1   IN THE SUPREME COURT OF THE UNITED STATES

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3   KENTUCKY RETIREMENT   :

4   SYSTEMS, ET AL.,   :

5   Petitioners   :

6   v.   : No. 06-1037

7   EQUAL EMPLOYMENT   :

8   OPPORTUNITY COMMISSION.   :

9   - - - - - - - - - - - - - - - - - x

10   Washington, D.C.

11   Wednesday, January 9, 2008

12

13   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States

15   at 11:09 a.m.

16   APPEARANCES:

17   ROBERT D. KLAUSNER, ESQ., Plantation, Fla.; on behalf of

18   the Petitioners.

19   MALCOLM L. STEWART, ESQ., Assistant to the Solicitor

20   General, Department of Justice, Washington, D.C.; on

21   behalf of the Respondent.

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C O N T E N T S

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1   P R O C E E D I N G S

2   (11:09 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in Case 06-1037, Kentucky Retirement Systems v.

5   EEOC.

6   Mr. Klausner.

7   ORAL ARGUMENT OF ROBERT D. KLAUSNER

8   ON BEHALF OF THE PETITIONERS

9   MR. KLAUSNER: Mr. Chief Justice, and may it

10   please the Court:

11   Retirement eligibility in Kentucky is based

12   on 20 years of service or age 55. Age is not the only

13   determiner. And "age" is not a bad word. As Justice

14   White said in McMann v. United Airlines, all retirement

15   plans necessarily make distinctions based on age.

16   Here it is age or service. And the EEOC's

17   focus on age alone fails to appreciate that Kentucky is

18   an integrated, consolidated retirement plan with the

19   goal of providing benefits to all qualified workers. To

20   say, as the EEOC does, that all younger workers will

21   always fare better than all older workers is factually

22   wrong, and it fails to appreciate the myriad factors

23   that go into determining pension amounts.

24   It's not age alone that determines the

25   result. Age is a factor. It's not the factor. The

 1 plan is not facially discriminatory, it's not arbitrary,

 2 and it doesn't violate --

 3   JUSTICE BREYER: I guess the part that they

 4 are saying is arbitrary as I understand it -- and I

 5 would appreciate your correcting me if I don't understand

 6 it correctly -- is that you get double your pension at 55

 7 if you've worked 20 years as opposed to 10. Is that

 8 right?

 9   MR. KLAUSNER: No, Mr. Chief Justice --

10   JUSTICE BREYER: A worker who has been

11 there, he's qualified, he has only worked for 10 years

12 and now he's 55 years old. There is a chart in the SG's

13 brief, and as I read that chart, he got amount "X". He

14 started at 45, he ended up at 55, he gets "X". If he had

15 started at 35 and worked for 20 years, he would get much

16 more than "X".

17   MR. KLAUSNER: If the EEOC's chart were

18 factually correct, that would be true, Your Honor,

19 limited only to the amount of imputed service. The

20 person who began younger in the example which Your

21 Honor used would get more imputed service.

22   JUSTICE BREYER: You would get "Y", because

23 he worked for 20 years rather than 10; is that right?

24 I'm not talking about a disabled person. I'm talking

25 about anybody.

1   MR. KLAUSNER: No, Your Honor. That's only

2   in the case of a disability. In a normal requirement

3   setting, one works a number of years and you get two

4   and-a-half percent of your salary for each year that you

5   worked.

6   JUSTICE BREYER: So if a person works for 20

7   years, he gets more than if he worked for 10 years; is

8   that right?

9   MR. KLAUSNER: Absolutely.

10   JUSTICE BREYER: Now he is disabled. And

11 when he's disabled, if he's disabled after working only

12 10 and he is 45 years old, they pretend he had worked

13 the full 20?

14   MR. KLAUSNER: They impute -- yes, Your

15 Honor. They impute the additional service to you.

16   JUSTICE BREYER: Now I understand it.

17   Now, this individual says, I was working

18 there after the age of 55, I only worked for 14 years,

19 now I become disabled. If I become disabled before I

20 was 55, let's say I had six years to go, they would give

21 me six years extra. But because I was disabled after

22 I'm 55, I get nothing extra. Nothing is imputed. Is

23 that right?

24   MR. KLAUSNER: It's only partially right,

25 Mr. Justice. Justice Breyer, the reason that you get

1 additional before age 55 is the same as the reason why

2 you get extra before you reach 20 years.

3   JUSTICE BREYER: I didn't ask you for the

4 reasons. I want to know if I'm factually right.

5   MR. KLAUSNER: You're only partially correct.

6   JUSTICE BREYER: Where am I factually wrong?

7   MR. KLAUSNER: The difference is that the

8 imputed service comes before 55, because you're not

9 eligible for after 55 or after 20 years you are eligible

10 for benefits --

11   JUSTICE BREYER: You're giving me reasons.

12 I'll ask you in a second for the reasons. I want to

13 know if what I said factually is true.

14   MR. KLAUSNER: If you were disabled before

15 normal retirement, you receive imputed service.

16   JUSTICE BREYER: And not after?

17   MR. KLAUSNER: Correct.

18   JUSTICE BREYER: Okay. Now I'll say that I

19 think is the discrimination of which he is complaining.

20 And now what he would like to know is what possible

21 reason is there for that difference? Now I'd like to

22 hear what the reason is that justifies that difference.

23   You give him six extra years when he retired

24 after 14 years and though he was only 49 years old, and

25 you don't give him even one extra year when everything

1   else was the same but he retired after he was 55.

2   Now, explain to me what the reason is for

3   that.

4   MR. KLAUSNER: The reason for that, Justice

5   Breyer, is as follows: The person who's 49 and gets

6   disabled, assuming he does not have -- he or she doesn't

7   have 20 years of service, can't retire. The person who

8   is 55 in your example can leave tomorrow.

9   Additionally, the person who begins work

10   older starts out closer to retirement. We are not

11   talking about two different groups of people. The plan

12   favors the older worker by saying on the day you begin

13   work, you're always closer to retirement than a younger

14   person.

15   The purpose of the imputed service is to try

16   to replicate as closely as possible within some

17   financial limits set by the -- by the General Assembly

18   of Kentucky what you would have received had you made --

19   JUSTICE BREYER: No. He says now, what he

20   says to that, I take it, is fine. He is 49 years old.

21   He has six years to go to qualify for retirement, so let

22   him retire. If you let him retire, and you gave him 14

23   years of credit, you would be treating him just like

24   you're treating me.

25   But in addition to letting him retire, you

1   give him six extra years of credit, which at two

2   and-a-half percent per year. Good, I'm glad you do

3   that. Give me the six extra years at two and-a-half

4   percent as well. Treat us alike.

5   What's your response?

6   MR. KLAUSNER: My response, Justice, is

7   this. They start out un-alike. As I mentioned before,

8   the person who was in 55 in your example, A, is already

9   eligible for benefit. He doesn't have to wait to be

10   disabled. He may leave tomorrow.

