section 231.031, Florida Statutes (1983). If this is not done, the two-pronged test for the validity of statutory age restrictions established by this Court cannot be met. In White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1980), the standards for such restrictions were established as requiring that the restriction be both reasonable and evenly applied. Permitting a school superintendent to exercise total discretion in choosing whether to rehire a teacher merely because he or she is over 70 violates the second requirement, that the restriction not be applied arbitrarily. This lack of standards is also impermissable as an unlawful delegation of authority. The Legislature may not allow such decisions to be made without setting standards. This is particularly true where the decision affects the Florida Constitutional right "to be rewarded for industry." Art. I, §2, Fla. Const.

II.

The 70 year old teacher retirement law also fails to meet federal equal protection standards. Massachusetts Board of

Retirement v. Murgia, 427 U.S. 307 (1976), held that age restrictions must have a rational basis. FTP-NEA contends that no reason has been given, nor can any rational reason be given, for the State's choice to provide for retirement of Florida teachers at age 70.

ARGUMENT

I.

PERMITTING PUBLIC SCHOOL TEACHERS TO BE INVOLUNTARILY RETIRED AFTER AGE 70 AT THE DISCRETION OF THE SUPERINTENDENT VIOLATES FLORIDA EQUAL PROTECTION AND DUE PROCESS REQUIREMENTS

The sole issue raised in this case is whether Section 231.031, Florida Statutes (1983), creates an enforceable exception to the Florida Human Rights Act's prohibition against age discrimination in employment. §760.10(1)(a), (8)(a) and (b), Fla. Stat. (1983). Section 231.031, Florida Statutes (1983), provides, in pertinent part:

> . . ., [N]o person shall be entitled to continued employment in any instructional capacity in the public schools . . . after the close of the school year following the date on which he attains 70 years of age; however, upon recommendation of the superintendent, the person may be continued . . . subject to annual reappointment. . . .

The Florida Human Rights Act provides in pertinent part:

> (1) It is an unlawful employment practice for an employer; (a) To discharge or fail or refuse to hire any individual . . . because of . . . age. . . .

§760.10(1)(a), Fla. Stat. (1983), and

> . . ., [N]o [retirement] system . . . shall excuse the involuntary retirement of any individual on the basis of any factor not related to the ability of such individual to perform the particular employment for which such individual has applied or in which such

> individual is engaged. This subsection shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee has failed to meet bona fide requirements for the job or position sought or held. . . .

§760.10(8)(b), Fla. Stat. (1983).

All statutes come clothed with the presumption of validity. Assuming both of these statutes are constitutional, they must be read in pari materia. In reading statutes together, courts should try to retain as much of the full force of each as is possible while attempting to resolve apparent contradictions. Singleton v. Larson, 46 So.2d 186 (Fla. 1950); DeBolt v. Department of Health and Rehabilitative Services, 427 So.2d 221 (Fla. 1st DCA 1983). However, if either of the statutes is susceptible to an interpretation which places it in conflict with constitutional rights and protections, that interpretation should first be rejected. After that, other reasonable interpretations which would harmonize the statutes should be considered.

Amicus FTP-NEA contends that the interpretation given to Section 231.031, Florida Statutes (1983), by the First District Court of Appeal would make that statute unconstitutional under Florida equal protection and due process standards. Amicus also contends that this statute is capable of being reasonably interpreted to be both constitutional and consistent with the Human Rights Act.

Though the issue of the constitutionality of Section 231.031, Florida Statutes (1983), has not been raised previously, the Court has jurisdiction to consider it for the first time at this stage of the proceedings:

> The facial validity of a statute, . . . can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived.

Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1983).

This Court has considered the standards to be applied to equal protection claims based on age in depth in White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1980). In this case, the following standard was set down:

> Whenever an age restriction is attacked on due process or equal protection grounds, we find the test is: (1) whether the restriction under the particular circumstances of the case is reasonable, and (2) whether it is discriminatory, arbitrary or oppressive in its application.

White Egret, 379 So.2d at 351.

