

IN THE SUPREME COURT OF FLORIDA

ROBERT P. MORROW,

Petitioner,

vs.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

CASE NO. 69,424

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CLERK SUPREME COURT
Deputy Clerk

DEPARTMENT OF ADMINISTRATION,
etc.,

Petitioner,

vs

DUVAL COUNTY SCHOOL BOARD,

Respondent.

CASE NO. 69,430

ON APPEAL FROM THE FLORIDA FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER,
ROBERT P. MORROW

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STATEMENT OF THE CASE AND FACTS

On April 22, 1983, petitioner, Robert P. Morrow, was terminated from his position of employment as a teacher in the Duval County public schools effective the following school year. (R. vol. IV at 573-74) Morrow was terminated solely because he had reached the age of seventy. Prior to his termination, Morrow had received for his 1982-83 school year evaluation the highest ranking in each of the thirty-six performance categories reviewed by the respondent, Duval County School Board (the "School Board"). (R. vol. II ex. 15 at 195-365) The ratings were in accord with Morrow's twenty-one year history of employment with the School Board. (R. vol. II ex. 13 at 195-365)

One fact which cannot be overstressed is that Morrow was terminated solely because of his age. The superintendent of schools for Duval County testified that Morrow's performance as a teacher was not even a consideration in the decision to terminate him and that he had been informed that Morrow was "an outstanding teacher." (R. vol. I at 156, 170) Nor did the superintendent follow any written guidelines or procedures in making his decision to terminate Morrow. (R. vol. I at 155)

In addition, the School Board's termination of Morrow solely on the basis that he had reached age seventy was unique to him. During the 1982-83 school year, eleven teachers in the Duval County public schools attained the age of seventy. While

six of these teachers voluntarily retired, of the remaining five, only Morrow was not reappointed for the following school year. (R. vol. III, ex. 19 at 366-414) The School Board gave no explanation why Morrow was singled out for this disparate treatment.

After the School Board terminated Morrow, he filed a complaint with the Florida Commission on Human Relations on March 28, 1984 against the School Board alleging discrimination on the basis of age. After efforts to conciliate the matter were unsuccessful, Morrow filed a petition for relief from an unlawful employment practice with the Florida Commission on Human Relations. (R. vol. at 1-27) This petition was turned over for hearing to a hearing officer in the Florida Department of Administrative Hearings. The hearing officer, in an order dated November 21, 1984, found that the School Board had discriminated against Morrow in violation of Section 760.10 of the Florida Statutes (1983). (R. vol. I at 99-106) On April 29, 1985, the Florida Commission on Human Relations adopted the order of the hearing officer. (R. vol. I at 113-20)

The School Board appealed the order of the Florida Commission on Human Relations to the Florida First District Court of Appeal. On June 12, 1986, the appellate court in its majority opinion found that the School Board has the right under Section 231.031 of the Florida Statutes (1983) to terminate an employee solely on the basis of age. Duval County

School Board v. State of Florida, Department of Administration, ___ So.2d ___, 11 Fla. L. W. 1135 (Fla. 1st DCA 1986). Morrow moved for rehearing, which was denied on September 3, 1986. However, the appellate court did certify the following issue of great public importance to this Court: "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?" Id., ___ So.2d at ___, 11 Fla. L. W. 1901.

Morrow and the Florida Commission on Human Relations filed timely appeals to this Court, which have been consolidated.

SUMMARY OF ARGUMENT

This case presents this Court with the issue of whether the Duval County School Board may terminate a full time teacher, with a twenty-one year employment history of outstanding performance, solely on the basis that he had reached age seventy, while continuing to employ other teachers of the same age. The School Board cites to Section 231.031 of the Florida Statutes (1983) for its authority to act in an arbitrary manner regarding the retention or dismissal of full time teachers after they have reached the age of seventy. The First District Court of Appeals accepted this construction of section 231.031.

Morrow submits that section 231.031 only removed tenure rights from a full time public school teacher after he or she reaches age seventy.

The Human Rights Act of 1977 prohibits discrimination on the basis of age. Private school teachers and part time public school teachers are not affected by section 231.031. Under the Human Rights Act, a private school teacher and a part time public school teacher cannot be terminated solely on the basis of age. The First District Court of Appeal's construction of section 231.031 results in a full time public school teacher having less protection from age discrimination than a private school teacher or a part time public school teacher. There is absolutely no rational basis for such unequal treatment.

