

2001 WL 34483995 (N.D.Ill.) (Trial Pleading)
United States District Court, N.D. Illinois.

Donald DRNEK, Plaintiff,
v.
CITY OF CHICAGO, an Illinois Municipal Corporation, Defendant.

No. 01 C 0840.
May 8, 2001.

Trial by Jury Demanded

Amended Complaint

Judge Bucklo, Magistrate Judge Ashman.
Clinton A. Krislov, Michael R. Karnuth, Krislov & Associates, Ltd., Chicago, IL

Ronald L. Futterman, Joan Matlack, Futterman & Howard, Chtd., Chicago, IL

The plaintiff, Donald Drnek, by and through his attorneys, for his complaint against the City of Chicago, an Illinois Municipal Corporation, states as follows:

THE PARTIES

1. Plaintiff Donald Drnek (“Drnek”) is a citizen of the United States and a resident of Chicago, Illinois. Drnek is a former police officer and former employee of the City of Chicago who was wrongfully terminated or “involuntarily retired” on December 3 I, 2000 because of his age. Plaintiff Drnek was age 65 at the time of his termination. Plaintiff Drnek is an “employee” for the purposes of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §630(f).
2. Defendant City of Chicago is an Illinois Municipal Corporation located within this judicial district which maintains its own police force. The City of Chicago is an “employer” under the ADEA, 29 U.S.C. §630(b).

JURISDICTION AND VENUE

3. This cause of action arises under the ADEA, 29 U.S.C. § 621 *et seq.*, the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution.
4. Jurisdiction is based upon 28 U.S.C. § 1331, 28 U.S.C. § 1367 and 29 U.S.C. § 626.
5. Venue is proper in this Court pursuant to 28 U.S.C. 1391 (b) because the claim arose in this judicial district.

JURY DEMAND

6. Plaintiff demands a trial by jury.

SUBSTANTIVE ALLEGATIONS

A. Conditions Precedent Met

7. All conditions precedent to this action have been fulfilled. On September 19, 2000, Plaintiff timely filed a charge with the Equal Employment Opportunity Commission alleging age discrimination in termination (attached as Exhibit A) and received his right to sue letter within ninety days of commencement of this case (attached as Exhibit B).

B. Background

8. Plaintiff was born on May 22, 1935 and is 65 years old.

9. On or about July 1, 1957, plaintiff was hired by the City of Chicago as a police officer.

10. At all times pertinent hereto, plaintiff performed his job duties as a police officer in a satisfactory manner.

11. Nevertheless, sometime in December 2000, plaintiff was informed that pursuant to an ordinance adopted by the City of Chicago on May 17, 2000, plaintiff was to be terminated or "involuntarily retired" solely because he was over the age of 63 years.

12. The Age Discrimination in Employment Act (29 U.S.C. §621, *et. seq.*) prohibits discrimination on the basis of age in employment. Section 623(a) of the ADEA provides that it is unlawful for any employer:

a. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

b. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

c. to reduce the wage rate of any employee in order to comply with this chapter.

13. Beginning on or around September 30, 1996 and continuing to the present, there existed and continues to exist a legislatively-created "public safety" exception to the ADEA, 29 U.S.C. 6230), which provides in relevant part:

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken-

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained-

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)

(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of-

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that *is not a subterfuge to evade the purposes of this chapter.*

(emphasis added).

14. On May 17, 2000, the City of Chicago adopted an ordinance which amended Chapter 2-152-140 of the Municipal Code to read as follows:

(a) Effective December 31, 2000, the age of 63 shall be the maximum age for employment of sworn members of the police department, including a sworn member who is transferred or appointed to a supervisory or administrative position.

* * *

(d) All persons to whom this ordinance applies shall be retired upon attainment of age 63. Any person to whom this ordinance applies whose age is 63 or more on December 31, 2000 shall be retired upon that date.

Chicago Municipal Code 2-152-140 (hereinafter, the "Ordinance" or "Mandatory Retirement Ordinance").

15. Following enactment of the Ordinance, plaintiff was terminated by the City of Chicago on December 31, 2000, the effective date of the Ordinance, for exceeding the mandatory retirement age.

C. The Real Purpose in Enacting the Ordinance

16. The Ordinance was enacted as a subterfuge to evade the purposes of the ADEA. The purpose of the Mandatory Retirement Ordinance was not to promote the interests of public safety; the Ordinance was passed to accomplish other objectives through the mandatory retirement of police officers over the age of 63.

17. The Mandatory Retirement Ordinance was enacted for the purpose of eliminating from the ranks of the Police Department plaintiff and other police officers who had surpassed 63 years of age so that, among other reasons, the City could hire and promote younger police officers within its Police Department.

COUNT I

AGE DISCRIMINATION IN TERMINATION

18. Plaintiff adopts and realleges paragraphs 1 through 17.

A. Subterfuge of the ADEA's Purposes

19. By enacting and enforcing the Mandatory Retirement Ordinance and terminating plaintiff's employment for reasons other than the promotion of public safety, defendant and its agents have willfully and intentionally discriminated against plaintiff on the basis of his age in a manner that acts as a subterfuge to evade the purposes of the ADEA. Such conduct violates the ADEA. 29 U.S.C. §§ 623(a) and 623(j)(2).