11   The person who starts younger, particularly

12   in a public safety retirement plan, spends more time in

13   the line of fire than the person who starts older. The

14   person who starts older takes advantage of the fact that

15   in this retirement plan you can retire with as little as

16   five years of service. Actually a person who is 55 is

17   eligible for a benefit after only a month. In fact,

18   Kentucky may be the only plan in the country that does

19   that.

20   But where they don't start out alike and

21   where the EEOC's chart is based on a fallacy is that

22   the person who began work older in your example was

23   always closer to retirement, they needed less years.

24   The purpose of the plan for disability

25   purposes, which is not a separate plan, it's simply a

1 means of getting one to normal retirement who is not

2 otherwise eligible to get there.

3   JUSTICE SOUTER: So you're in effect

4 saying --

5   JUSTICE KENNEDY: This has been very

6 helpful, but it does seem to me to raise the question

7 about the fairness of your opening statement. You began

8 by saying something to the effect that this does not

9 discriminate on the basis of age. It does. Age is the

10 explicit factor that the statute uses in order to answer

11 Justice Breyer's question. And the Act does not

12 prohibit the use of age in all circumstances to which it

13 applies, but it does -- the Act goes on to prohibit the

14 use of age in some of the circumstances. And one of

15 those circumstances is the hypothetical of the

16 55-plus-year-old person used in Justice Breyer's

17 statement and example.

18   So, it is not correct, it seems to me, for

19 you to say that this does not discriminate on the basis

20 of age. Now, maybe there is some good reasons for doing

21 that, you can get into that, but it seems to me it does

22 make an explicit determination based on age as to some

23 people.

24   MR. KLAUSNER: Respectfully, Justice

25 Kennedy, I think that's not entirely correct, for this

1   reason. The plan makes the determination of eligible to

2   retire on 20 years or age 55 with five years. In other

3   words, it makes the determination not based on age but

4   on pension status, that is, eligibility to receive an

5   unreduced normal retirement.

6   JUSTICE SCALIA: You're saying you're one

7   step removed. You're making your determination on the

8   basis of eligibility for retirement, which in turn is

9   based on age. And you're saying that that --

10   JUSTICE STEVENS: It's sometimes based on

11   age.

12   JUSTICE SCALIA: Huh?

13   JUSTICE STEVENS: It's sometimes based on

14   age, sometimes on years of service.

15   JUSTICE SCALIA: Right.

16   CHIEF JUSTICE ROBERTS: And always based on

17   age plus service.

18   JUSTICE SCALIA: Right.

19   MR. KLAUSNER: Yes, Mr. Chief

20   Justice.

21   JUSTICE SOUTER: But your answer, as I

22   understand it, to Justice Breyer's question was --

23   could be boiled down to this: The person whose

24   disability benefit or total benefit following

25   disability is calculated on the basis of age 55, is

1 less likely to have worked or is likely to have

2 worked less long than the person whose benefit is

3 imputed and calculated on the basis of 20 years.

4 And because the odds are that we'll say the person

5 in the 55-year-old category has worked less and

6 endured less risk, it is, therefore, fair to impute

7 less time on average to such a person, and therefore,

8 give a lower benefit.

9   You're saying there is a tradeoff. And the

10 tradeoff is because the 55-year-old retiree may get a

11 benefit after very little work and very little risk, it

12 is therefore fair and not a discrimination that on the

13 average the windfall is less for that person by the

14 imputation than the windfall to the person who retires

15 on the basis of age 20.

16   Is that a fair statement of your argument?

17   MR. KLAUSNER: Yes.

18   JUSTICE SOUTER: Okay.

19   MR. KLAUSNER: As I noted before, it's

20 about retirement eligibility, not about age.

21   In Hazen Paper you dealt with the question

22 of an individual who was fired because they were about

23 to meet the 10-year vesting requirement in a private

24 sector plan. The person was also over the age of 40.

25 The Court found that it wasn't an age discrimination

1   case because it said that age was merely correlated with

2   what the Court called "pension status." I think pension

3   status and retirement eligibility, which can occur at 20

4   years or it can occur at age 55 with some service, is

5   exactly the same. In --

6   JUSTICE ALITO: That would be a good

7   argument if the sole basis for retirement under your

8   system was years of service, but it's not just years of

9   service, isn't that right?

10   MR. KLAUSNER: That's correct, Justice. One

11   needs some service, but one may retire at 55 or one may

12   retire at 20 years.

13   JUSTICE ALITO: You can't take your -- you

14   couldn't take your statute and erase all the references

15   to age and have the statute work, could you?

16   MR. KLAUSNER: No. And I don't -- I don't

17   think that pension statutes are required to eliminate

18   any use of age at all.

19   JUSTICE ALITO: Because the ADA expressly

20   allows them to do that; isn't that right?

21   MR. KLAUSNER: The ADA is designed to

22   eliminate arbitrary age discrimination. That is where

23   the design of the plan is motivated by a policy of the

24   employer to discriminate, to provide less solely because

25   of the individual's age.

1   JUSTICE GINSBURG: That's -- you're sticking

2   in a word, "arbitrary," that appears nowhere in the body

3   of the statute. You picked it up from the preamble, and

4   that's -- and you're interpreting the statute with that.

5   And it isn't customary for this Court to take words that

6   don't appear in the text of the statute and read them

7   in, based on some statement of purpose or preamble.

8   MR. KLAUSNER: Justice Ginsburg, I'm aware

9   that the preamble alone doesn't direct, and I understand

10   that the operative language is in 623(a). But I think

11   that the --

12   JUSTICE SCALIA: You'd be in better shape if

13   it was in legislative history and not in the preamble.

14   Then we probably would take it into account.

15   MR. KLAUSNER: I think, Justice, the

16   legislative history is important for this reason. When

17   Title VII was first written, "age" was included and then it

18   was taken out, and there was a reason why it was taken

19   out: Because there is never a reason to discriminate on

20   the basis of race, there is never a reason to

21   discriminate on the basis of national origin or

22   religion; but in government retirement plans, which are

23   paid for life and in which the calculation is determined

24   in part on age, on how long someone will live and how

25   long they've worked and that interrelationship, I think

1   Congress recognized that "age" was qualitatively

2   different.

3   JUSTICE GINSBURG: I think the Congress

4   recognized that what they were protecting was not age as

5   such, but old age, where in the other case they say it's

6   the racial criterion and whether it's -- or the sex

7   criterion, whether it's a man that's adversely affected

8   or a woman it doesn't make any difference; Title VII

9   applies to them both. But the Age Discrimination Act

10   doesn't apply to younger workers. It doesn't say that

11   you can't discriminate on the basis of age, so you can't

12   prefer the older person over the younger person.

