

VOLUME NO. 44

OPINION NO. 8

CITIES AND TOWNS - Effect of requirements of section 7-33-4107 on section 7-33-4106;

FIRE DEPARTMENTS - Meaning of "original appointment" as used in section 7-33-4107;

RETIREMENT SYSTEMS - Appointment as firefighter made in violation of section 7-33-4107 and eligibility for membership in Firefighters' Unified Retirement System;

MONTANA CODE ANNOTATED - Sections 7-33-4106, 7-33-4107, 19-13-104, 19-13-202, 19-13-301, 49-1-102, 49-2-303, 49-3-103;

MONTANA LAWS OF 1981 - Chapter 566;

UNITED STATES CODE - 29 U.S.C. § 623.

- HELD: 1. An individual, over the age of 34 when first hired as a firefighter by a Firefighters' Unified Retirement System employer, is in compliance with section 7-33-4107, MCA, if the individual's first appointment as a firefighter, irrespective of place of employment, occurred when the individual was not over 34 years of age.
2. A firefighter who is over the age of 34 at the time of his original appointment is not eligible for membership in the Firefighters' Unified Retirement System.

March 4, 1991

Paul A. Smietanka, Counsel
Public Employees' Retirement Board
Department of Administration
Mitchell Building
Helena MT 59620

Dear Mr. Smietanka:

You have requested my opinion concerning the qualifications necessary for membership in the Firefighters' Unified Retirement System (FURS). In order

to address the issues inherent in your request I have phrased your request as two separate questions:

1. Is an individual, over the age of 34 when first hired as a firefighter by a Firefighters' Unified Retirement System employer, appointed in violation of section 7-33-4107, MCA?
2. Is an individual appointed as a firefighter in violation of section 7-33-4107, MCA, qualified to participate in the Firefighters' Unified Retirement System?

Title 7, chapter 33, part 41, MCA, addresses the establishment of municipal fire departments in the cities and towns of Montana. The mayor or manager of a municipality is charged with the appointment of the "chief of the fire department, the assistant chief or chiefs of the fire department, and all firefighters." § 7-33-4106, MCA. The statutorily required qualifications for those individuals seeking appointment are set out in section 7-33-4107, MCA, as follows:

The state of Montana determines that age is a valid, bona fide occupational qualification for the position of firefighter because of the rigorous physical demands of the firefighting profession and the expectation of many years of emergency service. The qualifications of firefighters shall be that they:

- (1) shall not be more than 34 years of age at the time of original appointment;
- (2) shall have passed a physical examination by a practicing physician duly authorized to practice in this state; and
- (3) at the option of said city or town, shall be qualified voters of the city or town.

The term "original appointment," as used in subsection (1), is not defined in the statute nor has its meaning been addressed by the Montana Supreme Court. Therefore, the ordinary principles of statutory construction must be applied to determine the proper interpretation of section 7-33-4107, MCA. The fundamental rule of statutory construction is that the intention of the Legislature controls, and that requires initial reference to the plain language of the statute. Missoula County v. American Asphalt, Inc., 216 Mont. 423, 426, 701 P.2d 990, 992 (1985); W.D. Construction, Inc. v. Gallatin County Board of Commissioners, 218 Mont. 348, 351, 707 P.2d 1111, 1113 (1985). Words must be construed in the context used and provisions relating to the same subject matter must be harmonized to the extent possible. Title

Insurance and Trust Co. v. County of Riverside, 767 P.2d 1148, 1152 (Cal. 1989); State v. Henderson, 664 P.2d 1291, 1292 (Wash. Ct. App. 1983).

The phrase "original appointment" is used here in the context of a statute which recognizes a maximum hiring age of 34 for firefighters as a bona fide occupational qualification (BFOQ). Montana's statutes governing age discrimination in employment provide for an exemption based on a BFOQ. This opinion does not address the appropriateness of a maximum hiring age for firefighters in the state of Montana. However, in order to determine the meaning of the phrase "original appointment" as used in the context of a statute determining a BFOQ, it is necessary to look at the Montana statutes governing age discrimination in employment and case law applicable to the designation of a BFOQ.

In Montana the right to be free from discrimination based on age is declared to be a civil right. § 49-1-102, MCA. It is unlawful for "an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his ... age ... when the reasonable demands of the position do not require an age ... distinction." § 49-2-303 (1)(a), MCA. Nothing in this law, however, "prohibit[s] any public or private employer from enforcing a differentiation based on ... age ... when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age." § 49-3-103, MCA.