This Court must construe section 231.031 in harmony with the Human Rights Act and in a manner that will render it constitutional. The First District Court of Appeal's construction of section 231.031 renders the age discrimination provisions of the Human Rights Act completely inapplicable to full time public school teachers and results in the statute being unconstitutional in violation of equal protection and due process of law.

This Court should reverse the decision of the First District Court of Appeal.

I. Does The Duval County School Board Have The Right To Terminate A Full Time Teacher Solely Because He Or She Has Reached Age Seventy?

This case presents this Court with the issue of whether the Duval County School Board may terminate a full time teacher, with a twenty-one year employment history of outstanding performance, solely on the basis that he had reached age seventy, while continuing to employ other teachers of the same age. The School Board's position on this issue is that it has the absolute right under Florida law to selectively terminate any full time teacher solely on the basis that he or she has reached the age of seventy. The School Board believes that no guidelines or procedures need be followed in deciding whether to terminate a full time teacher after he or she has reached the age of seventy. The School Board believes that it need give no explanation or reason as to why Morrow was terminated solely because of his age while other teachers of the same age were retained.

The School Board cites to Section 231.031 of the Florida Statutes (1983) for its authority to act in an arbitrary manner regarding the retention or dismissal of full time teachers after they have reached the age of seventy. Section 231.031 of the Florida Statutes provides as follows:

Maximum Age For Continued Employment Of Instructional Personnel - Notwithstanding the provisions of § 112.044, no person shall be entitled to continued employment in any instructional capacity in the public schools of this state 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 in employment beyond such date, subject to annual reappointment in the manner prescribed by law. Nothing contained herein shall apply to employment limited to substitute and part time teaching.

Section 231.031 was substantially revised in 1980 by Chapter 80-295, § 7, Laws of Florida. Previously, section 231.031 had provided that no person could be employed as a full time teacher in the public schools in Florida after they had reached the age of seventy years. The School Board takes the position that the only change made by section 231.031 was to eliminate the absolute prohibition on continued employment and instead grant the superintendent of the local school board the unbridled discretion to determine whether employment should be continued. This position was accepted by the First District Court of Appeal, which found that the School Board has "the authority to refuse to continue to employ seventy year old tenured teachers solely because of their age." Duval County School Board, ___ So.2d at ___, 11 Fla. L. W. at 1135.

A. The Florida Human Rights Act Prohibits Discrimination On The Basis Of Age.

In 1977, the Florida Legislature passed the Human Rights Act of 1977. Section 760.10(1) of the Florida Statutes provides:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire an individual, or otherwise to discriminate against any individual with respect to compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely effect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

The Human Rights Act is based upon Section 2 of Article I of the Florida Constitution which provides in pertinent part that: "No person shall be deprived of any right because of race, religion or physical handicap."

A year prior to enacting the Human Rights Act, the Florida Legislature enacted the Florida Age Discrimination in Employment Act, an almost identical statute prohibiting age discrimination by public employers. Ch. 76-208, § 10, Laws of Florida. This prohibition against age discrimination applicable to public employees is codified at Section 112.044 of the Florida Statutes (1985). The Human Rights Act, enacted the following year, prohibits age discrimination by both public and private employers. See § 760.02(6), Fla.Stat. (1985); Housing Authority of City of Sanford v. Billingslea, 464 So.2d 1221, 1224 (Fla. 5th DCA 1985).

In enacting the Human Rights Act, the Florida Legislature put Florida in the vanguard of states in the United States prohibiting discriminatory employment practices. In the area of age discrimination, Florida exceeded the then existing

federal proscriptions. In 1977, federal law prohibited age discrimination only if the individual was under 65 years of age.¹ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 § 12, 81 Stat. 607 (current version codified at 29 U.S.C. § 631(a)). Florida's Human Rights Act contains no limitations at all with regard to the age of the citizens it protects.

The Human Rights Act applies to all employees employed within the State of Florida in both the public and private sectors. According to its own terms, the Human Rights Act is to be liberally construed. § 760.01(3), Fla. Stat. (1985). This means that absent Section 231.031 of the Florida Statutes, there would be absolutely no controversy over whether the School Board acted in violation of law in terminating Morrow. If Morrow had been employed in a private school within Florida, the private school could not have terminated Morrow on the basis of age. In addition, if Morrow was a part time or substitute teacher in the public schools, he could not have been terminated on the basis of age. Morrow, as a full time public school teacher, is simply seeking the same protections that would be available to him if he were either a private school teacher or a part time public school teacher.