In White Egret, a condominium association sought to set aside the transfer of the ownership of one of its units because the transferee had minor children. This was done to enforce the condominium association's restriction against residency by any children under twelve.

In this case, the restriction was found reasonable. However, the condominium association was not permitted to set aside the transfer because its enforcement of the restriction was done in an "unequal and arbitrary" manner.

> Although this restriction was reasonably related to a lawful objective, the appellant is estopped from selectively enforcing the age restriction.

White Egret, 379 So.2d at 352.

The First District's interpretation of Section 231.031, Florida Statutes (1983), is that:

> Under the statute's unambiguous language, it is 'continued employment' to which the 70 year old teacher is not entitled, and not simply tenure or continuing contract status.

Duval County School Board v. Florida Department of Administration, Florida Commission on Human Relations, ___ So.2d at ___, 11 Fla.L.W. at 1336.

With this interpretation of the teacher's employment status after age 70, the balance of Section 231.031, Florida Statutes (1983), gives the superintendent total and unbridled discretion to choose whether or not to recommend that teacher for continued employment on an annual appointment basis.

Respondent was very clear below concerning its decision to involuntarily retire Petitioner, Morrow:

> The School Board did not, and does not, dispute the fact that Morrow's age was the sole factor in not allowing him to continue

> teaching in the Duval County school system. In fact, it is not disputed that Morrow consistently received high performance evaluations throughout his teaching career, including his last year.

Duval County School Board, ___ So.2d at ___, 11 Fla.L.W. at 1335.

Apparently, the Respondent considered its discretion to retire Morrow involuntarily, because he had passed his 70th birthday, complete and total. Although it claims Morrow's being over 70 was the sole reason for his retirement, the facts show:

> Morrow was employed continuously as a teacher in the Duval County school system from 1962 through June, 1983. He received tenured, or continuing contract status in 1965. He reached age 70 in September, 1981. During the 1981-82 school year, Morrow was informed by school officials that in view of his having attained the age of 70, he would be subject to the provisions of Section 231.031, Florida Statutes, at the close of the school year. . . . Subsequently, Morrow received an annual contract for the school year 1982-83 and continued teaching at Forrest High School. In April, 1983, Morrow was informed that he would not receive a contract for the ensuing 1983-84 school year.

Duval County School Board, ____ So.2d at ____, 11 Fla.L.W. at 1335. Petitioner's age was the reason for his retirement beginning with the 1983-84 school year. However, although he was just as clearly over 70 during the 1982-83 school year, he was not prevented from teaching that year. Even considering the facts of the instant case above, the School Board has demonstrated that its application of this restriction was selective and arbitrary. It did not consistently apply this

provision to retire all teachers at the point they passed age 70. It also failed to show that there were any other standards being applied to prevent selective or arbitrary enforcement of this age restriction.

This Court implied in White Egret that there may, in fact, be a stricter standard to be met by an age restriction if the restriction is an "application of the governmental police power," rather than a private agreement.

> In the instant case, the restriction is not a zoning ordinance adopted under the police power but rather a mutual agreement entered into by all condominium apartment owners of the complex. With this type of land use restriction, an individual can choose at the time of purchase whether to sign an agreement with these restrictions or limitations.

White Egret, 379 So.2d at 350.

In Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc., ___ So.2d _____, 11 Fla.L.W. 714 (Fla. 3d DCA 1986), the Third District, en banc, affirmed the circuit court's decision holding that Dade County's ordinance prohibiting age discrimination in housing was unconstitutional under White Egret. However, in a well reasoned dissent by Judge Schwartz, joined by Judges Hubbart and Ferguson, Amicus' view of the limited applicability of White Egret is reinforced:

> A fortiori, White Egret affords no basis for the circuit court conclusion. That decision simply holds, in the absence of any

> constitutional or statutory provision on the question, that age restrictions may properly be the subject of a private contract such as a condominium agreement.