The Montana Supreme Court has not specifically addressed the appropriateness of a BFOQ based on age; however, it has addressed the appropriateness of a BFOQ based on sex. In analyzing this BFOQ, the Court relied on case law interpreting federal law prohibiting sex discrimination. Stone v. Belgrade School Dist. No. 44, 217 Mont. 309, 703 P.2d 136 (1984). The Montana Supreme Court has held that reference to federal case law is useful and appropriate in considering questions arising under the Montana Human Rights Act. Snell v. Montana-Dakota Utilities, 198 Mont. 56, 62, 643 P.2d 841, 845 (1982). Federal case law interpreting the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634, is also helpful to understand the context of section 7-33-4107, MCA.

The ADEA has provisions similar to Montana's statutes governing age discrimination in employment. Section 623 of the ADEA makes it "unlawful for an employer ... 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." 29 U.S.C. § 623(a)(1). However, a classification based on age is lawful "where age is a bona fide occupational qualification reasonably

necessary to the normal operation of a particular business." 29 U.S.C. § 623(f)(1).

The United States Supreme Court set out the test an employer must meet in order to establish a BFOQ in Western Air Lines v. Criswell, 472 U.S. 400, 413-15 (1985). The Court of Appeals for the Fifth Circuit summarized this test as follows:

To qualify under the BFOQ exception to the ADEA, an employer must show: (1) The job qualifications invoked to justify the age discrimination must be reasonably necessary to the normal operation of the particular business, and (2) age is a necessary proxy for those job qualifications, either because (a) there is a factual basis for believing that all or substantially all people over a certain age would be unable to satisfy those job qualifications, or (b) there is proof that individual testing for those job qualifications is impossible or highly impractical. Western Air Lines v. Criswell, 472 U.S. 400, 413-15 (1985).

E.E.O.C. v. Mississippi State Tax Comm'n, 873 F.2d 97, 98 (5th Cir. 1989). The United States Supreme Court in Criswell went on to find that the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by safety interests are whether the job qualification is "reasonably necessary" to the overriding interest in public safety, and whether the employer is compelled to rely on age as a proxy for the safety-related job qualification validated in the first inquiry. The BFOQ exemption was meant to be an extremely narrow exemption to the general prohibition against age discrimination and any problems involving age discrimination were to be decided on a case-by-case basis. Criswell, at 412, 422.

It became apparent that those professions requiring a high degree of physical stamina and agility in which public safety was an issue required special consideration under the ADEA. Congress, in recognition of the importance of the safety considerations involved in the firefighting and law enforcement professions and the problems of dealing with these professions on a case-by-case basis, amended the ADEA in 1986 by adding the following exemption:

It shall not be unlawful for an employer ... 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 and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983[.]

29 U.S.C. § 623(i)(1). The amendment will terminate effective December 31, 1993, allowing these professions time to study the feasibility of developing physical and mental fitness tests which will adequately measure the ability of police officers and firefighters to do their jobs. 132 Cong. Rec. S16853-54 (daily ed. Oct. 16, 1986).

Although firefighters are not exempted from the Montana statutes addressing age discrimination in employment, section 7-33-4107, MCA, does state that a maximum hiring age is a bona fide occupational qualification for the position of firefighter "because of the rigorous physical demands of the firefighting profession and the expectation of many years of emergency service."

Prior to the 1986 amendments to the ADEA, numerous courts addressed the criteria necessary to establish a maximum hiring age as a BFOQ. In relation to law enforcement personnel, the Court of Appeals for the Eighth Circuit upheld a maximum hiring age for highway patrol officers because the maximum entry age ensures that the Patrol can take advantage of the physical skills and abilities of younger persons and also provide those persons with enough experience while they are relatively young to compensate for the inevitable reduction in their physical skills and abilities that comes with aging. E.E.O.C. v. Missouri State Highway Patrol, 748 F.2d 447, 456 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985); see also Civil Service Board of City of Portland v. Bureau of Labor and Industry, 692 P.2d 569 (Or. 1984).

In 1981, the Montana Legislature amended section 7-33-4107, MCA, by increasing the maximum hiring age for firefighters from age 31 to age 34. 1981 Mont. Laws, ch. 82, § 1 (Senate Bill 204). The legislative history of SB 204 indicates that there was some concern over the impact an increase in the maximum hiring age would have on the firefighters' retirement plan. See Hearing on Senate Bill 204, Minutes of House Committee on Local Government, February 3, 1981, at 5; Hearing on Senate Bill 204, Minutes of Senate Committee on State Administration, March 9, 1981, at 4. It is clear, however, from case law that a claim of an adverse impact upon pension and disability plans that would be encountered by hiring "older" firefighters cannot justify hiring only those applicants under a particular age. Civil Service Board, 692 P.2d at 574. Economic considerations cannot be the basis for a BFOQ as it was precisely those considerations which were the target of the ADEA. E.E.O.C. v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983).

