



Writer's email: bob@robertdklausner.com

April 24, 2020

Susan Lenczewski, Executive Director
Legislative Commission on Pensions and Retirement
100 Rev. Dr. Martin Luther King, Jr. Blvd.
State Office Building Room 55
St. Paul, MN 55155

Re: HF 4298/SF 4203 and Age Discrimination

This is in response to a request from Brian Rice for guidance on whether HF 4298/SF 4203 (the Bill) is discriminatory on the basis of age in violation of 29 U.S.C. 623 and Minn. Stat. Sections 363A.08 and 181.18. For the reasons which follow I believe that it is, and respectfully disagree with the opinion issued by PERA.

The Bill reduces disability benefits for public safety members who are 55 years of age, become disabled, but are not yet eligible to retire based on years of credited service. On its face, the Bill is based solely on age and not retirement status. According to the staff analysis by Chad Burkitt at the Legislative Commission on Pensions and Retirement (the Commission), there is no circumstance in which a person 55 years of age or older with less than 20 years of service fares equal to or better than a younger person. This factor is critical to understanding the analysis that led to the decision of the United States Supreme Court in *Kentucky Retirement Systems v. EEOC*, 128S.Ct. 2361 (2008). I was lead counsel and argued this case for Kentucky.

In Kentucky, under the challenged law, disability retirement benefits ceased to be available once a member was otherwise eligible to retire on a regular service retirement under KRS. In other words, disability coverage was akin to a program of disability insurance that covered members until they became eligible to retire based on years of service or age plus years of service, whichever came first. In Kentucky, a firefighter could retire at age 55 with 5 years of service OR 20 years

7080 NORTHWEST 4TH STREET, PLANTATION, FLORIDA 33317

PHONE: (954) 916-1202 – FAX: (954) 916-1232

www.klausnerkaufman.com

regardless of age. To get a disability, a member could not be eligible for a service retirement under either standard. The reason it was held NOT discriminatory is that there were many circumstances in which a younger firefighter could be denied a disability but an older one could still receive the benefit. For example, a 38-year old who had 20 years of service could not get a disability because that individual had reached normal retirement eligibility. By contrast, a 45-year old firefighter with 5 years of service could receive a disability because he or she would not be eligible to retire for 10 more years. In other words, it was equally likely that younger hires would lose disability protection before someone hired at an older age. So it was clear, on its face, that age was not the determining factor. It was all about ability to receive a service retirement. The U.S. Supreme Court took specific note of this distinction in its opinion at p. 2365. At p. 2367, the Court stated, that normal pension eligibility turned on “*either*” (emphasis in the original) service or age plus service. It is also worth noting that federal public safety officers have a nearly identical disability program.

Under the Minnesota Bill, no one who is 55 gets a disability. If, hypothetically, a 55 year old with 20 years cannot get a disability because he or she is eligible for a service retirement, but a 55 year old who has 10 years of service *could* get a disability, then there would be a good argument for the law being based on retirement status rather than age. That is not, however, how the plain language of the Bill reads. As noted in the Commission’s staff analysis, all 45-year olds with 20 years can get a disability but no 55-year olds with less than 20 years can get disability. In other words, age is the deciding factor. It is my view that this Bill, if adopted, will not withstand judicial scrutiny.

If the Bill is adopted, it is likely subject to challenge. As a state entity, however, PERA is not subject to suit by individuals. In *Kimel v. Fla. Board of Regents*, 120 S.Ct. 631 (2000), the United States Supreme Court held that the age discrimination statute did not abrogate a state’s immunity under the 11th Amendment. PERA is, however, is subject to suit under the age discrimination statute by the EEOC. *EEOC v. Kentucky Retirement Systems*, 16 Fed. Appx. 443 (6th Cir. 2001), relying on *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). The state has no immunity for claims under Minnesota law embodied in Minn. Stat. Sections 363A or 181.81.

As the public safety service is hiring much older people than it did in the past, senior firefighters are at greater risk of being disabled without disability retirement protection. Cutting disability protection for the most vulnerable group of public safety officers when their services are critical to the health, safety and, and welfare of all Minnesotans has no logic.

April 24, 2020
Page 3

To the extent it has been suggested that a small number of senior members are attempting to use the disability provisions to gain an economic advantage vis-a-vis the taxability of disability versus service retirements, my experience in working with hundreds of state and local retirement plans for more than 40 years strongly suggests that can be controlled through the administrative process by which disability benefits are decided.

Sincerely,

/s/Robert D. Klausner
ROBERT D. KLAUSNER

RDK/yv