Sunrise Village, ____ So.2d at ____, 11 Fla.L.W. at 716. The interpretation given to Section 231.031, Florida Statutes (1983), by the First District below, ignores White Egret's requirement that age restrictions be applied uniformly as well as its distinctions between age restrictions applied by private agreement and those applied by governmental bodies.

The Florida Constitution provides strong protection for the basic right "to be rewarded for industry." Art. I, §2, Fla. Const. In World Fair Freaks and Attractions, Inc. v. Hodges, 267 So.2d 817 (Fla. 1972), this Court invalidated a statute which prohibited pursuing a livelihood through a particular type of side show exhibition. The importance of clear standards and of this right itself were explained as follows:

> . . . In the present instance it would appear that the statute in question must fall because of a lack of any reasonable standards or definitions which can be followed in the enforcement of the statute. In its present form it would be left almost to the unbridled discretion of the individual public official to determine in his own mind by his personal judgment whether or not the exhibition fell within the questioned language of Section 867. This lack of standards has been consistently condemned by the courts.
>
> * * *
>
> . . . We have consistently upheld the individual's right to pursue a lawful occupation and also have held that this is a property right protected by the constitution

> and the courts. The power to regulate is not synonymous with the power to prohibit absolutely.

World Fair Freaks, 267 So.2d at 819. (Footnote omitted.) Section 231.031 directly impacts on the property right to pursue a lawful occupation. The Legislature has unlawfully delegated sole discretion to the superintendent to determine the employment fate of all teachers over the age of 70.

The selectivity in application permitted by this interpretation not only violates Morrow's equal protection rights under Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution, but also violates his due process rights under Article I, Section 9, Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Assuming, arguendo, that a school board may convert the status of a teacher from tenured to non-tenured, even non-tenured teachers can acquire property rights in their employment requiring that the school provide due process prior to depriving them of those rights. Morrow was a tenured teacher whose status, solely because of his age, was converted to annual contract employment. Where a public employer acts in a way that may deprive an employee of a fundamental right, tenure need not be shown to establish that that employee is entitled to due process

protections. In another case involving the involuntary termination of a teacher, the First District stated:

> While school administrators have the right to promote efficiency in an environment favorable to learning, and to investigate the competence and fitness of those whom they hire to teach, . . .
>
> Certainly her rights as an instructor under continuing contract should be no less protected than those of non-tenured teachers whose contracts may not be arbitrarily non-renewed because they have exercised First and Fourteenth Amendment rights.

Texton v. Hancock, 359 So.2d 895, 897 (Fla. 1st DCA 1978). Once the School Board elected to renew Morrow's employment for a year beyond the expiration of his tenured status, it had the due process obligation to provide him with both notice and an opportunity to be heard concerning their subsequent decision not to rehire him.

To save the constitutionality of Section 231.031, Florida Statutes (1983), rather than following the First District, this Court could adopt the construction of the Florida Commission on Human Relations below. This construction permits a teacher's status to be converted from tenured to annual contract after the teacher turns 70, but does not permit the teacher to be involuntarily retired without a showing that the teacher's ability to perform is inadequate. §760.10(8)(b), Fla. Stat. (1983).

The First District's construction nullifies Section 760.10, Florida Statutes (1983), as it applies to teachers over 70 without express legislative language stating that Section 231.031 was meant to be an exception. This is contrary both to Section 760's express provision that the Human Rights Act be "liberally contrued," §760.01(3), Fla. Stat. (1983), and to the primacy that anti-discrimination laws hold in the hierarchy of exercises of the police power.