13   MR. KLAUSNER: Justice Ginsburg, I

14   understand this Court's holding in Cline was that the

15   statute is intended to protect the relatively older as

16   it relates to the relatively younger. But you also said

17   in Cline that age is qualitatively different, because

18   what gives age reason in terms of discrimination is when

19   it's arbitrary. That is, when it is invidious, and

20   that's the distinction between the Title VII cases that

21   the Government relies on, and why I think Hazen Paper is

22   important, because, as the Court said, unless you can

23   show in a disparate treatment case that the policy is

24   motivated by age, then I think that the -- the intent

25   goes. And the -- one cannot draw from the face of the

1   Kentucky statute -- and that's what this is; this was a

2   challenge that said the statute discriminates on its

3   face -- that the only inference that one can have is

4   that the design of the plan is motivated to pay older

5   people less.

6   JUSTICE GINSBURG: There is one little piece

7   of it that seems, that clearly does favor the younger

8   retiree. And that's the -- what is it -- you're

9   guaranteed, what was it, at least 25 percent of your

10   final monthly salary. That's not under -- for a regular

11   retiree; and also this 10 percent that you get added on

12   for each child -- that's not part -- that's somebody who

13   is disabled gets that, but not somebody who is already a

14   retiree. Isn't that so?

15   MR. KLAUSNER: That is correct, but Justice

16   Ginsburg, that type of disability is not the disability

17   which was at issue in this particular case. That is for

18   a person who is disabled from any ability to work,

19   period, in other words, the Social Security standard of

20   disability. The disability at issue in this case was

21   the inability to work as a public safety officer, in

22   this case a police officer.

23   JUSTICE GINSBURG: I'm not sure that I

24   follow that answer.

25   JUSTICE STEVENS: Am I correct in

1   understanding that your plan does not provide a

2   disability benefit just as a disability benefit? The

3   only time disability is relevant is when it determines

4   whether or not a person will become eligible for the

5   regular retirement benefit?

6   MR. KLAUSNER: That's correct. This isn't,

7   for example, a stand-alone disability insurance policy.

8   JUSTICE STEVENS: So that for the old person

9   who has already reached retirement age the fact that he

10   doesn't get a disability benefit is common to everybody

11   subject to the plan.

12   MR. KLAUSNER: It is common subject to

13   everyone in the plan without --

14   JUSTICE STEVENS: Isn't that the answer to

15   Justice Breyer's question?

16   MR. KLAUSNER: And I -- you certainly said

17   it better than I did, Justice Stevens.

18   CHIEF JUSTICE ROBERTS: So is there any

19   reason -- I think what you're saying is we should view

20   this as a retirement plan and there are a number of ways

21   you can be eligible for retirement: Age plus years of

22   service, but another way you can be eligible is

23   disability.

24   MR. KLAUSNER: Disability fills in -- it

25   covers a gap. Disability is designed to cover you in

16

1   most instances from the time you get five years of

2   service -- and by the way, you're uncovered in this plan

3   for disability for the first five years of employment

4   except for a very limited, specific number of instances

5   in which only total disability from all work applies.

6   So in the case of the individual who the

7   EEOC talks about as having been discriminated against,

8   if you were a younger worker for the first five years of

9   employment you would have been not covered. A 55 -- for

10 any benefit at all. A person who starts at 21 and gets

11 disabled from work as a police officer or firefighter

12 for the first five years of employment has no protection

13 at all.

14   JUSTICE GINSBURG: But let's take the one

15 who gets over the five-year initial period. The

16 disability pay when you no longer can be in the

17 hazardous occupation, it will begin immediately, right?

18 You don't wait until you get -- you're 55 to get it.

19   MR. KLAUSNER: No, ma'am. That's the

20 purpose of the imputed services. And it's

21 essentially -- we say if during this gap of time before

22 normal retirement, this risk that's covered, that if

23 this disabling event occurs, we advance you to normal

24 retirement immediately and try to replicate as closely

25 as possible the benefit that one would have achieved had

1   you worked to the closest --

2   JUSTICE BREYER: But that's the point,

3   right?

4   MR. KLAUSNER: -- point of eligibility.

5   JUSTICE BREYER: There -- that's what the

6   complaint is, I think, that you say it's the second part

7   that you just said. What you do when the person is

8   disabled and he is not yet 55 -- he hasn't qualified

9   yet -- is you both qualify him, and when you qualify him

10   you give him credit for years he hasn't worked. Now,

11   the older person who is still working and is also

12   disabled says: Fine, you let me retire, but you don't

13   give me any extra years.

14   Now that's the complaint, I think. So that

15   if you had a person who had started at 45, eligible to

16   retire at 55, works for 4 years and becomes disabled, he

17   is credited with 14 years; while the person who started

18   at 35 and at 45 becomes disabled, he is given 20 years.

19   He is given the 10 extra years. So the first person,

20   older person, says: You gave him some extra years; you

21   didn't have to give him those extra years in order to

22   qualify him to retire. You could have just said you can

23   retire, but you gave him 10 extra years and you give me

24   no extra years. Why not?

25   MR. KLAUSNER: The answer to your question

1   is this: The person who has either 20 years or

2   is 55 on the day they become disabled is already

3   eligible to retire. The plan is a single plan that

4   provides a benefit. If you start older, you have to

5   work less to get there. By the same token, by starting

6   closer to retirement you need less added to your balance

7   to bring you to normal retirement. In the example --

8   JUSTICE BREYER: You don't need anything to

9   bring you to normal retirement. You could rewrite the

10   plan and say when a person becomes disabled you get

11   retirement, right at that moment. You could say that.

12   And what the plaintiff is saying is, why don't you say

13   that? Though it's a bit mean. But I think what he

14   would probably like is you would extend the extra years

15   to him.

16   MR. KLAUSNER: There's reasons why that

17   isn't done. Number one, to follow your example, Justice

18   Breyer, for current employees, people hired before 2004,

19   of which there were several hundred thousand, you'd have

20   to lower the benefit to follow your example. The

21   Kentucky Constitution forbids lowering of benefits.

22   Actually, the Commonwealth, in response to the liability

23   in this case, did change the disability benefit. For

24   people hired after 2004, they slashed its economic value

25   substantially, and now everybody just gets a certain

1   amount of disability. It doesn't, however, accomplish

2   the Commonwealth's goal of attracting and retaining

3   employees to do hazardous duty jobs.

4   CHIEF JUSTICE ROBERTS: So the effect of

5   this litigation is that policemen or firefighters who

6   are injured and become disabled now get lower benefits

7   for disability?

8   MR. KLAUSNER: Much lower. It's a

9   substantial reduction. They just get a small piece of

10   change.

11   It's interesting, you know, in the Federal

12   Civil Service Retirement System, the police officers,

13   for example, who work in this Court, if they become

14   disabled, they have imputed service to an age. It's a

15   very similar system. In fact, all employees in both

16   FERS, the Federal Employees' Retirement System, and the

17   Civil Service Employees' Retirement System, both

18   participate in a program where age is imputed to normal

19   retirement. It's a common practice, as the Court can

20   see from the amicus briefs. It's a common practice

21   throughout the United States. I think --

22   JUSTICE BREYER: See, that's why I think the

23   result in this case is just terrible. I think it takes

24   disabled people and cuts their benefits with no benefit.