In E.E.O.C. v. County of Los Angeles, the Ninth Circuit recognized that there was an inherent contradiction in the county's argument which justified a maximum hiring age of 35 on grounds that the experience gained by deputies hired at a young age makes up for the gradual decline in physical fitness that often accompanies the aging process, while at the same time making no provision for hiring persons over the age of 35 who had extensive similar

experience in other governmental agencies. E.E.O.C. v. County of Los Angeles, 706 F.2d at 1043.

The word "original" is defined as "relating to, or constituting an origin or beginning ... not secondary, derivative, or imitative." Webster's Ninth New Collegiate Dictionary 832 (1983). The plain meaning of this term would suggest an interpretation of "original appointment" as that appointment which is the individual's first appointment as a firefighter irrespective of the individual's employer. Such an interpretation allows an employer to consider the individual's prior experience as a firefighter in making a determination as to that person's qualifications and is consistent with the intent of state and federal law governing the criteria necessary to establish a BFOQ. To require that the "original appointment" must be appointment by an employer who is a member of FURS would discount that individual's prior experience and training as a firefighter and would be in direct opposition to the purpose of the laws governing age discrimination.

I conclude that an individual, over the age of 34 when seeking appointment as a firefighter with any employer in the state of Montana, must first prove that he or she was 34 or younger when originally appointed as a firefighter in order to be in compliance with section 7-33-4107, MCA. It is not necessary that the original appointment be within the state of Montana or with a FURS employer. The employer is then free to look at the experience, qualifications, and physical examination results of the individual applicant in order to make a hiring determination.

Your second question asks whether an individual who has in fact been appointed in violation of section 7-33-4107, MCA, is eligible for membership in FURS. The Firefighters' Unified Retirement System was established by statute in 1981. 1981 Mont. Laws, ch. 566. Although the Public Employees' Retirement Board (the Board) has the duty to determine the conditions under which persons may become members of and receive benefits under FURS, § 19-13-202, MCA, the basic requirements for membership are set out by statute.

Pursuant to section 19-13-301, MCA, a "full-paid firefighter" becomes an active member under the plan on the first day of his employment by a FURS employer. Upon becoming eligible for membership the firefighter must complete the appropriate forms and furnish any proof required by the board. A full-paid firefighter is defined as "a person appointed as a firefighter under 7-33-4106." § 19-13-104(8), MCA. An employer is defined as "any city that is of the first or second class or that elects to join this plan under 19-13-108." § 19-13-104(5), MCA. Therefore, in order for a firefighter to be a member of FURS, he or she must be appointed in compliance with section 7-33-4106, MCA, and the city or town by which the firefighter is appointed must be a FURS member.

Section 7-33-4106, MCA, requires that the mayor or manager of the city or town shall "nominate and, with the consent of the council or commission, appoint ... all firefighters." However, in order to be a firefighter in the state of Montana, an individual must meet particular statutory requirements. Section 7-33-4107, MCA, requires that the firefighter "*shall* not be more than 34 years of age at the time of original appointment." (Emphasis added.) Even a city with self-government powers may not establish standards or requirements which are lower or less stringent than those imposed by state law. § 7-1-113(2), MCA; see also Billings Firefighters Local 521 v. City of Billings, 214 Mont. 481, 694 P.2d 1335 (1985). Therefore, any individual who does not meet at least the minimum statutory requirements of section 7-33-4107, MCA, cannot be legally appointed pursuant to section 7-33-4106, MCA. Thus, a firefighter who is over the age of 34 at the time of his original appointment, as defined above, cannot be legally appointed pursuant to section 7-33-4106, MCA, and therefore is not eligible for membership in FURS.

THEREFORE, IT IS MY OPINION:

1. An individual, over the age of 34 when first hired as a firefighter by a Firefighters' Unified Retirement System employer, is in compliance with section 7-33-4107, MCA, if the individual's first appointment as a firefighter, irrespective of place of employment, occurred when the individual was not over 34 years of age.
2. A firefighter who is over the age of 34 at the time of his original appointment is not eligible for membership in the Firefighters' Unified Retirement System.

Sincerely,

MARC RACICOT
Attorney General