Again, the dissenting opinion concerning the validity of Dade County's age discrimination ordinance in Sunrise Village expresses this well:

> The ordinance in question is firmly rooted in the most fundamental source of governmental authority: the police power. That doctrine validates any enactment which may reasonably be construed as expedient for the protection or encouragement of the public health, safety, welfare or morals. Newman v. Carson, 280 So.2d 426 (Fla. 1973). Anti-discrimination laws like this -- which prohibit the arbitrary exclusion of a class of citizens from otherwise publicly available facilities and services -- are clearly related to the most basic concerns of the public welfare and morality and thus may not be struck down. See, e.g., Roberts v. United States Jaycees, 468 U.S. ___, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); In re: Cox, 3 Cal.3d 205, 474, P.2d 992 (1970). Indeed, I think it self-evident that government may properly conclude that it is simply wrong to discriminate on the basis of a personal characteristic over which a the concerned individual has no control -- whether it be race, sex, handicap or age; therefore, there can be no basis for interfering with a legislative conclusion to forbid it.
>
> While, probably because of the obviousness of this proposition, I have been

> unable to find any prior instance in which the contrary argument has ever been advanced, let alone accepted as by the majority, so that there is no quotable language which explicitly so holds, I am content to rely on the Supreme Court's statement that a statute which
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> > 'reflects the state's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . [reflects a] goal [which] plainly serves compelling state interest of the highest order.'
>
> Roberts, 468 U.S. at ____, 104 S.Ct. at 3253, 82 L.Ed.2d at 475.

Sunrise Village, ____ So.2d at ____, 11 Fla.L.W. at 715. (Emphasis added.)

In order to preserve the constitutionality of Section 231.031 and give effect to it without completely abrogating Section 760.10(1)(a) and (8)(b), an interpretation applying the Human Rights Act's competence standards must be applied to recommendations of superintendents for renewing contracts for teachers over 70. However, Amicus FTP-NEA in no way concedes that Section 231.031 is a reasonable restriction or that it has a rational basis. Even an interpretation of this section that permits only the automatic conversion of the employment status but not involuntary retirement of a teacher merely because that teacher is over 70 cannot easily pass constitutional muster. Arguments supporting this position are advanced in the following section of this brief.

II.

INVOLUNTARY RETIREMENT OF TEACHERS OVER 70 VIOLATES FEDERAL EQUAL PROTECTION AND DUE PROCESS STANDARDS.

The United States Supreme Court has also addressed the issue of the standards to be applied to determine whether age restrictions violate equal protection. Like this Court's determination that the reasonableness test must be met, the United States Supreme Court found that "rationality is the proper standard by which to test whether compulsory retirement . . . violates equal protection." Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

In Murgia, a mandatory, not selective, law requiring police officers to retire at 50 was found to be rational. The court stated:

> . . . Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel. As the District Court observed, "service in this branch is, or can be, arduous." 376 F.Supp., at 754. "[H]igh versatility is required, with few, if any, backwaters available for the partially superannuated." Ibid. Thus, "even [appellee's] experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." Id., at 755.

Murgia, 427 U.S. at 311, 312.

Police work has been considered so unique and demanding that restrictions concerning those who may perform it may not violate equal protection rights even where a classification requires stronger scrutiny than rationality.

In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Supreme Court described the standards an employment restriction based on sex must meet:

> . . . In Diaz v. Pan American World Airways, 442 F.2d 385, 388, the Court of Appeals for the Fifth Circuit held that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis in original.) In an earlier case, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235, the same court said that an employer could rely on the bfoq exception only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Se also Phillips v. Martin Marietta Corp., 400 U.S. 542, 27 L.Ed 2d 613, 91 S.Ct. 496. But whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes, . . .

Dothard, 433 U.S. at 333. (Footnote omitted.) Despite the fact that this standard is much more difficult to meet than the rationality standard for age restrictions, the Court found that

restrictions against women working as prison guards in a male facility met this stringent test.

> The essence of a correctional counselor's job is to maintain prison security . . . In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is under-staffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.

Dothard, 433 U.S. at 335, 336.

After Murgia, the United States Court of Appeals for the Seventh Circuit was asked to determine the validity of mandatory retirement for teachers at age 65, with a provision allowing subsequent employment on an annual basis. In Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), cert. denied 440 U.S. 945 (1979), the Seventh Circuit refused to uphold this law absent a factual showing that it "rationally furthers some identifiable and articulable state purpose." As in this case, no evidence had been presented to support any reason the Legislature could have had for creating such a restriction. Based on this lack of evidence the court observed:

> . . . In Murgia, the Court found no indication that the mandatory retirement provision had "the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrealted to the objective of the statute." 427 U.S. at 316, 96 S.Ct. at 2568. Unlike the Court in Murgia, we cannot say that the provisions in the instant case would eliminate any more

> unfit teachers (assuming again that such is the purpose) than a provision to fire all teachers whose hair turns gray.