¹ In 1978, federal law increased the limit to seventy years of age. Act of April 6, 1978, Pub. L. No. 95-256 § 3(a), 92 Stat. 189. As discussed below, federal law only this past month has extended its protections to all citizens regardless of their age and removed the previous seventy years of age limitation.

B. Section 231.031 Of The Florida Statutes Only Removes A Public School Teacher's Right To Tenure After He Or She Reaches The Age of Seventy And Does Not Grant A School Board The Unbridled Discretion To Terminate A Teacher Upon Attaining The Age of Seventy.

Section 231.031 of the Florida Statutes removes the tenure protections provided by Florida law to full time public school teachers after he or she has reached age seventy. Under Florida law, a tenured teacher is entitled to continued employment absent unsatisfactory performance. See § 231.36, Fla. Stat. (1983). A tenured teacher is not an at will employee as are most individuals working for private employers in Florida. A tenured teacher may not be dismissed without good cause. Id. at § 231.36(3)(e); see Gainey v. School Board of Liberty County, 387 So.2d 1023, 1029 (Fla. 1st DCA 1980) (§ 231.36(3)(e) is a penal statute which must be strictly construed in favor of teacher). He or she is protected against arbitrary or capricious action on the part of the school board or its superintendent just as most other public employees are protected by the civil service system. A tenured public school teacher may not be terminated without the school board complying with the procedural protections provided by Florida and federal law. Id.; see Board of Regents v. Roth, 408 U.S. 564 (1972).

Morrow does not dispute that section 231.031 removes the valuable rights of tenure from a public school teacher after he

or she has reached age seventy. The First District Court of Appeal, however, went further and found that section 231.031 removed all protections from age discrimination contained in the Human Rights Act for full time public school teachers after age seventy.

According to the First District Court of Appeal's construction, the Florida Legislature must have intended section 231.031 to deny full time public school teachers the right to be free from age discrimination that has been accorded teachers in private schools and part time teachers in public schools. Frankly, Morrow submits that this is a preposterous construction of section 231.031.

A construction of section 231.031 which results in a full time public school teacher having less protection against dismissal solely on the basis of age than a private school teacher or a part time public school teacher would be unconstitutional as a violation of equal protection and due process of law. There is absolutely no rational basis for granting a private school teacher or a part time public school teacher greater rights than a full time public school teacher against dismissal solely on the basis of age.

In addition, the construction accepted by the First District Court of Appeal necessarily implies that the Florida Legislature intended the superintendent of the Duval County school system to have the authority to arbitrarily,

capriciously, and selectively terminate an outstanding teacher who had reached the age of seventy while continuing to employ all other teachers who had reached that age. According to the appellate court, the superintendent may decide to terminate Morrow, who received the highest ranking in each of the thirty-six categories evaluated, solely on the basis that he had reached age seventy, while deciding at the same time to reemploy for the following school year four other teachers who had reached the age of seventy.

Morrow submits that this construction of the Florida Legislature's intent in enacting section 231.031 should be rejected. Constitutional due process and equal protection problems with such a construction of the statute are self-evident. Full time public school teachers are discriminated against solely on the basis that they are employed in public schools as opposed to being employed in a private school or on a part time basis in the public schools. School superintendents are granted the unbridled discretion to selectively terminate teachers in excess of seventy years of age on a completely arbitrary and capricious basis.

This Court in City of Boca Raton v. Gidman, 440 So.2d 1277, 1282 (Fla. 1983), summarized the relevant rules of statutory construction regarding statutes dealing with similar subject matters. This Court stated:

A law should be construed together with any other law relating to the same purpose such that they are in

harmony. Courts should avoid a construction which places in conflict statutes which cover the same general field. The law favors a rational, sensible construction.

Id. (citations omitted). Furthermore, this Court has stated that it must resolve doubts concerning the constitutionality of a statute in favor of its validity and "to construe a statute, if reasonably possible, in such a manner as to support its constitutionality - to adopt a reasonable interpretation of a statute which removes it farthest from constitutional infirmity." Corn v. State, 332 So.2d 4, 8 (Fla. 1976) (emphasis added).