25   I cannot believe for two minutes that Congress would

1 have intended that result. But the reason I asked you

2 the question was I want you to tell me how to get to

3 that result under this statute.

4   MR. KLAUSNER: You may get to this result in

5 this way: If you determine that age is not the driver,

6 that is, that because you have a plan that has normal

7 retirement based on service alone, a 38-year-old

8 employee who gets disabled with 18 years of service gets

9 two years of imputed service. The 45-year-old, in your

10 example, who started at 35 would get 10 years of imputed

11 service.

12   JUSTICE KENNEDY: Suppose I can't make that

13 assumption or adopt that premise. Is there another

14 basis on which to reach the result? I think this does

15 explicitly discriminate based on age as to some people,

16 and you're telling me you don't want me to do that.

17 Suppose I don't agree with you. Is there some other way

18 to reach the result?

19   MR. KLAUSNER: I think Your Honor can

20 reach the result in this way. The statute was

21 challenged as being facially discriminatory, and I think

22 under this Court's precedents for facial discrimination,

23 one would have to say that the only reasonable inference

24 in the statute, by its mere use of age, is that you say

25 that it starts out presumptively discriminatory. What

1   the Government has really argued here is an as-applied

2   circumstance. They said the effect of the statute in

3   certain cases, and in those circumstances the statute

4   would stand on its face and if there is a circumstance

5   in which someone effectively is discriminated, then you

6   look to see are there reasonable factors other than age

7   that effect -- that take effect in this instance?

8   Secondly, I think the Court can determine --

9   and I think this is the question that is the next step

10   after Hazen, where you said that age correlated with

11   pension status, in that case being vested for 10 years.

12   The question is, if a plan has eligibility to retire as

13   its motivation, that is -- that is service regardless of

14   age or age plus service, is it really motivated by age?

15   And I think the answer to that question, Justice Kennedy,

16   clearly is no.

17   The one thing I would add is if you look at

18   the statute in Betts, the Ohio case, which is the last

19   time an age case on a public plan got to this Court, in

20   the Ohio plan you couldn't get a disability because you

21   were 60, but you could also retire in that plan just

22   like Kentucky on years of service alone, but a

23   years-of-service retiree in Ohio could get a disability.

24   That's not true in Kentucky. Somebody who

25   starts as a firefighter at 18 no longer has disability

1 protection at 38 years old. A person who starts as a

2 police officer at 45 retains disability coverage until

3 they're 55. I think -- I think the language of the

4 statute alone enables you to get there.

5   And I think to get back to Justice

6 Ginsburg's question -- and I don't believe I fully

7 answered on this issue of the role of the word

8 "arbitrary" in the statute -- I think that that gives

9 that word meaning, not just because it's in the

10 preamble, but because it's in the legislative history,

11 and the evil that Congress was trying to get to is what

12 is it that we're trying to prevent? We're trying to

13 create job opportunities for older workers, and what

14 Congress said after Betts is you want to make sure

15 benefit plans are covered. And I think Kentucky has

16 accomplished both. It doesn't use a retirement age, as

17 many employers do. Again, the Federal Government forces

18 police officers and firefighters out of their jobs.

19 Firefighters at 55, police officers at 57. Kentucky

20 doesn't. The program doesn't discriminate on the basis

21 of age.

22   If there's no question, I'd like to reserve

23 the rest of my time for rebuttal.

24   CHIEF JUSTICE ROBERTS: Thank you, counsel.

25   Mr. Stewart.

1   ORAL ARGUMENT OF MALCOLM L. STEWART

2   ON BEHALF OF THE RESPONDENT

3   MR. STEWART: Mr. Chief Justice, and may it

4 please the Court:

5   In calculating the retirement benefits owed

6 to disabled workers, Kentucky uses age as an explicit

7 decisionmaking factor in a way that disadvantages older

8 employees. Although Kentucky may be able to establish

9 on --

10   JUSTICE BREYER: Let me ask you this sort of

11 basic question: Does it use age any differently than it

12 uses years of service?

13   MR. STEWART: It does in the sense that,

14 with respect to disabled employees, two employees who

15 have the same total years of actual service but who are

16 of different ages may receive dramatically different

17 benefits.

18   JUSTICE STEVENS: That's because of the

19 period necessary to qualify for retirement?

20   MR. STEWART: It's -- let me direct your

21 attention to the relevant provision of the Kentucky

22 statute, and it's at page 7a and 8a of the blue brief.

23 This is with respect to -- it's true that, for a normal

24 retirement, an individual either has to be age 55 with 5

25 years of service or have 20 years of service of whatever

1   age. But if you look at the requirements for disability

2   retirement in particular, the very bottom of the page,

3   it says: "Any person may qualify to retire on

4   disability subject to the following. The person shall

5   have 60 months of service, 12 of which shall be current

6   service credited under provisions of Kentucky law."

7   JUSTICE STEVENS: Let me just interrupt you.

8   Is there -- is it your position there is a disability

9   benefit that is different from the retirement benefit?

10   MR. STEWART: They -- they are different in

11 the sense that they are calculated differently. That

12 is, if all Kentucky had done was say --

13   JUSTICE STEVENS: I thought all the

14 disability did was determine -- help get a man who is

15 disabled eligible for the retirement benefit.

16   MR. STEWART: The program --

17   JUSTICE STEVENS: That's the only function

18 it provides.

19   MR. STEWART: I think that's incorrect.

20 There are two distinct functions of -- there are two

21 distinct differences between disability retirement and

22 normal retirement: The first is that the eligibility

23 criteria are different. In order to qualify for normal

24 retirement, you have to be either 55 years old with 5

25 years of service or have 20 years of service. For

1   disability retirement, you become eligible if you are of

2   any age and are forced to retire due to disability and

3   have at least five years of service.

4   JUSTICE SCALIA: Well, why does that matter?

5   I mean, the exception in the statute is for -- for

6   retirement, taking age into account for retirement, is

7   narrowly crafted. It says that they can make any

8   decision about -- they can require the attainment of a

9   minimum age as a condition of eligibility for normal or

10   early retirement.

11   Now, we have not read that to exclude adding

12   an additional element to age, namely age plus years of

13   service. We don't say that that disables you from the

14   -- from that exemption. Why can't you add a third

15   factor? Age, years of service, and disability.

16   MR. STEWART: You can't. The first thing I

17   would say about that exception is it refers specifically

18   to a minimum age, and what that was intended to make

19   clear was that to the extent that Kentucky allows

20   55-year-olds to retire with only 5 years of service, but

21   requires a 45-year-old to have 20 years of service, that

22   minimum age would not violate the statute. Now, as a

23   result of this Court's decision in Cline, that provision

24   in a sense is superfluous because the younger worker

25   wouldn't have an ADEA claim anyway. But the reference

1   to a minimum age is intended to address that situation.