Gault, 569 F.2d at 996.

Gault recognized the differences between the effect of advancing age on performance as a police officer and as a teacher.

> . . . The physical demands of teaching do not even begin to approach those found by the Supreme Court, upon credible evidence, to be critical to the performance of uniformed state police duties. No evidentiary proof is necessary to note that teaching is a profession in which mental skills are vastly more important than physical ability. We cannot assume that a teacher's mental faculties diminish at age 65. On the contrary, as suggested by plaintiff's offer of proof, much in the way of knowledge and experience, so helpful to the educational profession, is often gained through years of practice.
>
> . . . Because of the nature of the duties required of the policemen in the latter case and the imminent possibility of unfitness shown to be related to advancing age, failure to perform properly in any given instance could become a matter of life or death. In contrast, if a teacher becomes unfit, whether because of age or other factors, it does not become a matter of such immediacy that there is no time or opportunity to take appropriate procedural steps for his or her removal.

Gault, 569 F.2d at 996.

The Seventh Circuit was also concerned with Ms. Gault's due process right. She contends that the

> lack of any procedure in both the automatic termination of her tenure and her mandatory

> retirement resulted in treatment unequal to that given to any other teacher who is released. Both tenured and probationary teachers under age 65 are guaranteed procedural safeguards prior to any termination. This situation is similar to that in a recent case decided by this court. In Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), aff'd, ____ U.S. ____, 98 S.Ct. 786, 54 L.Ed.2d 603 (1978), . . .
>
> Here, as in Miller, the classification of teachers, between those who are afforded and those who are not afforded procedural safeguards before their removal, on its face discriminates against persons who are similarly situated. Accordingly, we cannot sanction the total lack of procedural equality suffered by teachers who have reached the age of 65 without a record showing the presence or absence of a justifiable and rational state purpose.

Gault, 569 F.2d at 996, 997.

Amicus submits that there are no facts which could be presented to support the rationality of an arbitrary 70 year old automatic retirement law for teachers. However, in light of the reasoning in Gault, the rationality of such a provision can, in no case, be upheld in the complete absence of evidence supporting its rationale.

In its September, 1983, report "Employment and Earnings," the United States Department of Labor, Bureau of Labor Statistics showed the total of civilian, noninstitutional population 70 and over in the United States to be 17,066,000 people in August, 1983. Of these, 1,301,000 (or 7.6% of those over 69) were in the labor force. At that time, there were a total of 113,578,000 people over sixteen years of age in the labor force. The

percentage of the entire adult labor force made up of those 70 or over was, therefore, 1.2%. Only 749,000 (or 4.4%) of those 70 or over reported that they were unable to work. Over one-third of those over 69 (6,990,000) reported that they were out of the labor force because they were keeping house. Nearly half of those 70 or over reported they were not in the labor force for "other reasons." It is probably a safe assumption that many of this last group are retired, either voluntarily or involuntarily.

So, the Bureau of Labor Statistics figures show that, at the time Morrow was not rehired, 7.6% of those persons available to work and 70 or over were, in fact, still in the labor force. Though the information is self-reported, it is still of some value to observe that only 4.4% of those over 69 described the reason for their not participating in the labor force as their inability to work.

Many public and private sector employers have programs and policies for employee retirement. Some permit the employee to receive retirement benefits after having worked for the employer for a specific number of years, e.g. twenty or thirty years, without regard to age. Some combine the job longevity requirement with a minimum age. Permitting an employee to choose to retire, after many years of service, with retirement benefits providing a source of income for the retirement years, is an employer policy that has individual, business, and social

benefits. Mandatory retirement ages, however, while they may simplify personnel procedures often have little relationship to increase productivity or other sound management goals.