B. Failure to Afford Plaintiff an Opportunity to Prove Fitness for Duty

20. In 1996, at the same time as it enacted the current provisions of 29 U.S.C. Section 623 (j) of the ADEA, Congress also enacted regulations requiring development and implementation of performance tests for police officers attaining mandatory retirement age to determine whether they are fit to continue their employment despite their age. Theregulation, Public Law 104-208, 110 Stat. 3009-24 (Sept. 30, 1996), provides in relevant part:

* * *

(c) ADVISORY GUIDELINES.--Not later than 4 years after the date of enactment of this Act, the Secretary shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters.

(d) JOB PERFORMANCE TESTS. --

(1) IDENTIFICATION OF TESTS.--After issuance of the advisory guidelines described in subsection (c), the Secretary shall issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4(j) of the Age Discrimination in Employment Act of 1967 with respect to firefighters or law enforcement officers who have attained an age of retirement described in such section 4(j).

(2) USE OF TESTS.--Effective on the date of issuance of the regulations described in paragraph (1), any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in paragraph (1), in order to continue employment.

21. When read in conjunction with the above regulations, the spirit and letter of Section 4230) of the ADEA provides an exception to the ADEA for mandatory retirement laws only when the officer can no longer meet the fitness requirements of his job.

22. Municipal Code §2-152-410, as written and as currently interpreted and implemented by the City of Chicago, is in direct contravention to Section 4230) of the ADEA in that it fails to provide any officer, including plaintiff, with an opportunity to prove his fitness for duty. This is not the result intended or contemplated by Section 4230).

23. At no time was plaintiff ever offered the opportunity to prove his “physical and mental” fitness to remain on the job.

24. In the absence of determining plaintiffs’ mental and physical fitness for duty, the City of Chicago’s termination of the plaintiff pursuant to Municipal Code Section 2-152-410 is in violation of the ADEA.

C. The City’s Violation of the ADEA

25. The City’s Mandatory Retirement Ordinance violates the ADEA and is void and unenforceable.

26. By terminating plaintiff’s employment, defendant and its agents have willfully and intentionally discriminated against plaintiff on the basis of his age.

27. In enacting and enforcing the Mandatory Retirement Ordinance and in terminating plaintiff Drnek, defendant knew, or should have known, that its conduct violated the ADEA.

28. As a result of the unlawful and willful acts complained of herein, Plaintiff has suffered loss of employment, wages, benefits, and other compensation, as well as emotional distress, embarrassment, humiliation, and other mental anguish, and loss of his useful working life as a police officer.

COUNT II

VIOLATION OF PLAINTIFF'S DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION

29. Plaintiff adopts and realleges paragraphs 18-28.

30. Plaintiff has a property interest in his employment as a police officer, and the wages, benefits and other compensation related to that employment.

31. Defendant's mandatory retirement of plaintiff has deprived him of his property interest without due process, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (U.S.C. Amends. 5 and 14).

32. The Mandatory Retirement Ordinance is unenforceable and void as written and as applied, and violates the Fifth and Fourteenth Amendments to the Constitution of the United States.

33. As a result of the unlawful and willful acts complained of herein, plaintiff has suffered loss of employment, wages, benefits, and other compensation, as well as emotional distress, embarrassment, humiliation, and other mental anguish, and loss of his useful working life as a police officer.

COUNT III

VIOLATION OF PLAINTIFF'S DUE PROCESS RIGHTS UNDER THE ILLINOIS CONSTITUTION

34. Plaintiff adopts and realleges paragraphs 18-28.

35. Plaintiff has a property interest in his employment as a police officer, and the wages, benefits and other compensation related to that employment.

36. Defendant's mandatory retirement of plaintiff has deprived him of his property interest without due process, in violation of Article I, Section 2 of the Illinois Constitution.

37. The Mandatory Retirement Ordinance is unenforceable and void as written and as applied, and violates Article I, Section 2 of the Illinois Constitution.

38. As a result of the unlawful and willful acts complained of herein, plaintiff has suffered loss of employment, wages, benefits, and other compensation, as well as emotional distress, embarrassment, humiliation, and other mental anguish, and loss of his useful working life as a police officer.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Donald Drnek respectfully requests that this Court enter an order:

a. Adjudging and decreeing that the conduct of the defendant as described herein is in violation of Section 7 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et.seq.;

- b. Declaring that Chicago Municipal Code Section 2-152-410 is in violation of, and superceded by, the ADEA, and is void and unenforceable;
- c. Declaring that City of Chicago Municipal Code Section 2-152-410 is unenforceable and void as written and applied, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States (U.S.C. Amends. 5 and 14);
- d. Declaring that City of Chicago Municipal Code Section 2-152-410 is unenforceable and void as written and applied, in violation of Article I, Section 2 of the Illinois Constitution;
- e. Awarding plaintiff the salary, with interest, that he has lost as a result of defendant's conduct;
- f. Awarding plaintiff liquidated damages, lost benefits (including, but not limited to pension benefits) and other compensatory damages, full restoration of seniority tights and pension credits, and such other relief as may be necessary to restore plaintiff to the position he would have had if not for defendant's unlawful and discriminatory conduct;
- g. Issuing a mandatory injunction against Defendant requiring that plaintiff be reinstated to his position as police officer with full back pay, salary, benefits, and seniority applicable to him on the date of termination and subsequently as if he had remained employed today;
- h. Awarding plaintiff reasonable attorneys' fees and costs; and
- i. Awarding plaintiff such other and further relief as this Court deems proper and just.

Appendix not available.

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