2   And --

3   JUSTICE ALITO: It seems to me that what

4   Kentucky is trying to do is to, at least in part,

5   provide make-whole benefits for a police officer who

6   becomes disabled below the age of 55. So what they want

7   to do is to say we want to give you the benefit that you

8   would have received if you had not been hurt on the job

9   and therefore unable to work and had been able to work

10   to the normal retirement age.

11   Now, if that's correct, is that an

12   illegitimate objective? And if it's not an illegitimate

13   objective, is there any way that they can do that

14   consistent with your understanding of the ADEA? Because

15   when someone is over the retirement age, it's rather

16   hard to see how many years you would add on projecting

17   how long that person would continue to work beyond the

18   age of retirement eligibility.

19   MR. STEWART: It is certainly not

20   illegitimate for Kentucky to say: We want to be more

21   generous to people who are forced to retire due to

22   disability than to people who choose to retire

23   voluntarily when they are physically capable of

24   continuing to work.

25   And so if Kentucky wants to say, in the case

1   of an individual who is forced to retire due to

2   disability, we will add additional years in computing

3   benefits to estimate the number of years this person

4   would have worked had he or she not become disabled,

5   that's fine as well.

6   What they can't do, at least what they can't

7   do without establishing one of the affirmative defenses,

8   is use age as a proxy, as the basis for deciding how

9   many years would this person have worked if he or she

10 had not become disabled because --

11   JUSTICE ALITO: So if they want to do that

12 and they have the case of a police officer who works

13 beyond 55 -- the officer is 55-plus with 10 years of

14 service and then becomes disabled -- you say they have

15 to give that person 10 years of credit.

16   MR. STEWART: If they are going to give the

17 45-year-old with 10 years of service 10 years of credit,

18 they have to give the 55-year-old 10 years of service --

19 with 10 years of service 10 years of credit, again,

20 unless they can establish the cost-justification

21 defense.

22   And part of the argument they are making is

23 it would be unduly expensive to guarantee the

24 55-year-old an additional 10 years of service, because

25 it's much more likely that the 55-year-old will become

1   disabled than it is with the 45-year-old.

2   JUSTICE SOUTER: But he is saying one thing

3   more. He is saying it's also highly likely that the

4   55-year-old has worked as long subject to risk at the

5   point at which the calculation is made than is the case

6   with the person who retires on the basis of 20 years.

7   And so that there is a tradeoff. And, therefore, you

8   constantly analyze this as the kind of garden variety of

9   discrimination based on age which Congress was aiming

10   for.

11   MR. STEWART: Well, to go back to the

12   question you were asking Mr. Klausner, I think if we

13   were looking at the class of voluntary retirees, it

14   would be an accurate generalization to say that those

15   above 55 were likely to have fewer years of service than

16   the younger people. Because the only way that a younger

17   person could qualify for normal retirement would be to

18   amass 20 years of service; whereas, the older person

19   could do it with fewer years.

20   But if you are looking at people who want to

21   continue working but who are prevented from doing so by

22   reason of disability, there is no reason to assume that

23   the older people are going to have spent less time in

24   the line of fire than the younger people. And, in any

25   event, the comparison that we are making --

1   JUSTICE SCALIA: Just say that again. Just

2   say the last thing again. I didn't follow you.

3   JUSTICE SOUTER: Yes. I didn't get it

4   either.

5   MR. STEWART: If we're looking at the class

6   of people who -- including over 55-year-old and under

7   55-year-old -- who want to continue working but who have

8   been prevented from doing so by reason of disability,

9   there is no reason to think that the older people within

10   that class, as a group, will have fewer years in the

11   line of fire than the younger people. And, in any event

12   --

13   JUSTICE SCALIA: Why? I -- I think -- you

14   mean in the future?

15   MR. STEWART: No. No. Under their belt.

16   Under their belt.

17   JUSTICE SCALIA: Under their belt. I see.

18   JUSTICE SOUTER: They are exactly the same

19   people. The only thing that distinguishes the one

20   class, those who voluntarily do and those who are

21   disabled, is happenstance; and the happenstance is

22   disability in the line of service.

23   MR. STEWART: It's not just happenstance,

24   because if you're guessing the likely tenure of service

25   of people who take voluntary normal retirement before

1   age 55, in a sense you are skewing the class, because

2   the only people who can do that under Kentucky law are

3   people with at least 20 years of service.

4   So the voluntary retirees, the younger

5   people, as a group, are likely to be -- have longer

6   tenure. But that generalization doesn't hold true with

7   respect to people who are forced to retire due to

8   disability.

9   JUSTICE STEVENS: It seems to me your

10 argument boils down to the claim that people who have

11 already reached -- become eligible for retirement by

12 either age or period of service, the State has a duty to

13 give them a chance to recover a disability benefit if

14 they give a disability benefit to younger workers.

15   MR. STEWART: No. Our point is that they

16 should use the same computation methodology for both

17 categories of employees.

18   JUSTICE STEVENS: The computation is for a

19 different purpose in that -- in -- for the younger

20 workers the purpose is to make them eligible for

21 retirement. For the older workers, they are already

22 eligible for retirement.

23   MR. STEWART: I think that's incorrect, and

24 that was really the point I was making by quoting from

25 the Kentucky law on page 7a and 8a. The Kentucky

1 provision that I quoted was the provision that

2 establishes eligibility for disability retirement. And

3 it says, as the criterion for eligibility, beyond, of

4 course, the fact of disability, the person shall have 60

5 months of service.

6   So an individual under Kentucky law who is

7 forced to retire due to disability and has at least five

8 years of service is eligible for disability retirement.

9 The imputation of additional years of service is not

10 necessary --

11   JUSTICE STEVENS: But isn't it true that the

12 term "eligibility for retirement," as used in that part

13 of the statute, is referring to actually the same thing

14 as retirement achieved by getting their -- getting

15 credit for post-disability years.

16   MR. STEWART: Exactly. Well, the purpose of

17 defining the category of eligible persons is to make

18 sure that they do get a retirement benefit even though

19 they wouldn't satisfy the normal age and service

20 requirements for ordinary retirement. And we have no

21 problem with that.

22   Kentucky can say we want to define a

23 separate category of individuals who don't satisfy

24 normal age and service rules but who should,

25 nevertheless, be given a retirement benefit because they

1   have been forced to retire due to disability. That's

2   fine.

3   And if they use the same computation

4   methodology, namely, some factor of actual years of

5   service times final compensation times a multiplier, as

6   they do for normal retirement, that would be fine. Our

7   --

8   CHIEF JUSTICE ROBERTS: So it's fine for

9   them to use that, but you're saying it's not fine for

10   them to use any element of age in making that

11   computation?

12   MR. STEWART: That's correct.

13   CHIEF JUSTICE ROBERTS: Even though, under

14   the Federal law, they can use age as the exclusive

15   requirement in determining retirement?