It is undisputed that Morrow consistently received high performance evaluations. It is a good management policy to retain good employees. This is particularly true when there is a shortage of good, qualified employees of the kind the business uses.

In 1983, in creating the position of adjunct instructor in the public schools, the Florida Legislature stated:

> The Legislature finds that there is a critical shortage of qualified teachers in various academic and specialization areas. Further, there is an abundance of talent in these critical areas in the private sector of the state and among its retired citizenry. It is hereby declared that the intent of the Legislature as expressed in this act is to encourage the full utilization of available resources outside the current teacher pool to meet these critical needs for qualified teachers.

§231.251(1), Fla. Stat. (1985). (Emphasis added). In 1984, the Legislature provided an alternative certification program for secondary school teachers (Morrow was a high school teacher). This program was established "for the purpose of attracting arts and science graduates to teach in the secondary schools of this state, particularly in areas of critical shortage." §231.172(1), Fla. Stat. (1985).

Retaining good teachers is clearly an important Legislative concern. Florida's "Master Teacher Program" was established "to recognize superior ability among Florida's instructional personnel and to provide an economic incentive to such personnel to continue in public instruction. §231.533, Fla. Stat. (1985). (Emphasis added). Under these conditions of shortage and with such serious measures being taken to retain good teachers, it seems highly irrational that the Legislature intended that good, experienced teachers be involuntarily removed from the classroom merely because they had passed an arbitrary age limit.

Amicus FTP-NEA contends that age restrictions prohibiting continued employment after 65 or 70, for example, are arbitrary as applied to virtually all types of employment. This is supported by the development of laws concerning age discrimination and the case law under them. In Johnson v. Mayor and City Council of Baltimore, ___ U.S. ___, 105 S.Ct. 2717, 86 L.Ed.2d 286 (1985), the United States Supreme Court described the development of the Federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621, et seq. (ADEA).

> The ADEA originally did not apply to the Federal Government, to the States or their political subdivisions, or to employers with fewer than 25 employees, but in 1974 Congress extended coverage to Federal, State and local Governments, and to employers with at least 20 workers. §§630(b), 633a. Also, while the Act initially covered employees only up to age 65, in 1978 Congress raised the maximum age to 70 for state, local and private employees and eliminated the cap entirely for federal workers. Age Discrimination in Employment Act

> Amendments of 1978, §3(a), 92 Stat. 189, 29 U.S.C. §631(b) (hereinafter 1978 Amendments).
>
> The 1978 Amendments eliminated substantially all federal age limits on employment, but they left untouched several mandatory retirement provisions of the federal civil-service statute applicable to specific federal occupations, including fire fighters, air traffic controllers, and law enforcement officers, as well as mandatory retirement provisions applicable to the Foreign Service and the Central Intelligence Agency.

Johnson, ___ U.S. at ___, 105 S.Ct. at 2719. (Footnote omitted).

Most states, like Florida, also have laws prohibiting age discrimination in employment. (Please see chart at the conclusion of this portion of the argument.) Some have upper and/or lower age limits. Some have neither.

Both private and public employers have attempted to enforce policies or laws requiring retirement prior to age 70 for certain types of employees. Two landmark cases, one dealing with airline flight engineers, and another dealing with fire fighters, held that the ADEA prohibited such action. The employers in these cases attempted to show that the physical demands of these jobs and the crucial factor safety plays in performing them justified the requirement that only employees younger than 60, for flight engineers, or younger than 55, for fire fighters, should be permitted to do these jobs.