Morrow's construction of section 231.031 is both straight forward and constitutional. Section 231.031 only removes the tenure rights of teachers in excess of seventy years of age. The Legislature could have found it prudent to remove from teachers who had reached the age of seventy the for good cause and procedural protections afforded tenured teachers under Florida law. Removal of tenure rights, which would require a legislative enactment in light of the Human Rights Act and the Age Discrimination in Employment Act, does not equate to granting local school boards the unbridled discretion to terminate a teacher solely on the basis that he or she has reached the age of seventy.

Section 231.031 places a full time tenured teacher who has reached the age of seventy in the position of an at will employee on a year to year contract basis. An at will

employee, however, may not be terminated solely on the basis of age under the Human Rights Act. Under this construction, a full time public school teacher is treated exactly the same as a private school teacher or part time public school teacher who does not have the rights of tenure granted under Florida law.

Such a construction avoids the troubling constitutional questions that are raised if the First District Court of Appeals' construction is accepted. In addition, this construction is in accord with the intent of the Florida Legislature in enacting the Human Rights Act wherein it provided within the statute itself that the Act "shall be liberally construed." § 760.01(3), Fla. Stat. (1985).

Finally, the construction proposed by Morrow is in accord with the explicit language of section 231.031 itself. The statute provides that a full time public school teacher may be continued in employment beyond the age of seventy "subject to annual reappointment in the manner prescribed by law." The statute therein incorporates the Human Rights Act.

Judge Shivers in his dissenting opinion in the First District Court of Appeal adopted this construction:

First, I do not agree with my colleagues' view that the phrase "annual reappointment in the manner prescribed by law" refers to the procedural requirements of section 230.33(7), Florida Statutes, rather than to the provisions of section 760.10, Florida Statutes. Assuming that the phrase did refer to section 230.33(7) (which is a subsection of the section listing the duties and responsibilities of a school superintendent), that section contains no statutory exceptions to age discrimination. Thus,

section 760 would apply to hiring under section 230.33(7) and it would remain discriminatory for a superintendent to refuse to recommend a teacher for an annual contract position, based solely on age.

Second, I agree with the Commission's rationale that the exception to the application of section 112.044 applies only to the school board's ability to remove a teacher from tenured status after reaching age seventy, but that the denial of annual contracts for teachers over age seventy, based solely on age, is prohibited by the antidiscrimination language in section 760.10(1)(a). . . .

Judge Shivers also noted that if the Florida Legislature had intended to allow discrimination against teachers on the basis of age, it could have done so by explicitly so stating, as it has done with regard to highway patrol officers. See § 321.04(4), Fla.Stat. (1983).

Morrow submits that the proper construction of section 231.031 is one that adopts the Florida Legislature's intent of liberal construction of the applicability of the Human Rights Act and avoids serious constitutional questions. Section 231.031 does not grant a county school board the right to refuse to rehire a teacher on an annual contract on the sole basis that such teacher has reached age seventy.

C. The Age Discrimination In Employment Amendments of 1986 Prohibit The Duval County School Board From Continuing To Deny Morrow The Right To Employment Solely Because He Has Reached Age Seventy.

On October 31, 1986, President Reagan signed into law the Age Discrimination In Employment Amendments of 1986, Public Law No. 99-592. This Act removed the seventy years of age

limitation on protection against age discrimination contained in the Age Discrimination In Employment Act. The Amendments are effective January 1, 1987. Under federal law, an employee may no longer be refused employment on the basis that he is over seventy years of age.

Morrow has made demand upon the School Board for reemployment effective January 1, 1987. As of the date this brief is filed, the School Board has not agreed to his reemployment. Under the federal law, Morrow is entitled to reemployment by the Duval County School Board as a full time teacher with tenure.

CONCLUSION

This Court should reverse the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished 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 Hall, Jacksonville, Florida 32202; DANA BAIRD, ESQUIRE, General Counsel, Florida Commission on Human Relations, 325 John Knox Road, Suite 240 - Building F, Tallahassee, Florida 32301; THOMAS W. BROOKS, ESQUIRE, Post Office Box 1547, Tallahassee, Florida 32302; and, LESLIE HOLLAND, ESQUIRE, 208 West Pensacola Street, Tallahassee, Florida 32301; by U.S. Mail this 14th day of November, 1986.

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