16   MR. STEWART: Well, again, there is a an

17   explicit exemption in the ADEA for a minimum retirement

18   age. And so it wouldn't have violated -- even apart

19   from this Court's decision in Cline, it wouldn't have

20   violated the ADEA to say an individual who is 55 with

21   five years of service can get retirement, even though a

22   younger --

23   JUSTICE BREYER: What is wrong with using

24   that as a benchmark? If you can fire a person when he

25   is 55, why can't you use it as a benchmark as to how

1   much you're going to give a disability person on

2   pension?

3   MR. STEWART: Well, again, I think the --

4   JUSTICE BREYER: The lesser or greater --

5   this would be an instance where greater includes lesser

6   for the reason that this lesser business has no

7   stereotypes. All they're trying to do is to help people

8   who are disabled at a time when they are younger and

9   probably have fairly good expenses, and everybody gets

10   this kind of insurance.

11   And this man who is the plaintiff here had

12   it, too, while he was there. So it's true you are

13   really using in a minimal sense age, but you are doing

14   it in a statute that permits you to do it because it's a

15   lesser version of that.

16   MR. STEWART: There are a couple of things

17   I'd say. The first is that the Act is quite specific in

18   saying that a State may establish a minimum -- may

19   establish a retirement age with respect to its State

20   police and firefighters, but it doesn't say the ADEA is

21   inapplicable to police and firefighters who are over age

22   55.

23   JUSTICE BREYER: It doesn't say it's

24   inapplicable. I wasn't saying it's inapplicable. What

25   I am worried about -- and this is a perfect example of

1 people using absolutely mechanical rules, and

2 particularly when you talk about pension systems, which,

3 of course, age is relevant to a pension system, and what

4 they do is find comparisons; and, before you know it,

5 you are in the kind of a -- of a hamburger situation

6 where it's so chopped up that perfectly worthwhile

7 things are forbidden. And this would seem to be a

8 number 1 exhibit.

9   MR. STEWART: There are several different

10 answers I would give. The first is if the greater

11 included the lesser, it would be permissible for

12 Kentucky to say: We will keep the over 55-year-old

13 people on the work force, but we'll pay them less

14 because of their age.

15   JUSTICE BREYER: No, because what you are

16 looking at is to see whether the purpose of Congress is

17 somehow implicated, a purpose designed to prevent

18 stereotypical thinking from being used to put older

19 people at a disadvantage. And there is no indication

20 that this is so in this case.

21   MR. STEWART: I think --

22   JUSTICE BREYER: Now, what's the response?

23   MR. STEWART: I think that's incorrect, that

24 is, the two justifications that have been given for the

25 disparate treatment of older workers are, first, younger

1 workers as a group are likely to need more of a boost;

2 and, second, the younger disabled person probably would

3 have worked longer if he had not become disabled. And

4 so this replicates the situation that would have

5 prevailed.

6   I think, whether or not you want to think of

7 those as stigmatizing stereotypes, it's quite clear that

8 neither of those generalizations could typically be used

9 as a basis for age-based disparities.

10   For instance, nobody would claim that an

11 employer could pay the older workers less because they

12 are likely to be less in need of financial assistance.

13 And with respect to the initial --

14   JUSTICE SOUTER: The reason for that is that

15 we accept the criterion at the outset that your pay

16 bears some relationship to what you do.

17   We are now in a situation in which the

18 benefit does not bear a relationship to what you are

19 doing or going to do.

20   MR. STEWART: Well, on the whole, the

21 benefit bears a close -- the retirement benefit bears a

22 close relationship to what you have done. That is, the

23 benefit is calculated on the basis of actual years of

24 service, and the purpose clearly is, in part, to reward

25 the employee for service to the employer.

1   But with respect to -- and that's the way

2   it's done with respect to the older disabled worker.

3   His benefits are computed based on what years of service

4   he has actually contributed to the employer. With

5   respect to the younger people, it's not based on that

6   alone. Rather, the State imputes additional years --

7   JUSTICE GINSBURG: And with respect to that,

8   Mr. Stewart, the problem that Justice Breyer brought up,

9   you -- if you would look to your brief, page 30,

10   footnote 13, the question is, so we have this -- if we

11   take your interpretation of the statute, how can we deal

12   with a person in her 30s who becomes disabled when she

13   is making a low salary and has only, say, 10 years of

14   service? She is going to get a very low disability.

15   And you say that's one thing that's all right.

16   On a prospective basis, what could Kentucky

17   do? One is give the younger workers only their actual

18   years of service, which Mr. Klausner said is what is

19   happening, and therefore, these people are getting a lot

20   less than they used to get. And then you say, oh, but

21   there's another way, and that is to impute additional

22   years of service on an age-neutral basis. And you're

23   not specific about what would the age-neutral basis be.

24   MR. STEWART: I guess there could be a range

25   of alternatives. One alternative, for instance, would

1   be for every disabled worker of whatever age impute an

2   additional five years of service as something of a rough

3   estimate of the number that person might have worked if

4   he or she had not become disabled.

5   Another possibility would be to impute years

6   of service up to 10 or 20. Again, there would be

7   probably an infinite number of ways it could be done as

8   long as age were not used as, as the basis.

9   The other thing I wanted to say about --

10   JUSTICE ALITO: But if do you that, aren't

11 you going to be -- you're going to be undercompensating

12 the younger person who gets disabled and

13 overcompensating the person over 55 who gets disabled

14 who may not -- it may not be realistic to think that

15 someone's going to continue to work as a police officer

16 until 65. I don't know.

17   MR. STEWART: Well, the other thing I would

18 say about that justification, which rests on I think the

19 valid statistical correlation between how old you are at

20 the time that you're disabled and how much longer you

21 would have worked. Again, whether or not -- I think you

22 wouldn't think of that as an invidious stereotype. But

23 again, it's not a generalization that could typically be

24 used as a basis for age-specific decisions.

25   For example, the Wirtz report makes clear

1   that the paradigmatic pre-ADEA practice that Congress

2   wanted to get rid of was a limit of age 50 or age 45 and

3   an employer saying: We're not going to hire anybody who

4   is over that age. And certainly the employer could say

5   justifiably as a group people above that age are likely

6   to have fewer work years ahead of them than people below

7   that age. And if that generalization could provide a

8   basis for an explicit age-based distinction, the Act

9   would really be eviscerated.

10   The other thing I wanted to respond to is

11   the suggestion that, while we might be able to tease

12   this out of the literal language of the statute, this is

13   certainly an unintended consequence. It is not

14   something that Congress would have wanted. I think, to

15   the contrary, this is not identical but very similar to

16   the type of disparity that was present in Betts. That

17   is, in Betts the individual was over the age of normal

18   retirement but had elected to keep working. She became

19   disabled and was prevented from continuing to work. She

20   was eligible for normal retirement benefits. She wanted

21   to collect disability retirement benefits, because

22   again, the reason for her retirement was disability.