In Western Air Lines v. Criswell, ___ U.S. ___, 105 S. Ct. 2743, 86 L.Ed.2d 523 (1985), the Court held that Western Air Lines could not require retirement of flight engineers, who are responsible to fly the plane should a pilot become incapacitated,

at age 60. Congressional findings concerning age were related by the Court to support its holding that exceptions to the ADEA should be narrowly construed. The House Committee on Education and Labor reported:

> Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. . . .
>
> Society, as a whole, suffers from mandatory retirement as well. As a result of mandatory retirement, skills and experience are lost from the work force resulting in reduced GNP.
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> * * *
>
> The Senate Committee Report expressed concern that the amendment prohibiting mandatory retirement in accordance with pension plans might imply that mandatory retirement could not be a BFOQ:
>
> > For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

Western Air Lines, ___ U.S. ___, 105 S.Ct. at 2750, 2752.

In its unanimous opinion in Johnson, the Court held that city fire fighters could not be required to retire at 55 or 60 under the ADEA. Again, the employer was unable to show that substantially all employees over these ages would be unable to perform the job safely or that it would not be practical to determine capability on an individualized basis.

It is clear that the ADEA did not cover Morrow's termination. At that time, the upper age limit for discrimination actions was 70. However, President Reagan recently signed a new amendment to the ADEA into law. This amendment eliminates any upper age limits to actions based on age discrimination in employment. This amendment, effective January 1, 1987, effectively invalidates laws requiring retirement at a particular age without a showing of invalidity to perform the job. Congressional Quarterly Weekly Report, at 2676 (Oct. 25, 1986).

Amicus FTP-NEA asserts that changing the upper age limits for actionable discrimination claims from 65 to 70 to no limit shows how irrational such arbitrary cutoffs are. Mr. Morrow was born a few years too early to benefit from the sudden enlightenment of Congress concerning the fact that no age can be selected which is an accurate predictor of employee decline. (Although, if he applies again after January 1, 1987, and is rejected for employment he may well have a new claim for age discrimination in hiring under the ADEA.) Regardless of what conceivable reason the State may have had for providing that

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Types of Discrimination Prohibited

State	Race	Religion	Sex	National Origin	Age[a]	Handicap	Marital Status	Equal Pay	Arrest Records[b]	Lie Detectors[b]
Alabama	—	—	—	—	—	X[c]	—	—	—	—
Alaska	X	X	X[d]	X	X	X	X	X	—	X
Arizona	X	X	X	X	40 to 70	X	—	X	—	—
Arkansas	—	—	—	—	40 to 71[c]	X[c]	—	X	—	—
California	X	X	X	X	40 and over	X	X	X	X	X[e]
Colorado	X	X	X	X	40 to 70	X	—	X	X	—
Connecticut	X	X	X	X	X	X	X	X	X	X
Delaware	X	X	X	X	40 to 70	—	—	X	—	X
District of Columbia	X	X	X[d]	X	18 to 65	X	X	—	—	X
Florida	X	X	X	X	X	X	X	X	X[c]	—
Georgia	X[c]	X[c]	X[c]	X[c]	40 to 70	X	—	X	—	—
Hawaii	X	X	X[d]	X	X	X	X	X	X[c]	X
Idaho	X	X	X	X	40 to 70	X[c]	—	X	—	X
Illinois	X	X	X	X	40 to 70	X	X	X	X	X
Indiana	X	X	X	X	40 to 70	X	—	X	—	—
Iowa	X	X	X[d]	X	18 and over	X	X	—	—	X
Kansas	X	X	X	X	40 to 70	X	X	X	—	—
Kentucky	X	X	X[d]	X	40 to 70	X	—	X	X[c]	—
Louisiana	X	X	X	X	40 to 70	X	—	—	—	—

(a) Age coverage indicated by X or by age range, if specified. In general, protection ends when the upper age is reached.
(b) See state laws for specific provisions on employer use.
(c) State employment only.
(d) Contains provisions prohibiting pregnancy discrimination.
(e) Includes voice stress analyzers.

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Types of Discrimination Prohibited—Contd.

State	Race	Religion	Sex	National Origin	Age[a]	Handicap	Marital Status	Equal Pay	Arrest Records[b]	Lie Detectors[b]
Maine	X	X	X[d]	X	X	X	X[c]	X	—	X
Maryland	X	X	X[d]	X	X	X	X	X	X	X
Massachusetts	X	X	X[d]	X	over 40	X	X	X	X	X
Michigan	X	X	X[d]	X	X	X	X	X	X	X
Minnesota	X	X	X[d]	X	18 and over	X	X	X	X	X
Mississippi	X[c]	X[c]	X[c]	X[c]	X[c]	X[c]	—	—	—	—
Missouri	X	X	X	X	40 to 70	X	—	X	—	—
Montana	X	X	X[d]	X	X	X	X	X	—	X
Nebraska	X	X	X[d]	X	40 to 70	X	X	X	—	X
Nevada	X	X	X	X	40 to 70	X	—	X	—	X
New Hampshire	X	X	X[d]	X	X	X	X	X	—	—
New Jersey	X	X	X	X	X	X	X	X	—	X
New Mexico	X	X	X	X	X	X	—	—	—	—
New York	X	X	X	X	18 to 65	X	X	X	X	X[f]
North Carolina	X	X	X	X	40 to 70[c]	X	—	—	—	—
North Dakota	X	X	X[d]	X	40 to 70	X	X	X	—	—
Ohio	X	X	X[d]	X	40 to 70	X	—	X	X	—
Oklahoma	X	X	X	X	40 to 70	X	—	X	—	—
Oregon	X	X	X[d]	X	18 to 70	X	X	X	—	X
Pennsylvania	X	X	X[d]	X	40 to 71	X	—	X	X	X[e]

(a) Age coverage indicated by X or by age range, if specified. In general, protection ends when the upper age is reached.
(b) See state laws for specific provisions on employer use.
(c) State employment only.
(d) Contains provisions prohibiting pregnancy discrimination.
(e) Includes voice stress analyzers.
(f) Psychological stress evaluator only.

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Types of Discrimination Prohibited—Contd.

State	Race	Religion	Sex	National Origin	Age[a]	Handicap	Marital Status	Equal Pay	Arrest Records[b]	Lie Detectors[b]
Puerto Rico	X	X	X[d]	X	under 70	—	—	—	—	—
Rhode Island	X	X	X	X	40 to 70	X	—	X	X	X
South Carolina	X	X	X[d]	X	40 to 70	X	—	—	—	—
South Dakota	X	X	X	X	18 to 70[c]	X	—	X	—	—
Tennessee	X	X	X	X	40 to 70	X	—	X	—	—
Texas	X	X	X	X	40 to 70	X	—	X[c]	—	—
Utah	X	X	X	X	40 to 70	X	—	—	—	X
Vermont	X	X	X	X	18 and over	X	—	—	—	X
Virginia	X[c]	X[c]	X[c]	X[c]	X[c]	X	—	X	X	X
Virgin Islands	X	X	X[d]	X	X	—	—	—	—	—
Washington	X	X	X	X	40 to 70	X	X	X	X	X
W. Virginia	X	X	X	X	40 to 65	X	—	X	—	X
Wisconsin	X	X	X[d]	X	40 and over	X	X	—	X	X
Wyoming	X	X	X	X	40 to 70	X	—	X	—	—

(a) Age coverage indicated by X or by age range, if specified. In general, protection ends when the upper age is reached.
(b) See state laws for specific provisions on employer use.
(c) State employment only.
(d) Contains provisions prohibiting pregnancy discrimination.
(e) Includes voice stress analyzers.
(f) Psychological stress evaluator only.

CONCLUSION

Based on the authority and for the reasons cited herein, Amicus FTP-NEA requests this Court to reverse the decision of the First District Court of Appeal and find Florida's 70 year old teacher retirement law invalid on its face, or, in the alternative, require that the law be read to require that teachers over 70 be retained on annual contracts unless it can be shown that they are unable to perform their jobs, as required by the Florida Human Rights Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 18th day of November, 1986, to: Gerald A. Schneider, General Counsel, 1300 City Hall, Jacksonville, Florida 32202; William Lee Allen, Gary E. Eckstine, Neill W. McArthur, Jr., Assistant Counsel, 1300 City