23   She was told that she couldn't do it. And the State's

24   computation methodology for calculating disability

25   retirement benefits was significantly more generous than

1   the one that it offered for --

2   JUSTICE BREYER: What about this idea, which

3   is -- would this wreck the statute? You say we're

4   talking about age, which is not an immutable

5   characteristic. Everybody goes through it. Everybody

6   is younger, everybody is older. And therefore we take

7   the word "discriminate" and the word "discriminate" in

8   this context, when considered in terms of pension

9   requirements, which inevitably are age mixed to a

10   considerable degree, means that if there are plausible

11   justifications and no significant reason for thinking

12   that it reflects stereotypical thinking, that it does

13   not fall within the scope of the word "discriminate."

14   MR. STEWART: I think, first, that would be

15   contrary to the way that the word "discriminate" has

16   been construed in Title VII.

17   JUSTICE BREYER: I started out by saying,

18   that's why I said that this is not an immutable

19   characteristic, and it is -- that's why I put all the

20   qualifications in there.

21   MR. STEWART: Well, the court in Thurston

22   has said the language of the ADEA should be construed

23   similarly to that of Title VII because the basic

24   anti-discrimination prohibition was drawn in haec verba

25   from Title VII in the legislative history to the Older

1   Workers Benefit Protection Act when Congress amended

2   the statute to cover fringe benefits, which the Court in

3   Betts had held were not covered. Congress did that by

4   enacting a new 29 U.S.C. 630(l) to say the term -- that

5   the phrase "terms and conditions of employment" includes

6   fringe benefits.

7   And the legislative history explains that

8   Congress could have achieved the same result by adding a

9   reference to fringe benefits in the basic

10   anti-discrimination provision contained in 29 U.S.C.

11   623(a), but the Congress chose not to do that because it

12   wanted to maintain the similarity in wording between the

13   ADEA's anti-discrimination provision and that of Title

14   VII in order to reinforce the inference that the two

15   were to be construed in pari materia.

16   The other thing I would say with respect to

17   your reference to age distinctions that are not based on

18   stereotypes is again to return to what I was discussing

19   earlier. The two justifications that have been offered

20   are first, younger people are likely to have fewer

21   financial resources, so they need more of a boost; the

22   second is the younger worker probably would have worked

23   longer if he hadn't become disabled and therefore this

24   is replicating the situation that would have prevailed

25   absent the disability.

1   And again, my point is, whether or not you

2   think of those as invidious stereotypes, they are

3   plainly not generalizations that could typically be used

4   to justify --

5   JUSTICE STEVENS: May I ask this question

6   right on that point. Supposing you have two different

7   people retire, one -- that become disabled, rather --

8   one because he's five years short of the age eligibility

9   and the other because he's five years short of years of

10   service, so it would be a younger person, and both would

11   have become eligible for retirement in five years after

12   their disability. Are they treated the same way under

13   the plan? And if they are, where is the discrimination?

14   MR. STEWART: Well, the discrimination is if

15   you imagine --

16   JUSTICE STEVENS: Well, first of all, tell

17   me whether they're treated the same under the plan.

18   MR. STEWART: I mean, it depends on other

19   variables. For instance, if you have a --

20   JUSTICE STEVENS: What other variables?

21   MR. STEWART: As to the person who is five

22   years away from qualifying by reason of --

23   JUSTICE STEVENS: Years of service.

24   MR. STEWART: -- years of service, if that

25   person is younger than 50, then they'll be treated the

1   same, because each of them will have --

2   JUSTICE STEVENS: That's my hypothesis.

3   MR. STEWART: But --

4   JUSTICE STEVENS: So then how is that

5   discrimination on the basis of age?

6   MR. STEWART: But it is a discrimination on

7   the basis --

8   JUSTICE STEVENS: It's not even

9   discrimination as far as I see it.

10   MR. STEWART: Well, it wouldn't -- there

11   wouldn't be any claim of disparate treatment with

12   respect to those two individuals. But if you have an

13   individual who is 55 years old with 15 years of service

14   and 50 years old with 15 years of service, they are both

15   equally close to the 20-year threshold for qualifying

16   for normal retirement on the basis of years of service.

17   Yet the 50-year-old gets 5 imputed years added and gets

18   a significantly larger benefit than the 55-year-old.

19   Their justification is, well, the

20   55-year-old is already eligible for normal retirement

21   and therefore, it's fair to treat him differently. And

22   the point I was making with reference to the Kentucky

23   code is the 50-year-old who is forced to retire due to

24   disability is also eligible for retirement. It's called

25   disability retirement.

1   JUSTICE STEVENS: It seems to me that your

2 claim boils down to an argument that the statute

3 requires someone who is already qualified for retirement

4 to get a disability benefit that the younger person

5 would. It seems to me that's the basic difference.

6   MR. STEWART: No, I don't think that's

7 correct. If all the State did was to say disability

8 retirement benefits will be available to people who have

9 at least five years of service and are forced to retire

10 due to disability and we are excluding people who are

11 above 55, in and of itself that's fine. If the only

12 purpose of excluding the older workers is to make clear

13 that they can't get both benefits simultaneously, there

14 is no problem with that.

15   Our problem is that, having defined the

16 class of persons eligible for disability benefits to

17 include only those who are under 55 --

18   JUSTICE STEVENS: Mr. Stewart -- talking

19 about two benefits.

20   MR. STEWART: -- they did use a more

21 generous computation methodology.

22   JUSTICE STEVENS: There not two benefits.

23 It's only one.

24   MR. STEWART: It's only one benefit. And

25 really, that's part of our point. It's only one

1   benefit, so why would they say that people who are older

2   will have their benefits computed using a different

3   formula than people who are younger?

4   CHIEF JUSTICE ROBERTS: You prevent the

5   State from taking into account the fact that younger

6   disabled workers have not had the same opportunity that

7   older disabled workers have. And it results -- if we

8   adopt your system where you can look only at years of

9   service, what it, in effect, is going to do is to

10   prevent Kentucky from giving disability benefits to

11   older workers who become disabled.

12   For example, if you have two workers, one

13   who starts work at 18 and acquires years of service,

14   say, 12 years of service and becomes disabled, you would

15   say, well, you can take those years of service into

16   account. The older worker who begins at age 30 and is

17   disabled in his first year on the job, you say, well,

18   you can only look at years of service. You can't impute

19   to both of them retirement age. So the 30-year-old who

20   becomes disabled has to get less, fewer benefits than

21   the 18-year-old who becomes disabled.

22   MR. STEWART: Well, first, we are not

23   preventing Kentucky from imputing additional years. We

24   are simply saying the method of determining how many

25   years will be imputed, absent an affirmative defense,

1   can't be dependent on the employee's age.

2   JUSTICE BREYER: Would it be the same as --

3   I mean it seems to me now -- I'm thinking the problem is

4   we are going into the package; we are starting opening

5   up the package that the 55-year-old retiree normally

6   gets.

7   Suppose they said this: here's what we'll

8   do to the disabled person. We'll treat him just as if

9   he retired at 55. He is only 35; and, moreover, at 55

10   when you retire in our police force, we give you a big

11   party and a gold watch. Well, we don't do that if you

12   retire later on. Same kind of claim.

13   Why not? Over 65 years old, he retired.

14   Hey, you didn't give him the gold watch. Why did you

15   give the other person the gold watch? You said the

16   reason is we treat them all like we treat them when you

17   retire at 55.

18   MR. STEWART: I'm not quite sure if I

19   understand the question, but I don't think that there is

20   any --

21   JUSTICE BREYER: That's fair, that you don't

22   understand.

23   (Laughter.)

24   MR. STEWART: I don't think there would be

25   anything wrong with Kentucky saying we are going -- in

1 fact, this is what we are asking for. If Kentucky wants

2 to say a younger person who is forced to retire due to

3 disability will be treated as though he were 55 years

4 old, that's fine. If they give him disability benefits

5 and they calculate the benefits using actual years of

6 service as they do for the other -- for the older

7 employees, that there is no ADEA problem with that.

8   Our problem is that they say we are treating

9 him as though he had worked additional years until he

10 was 55 when he hasn't, and when the older employee isn't

11 given that same opportunity.

12   And, again, it is true that Kentucky's

13 system is particularly generous to older employees who

14 want to retire voluntarily. They can retire with as

15 little as five years of service, even though the younger

16 worker would have to have more.   But the people on

17 whose behalf the EEOC is suing have not derived any of

18 that benefit. These were people who did not retire

19 voluntarily. They were people who were eligible for

20 retirement benefits, but chose to remain in the work

21 force. And, essentially, they are being told, in

22 estimating how many more years you would have worked, we

23 are going to have an irrebuttable presumption that the

24 answer is zero, even though their very circumstances,

25 the fact that they continued to work after they could

1   have retired, belie that assumption.

2   And just a final point I wanted to make

3   about Betts, is that the system here is not identical,

4   but very similar to the system that was at issue there,

5   in the sense that an older worker who was forced to

6   retire due to disability got a lower benefit than she

7   would have received if she had been younger with the

8   same years of service and the same disability.

9   It couldn't be clearer that Congress wanted

10   to overturn that decision. That was the impetus for the

11   enactment of the OWBPA.

12   So I think there is really -- it's not

13   correct to suggest that, even if we win, this is somehow

14   an unintended consequence of what Congress did. This is

15   the very situation that Congress wanted to cover while

16   providing an affirmative defense to employers who can

17   satisfy it.

18   JUSTICE GINSBURG: Mr. Stewart, before you

19   finish, that little piece that seems to be favoring the

20   younger worker that you guaranteed at least -- what was

21   it, 25 percent of your final monthly salary, and you get

22   10 percent for each child -- now that does seem to be

23   something that's -- that's not available for a regular

24   retiree.

25   MR. STEWART: It's not available for a

1 regular retiree, and it's not available for a person who

2 is eligible for normal retirement but becomes disabled

3 and is forced to retire for that reason.

4   If the only problem were that Kentucky made

5 those benefits available to people who were forced to

6 retire due to disability, that wouldn't be an ADEA

7 violation, so long as they made those benefits available

8 to the older worker who was also forced to retire.

9   But I take your point that those aspects of

10 the statute introduce a further element of age

11 discrimination without even the justification that

12 Kentucky has proffered for the imputed years.

13   With respect to the children, in particular,

14 that seems to be the only other area in the plan in

15 which Kentucky is directly targeting the people who are

16 in greatest financial need, at least by one measure

17 having dependent children, and yet the older workers are

18 left out of that entirely.

19   CHIEF JUSTICE ROBERTS: Thank you,

20 Mr. Stewart.

21   Mr. Klausner, you have four minutes

22 remaining.

23   REBUTTAL ARGUMENT OF ROBERT D. KLAUSNER,

24   ON BEHALF OF THE PETITIONERS

25   MR. KLAUSNER: I'd like to start back where

1   we just left off with Justice Ginsburg's question about

2   the guaranteed benefit. If a person is 38 years old and

3   has 20 years of service, that benefit is not available.

4   If you're 50 years old with 5 years of service, the

5   benefit is available.

6   The benefit is not available to the

7   38-year-old because that person is eligible to retire on

8   a normal retirement benefit. Age isn't the driver.

9   Eligibility for retirement is the motivation.

10   And while my brother says that Congress

11 wanted to overturn Betts, what they wanted to overturn

12 in Betts was the language in this Court's decision that

13 cast doubt on whether pension plans were generally

14 covered by the language of the Age Discrimination in

15 Employment Act. And the Older Workers Benefits

16 Protection Act, if one looks at the legislative history,

17 was focused far less on what happened in a public

18 employee retirement system.   The real issue that

19 Congress focused on, if one looks at the House and

20 Senate reports, is they said there is a problem in

21 private industry in the Rust Belt that normal retirement

22 eligibility is being used to force people not to get

23 some other benefit in some other stand-alone plan.

24 That's not the issue here.

25   And the plan in Betts is no more like

1 Kentucky's plan than the Thurston plan. In Thurston,

2 the pilot case, no pilot over 60, no matter how

3 skillful, had bumping rights to be a flight engineer.

4 In Kentucky, one who has 20 years of service, regardless

5 of age, is in the same posture as someone who is 55 with

6 a minimum service.

7   My brother also pointed you to a provision

8 in the Kentucky statute on pages 7a and -- page 7a in

9 the appendix. Look also at 2a, which defines normal

10 retirement to be 55 with 5 years of service, or 20 years

11 of service regardless of age. The methodology for

12 determining disability in this case is exactly the same.

13 It's based on your proximity to normal retirement, not

14 based on your age.

15   One example was given. If a person is 45

16 years old with 4 years of service and became disabled,

17 that person would get nothing because they haven't met

18 the five-year service requirement. But a 55-year-old

19 with 4 years of service has a normal retirement benefit.

20   It's about limited government resources not

21 being duplicated, and perhaps that's the reason why the

22 EEOC adopted its regulation on December 26th

23 coordinating retiree health care. The rationale they

24 gave was we looked at all the -- all the ways to do

25 this, and we couldn't come up with a reason to do it any

1   other way.

2   In the Sixth Circuit Federal argument, Judge

3   Boggs noted in his dissent -- Chief Judge Boggs noted he

4   asked the EEOC for a reason on how to fix this, and they

5   couldn't give him one.

6   What this case is about is about being fair

7   to workers without regard to age. All the people who

8   run these plans, who fund these plans, who are in these

9   plans, are all lined up on Kentucky's side of the table.

10   That should tell you that it's neither

11   arbitrary nor discriminatory. The plan is fair, and the

12   plan does not violate the law. We ask you to reverse

13   the decision below and reinstate the district court's

14   original final summary judgment.

15   Thank you.

16   CHIEF JUSTICE ROBERTS: Thank you

17   Mr. Klausner. The case is submitted.

18   (Whereupon, at 12:07 p.m., the case in the

19   above-entitled matter was submitted.)

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