4-9-1984

Branson v. Denver

SUPREME COURT, STATE OF COLORADO

Case No. 84-SA-5

BIRDIE L. BRANSON,

Plaintiff-Appellant,

v.

THE CITY AND COUNTY OF DENVER;
BOARD OF TRUSTEES OF THE
FIREMEN'S PENSION FUND OF
THE CITY AND COUNTY OF DENVER;
and ELVIN R. CALDWELL, in his
capacity as Secretary of the
Board of Trustees of the
Firemen's Pension Fund,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT FOR THE CITY AND COUNTY
OF DENVER, COLORADO,
HON. HAROLD D. REED, DISTRICT JUDGE

OPENING BRIEF OF PLAINTIFF-APPELLANT BIRDIE L. BRANSON

HOLLAND & HART

Bruce W. Sattler, #2639
Kathryn E. Miller, #10614
A. Bruce Jones, #11370

555 Seventeenth Street
Suite 2900
P.O. Box 8749
Denver, Colorado 80201
Telephone: (303) 295-8000

Attorneys for
Plaintiff-Appellant
Birdie L.. Branson

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Defendants-Appellees.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court Erred in Finding That § 31-30-509, C.R.S., Does Not Violate Either the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or the Equal Protection Component of the Due Process Clause of the Colorado Constitution, Article II, § 25.
2. Whether the Trial Court Erred in Finding That Plaintiff's Claim for a Declaratory Judgment Was Barred by the Statute of Limitations.

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from a final judgment of the District Court for the City and County of

Denver, Colorado in a combination C.R.C.P. 106 and C.R.C.P. 57 proceeding. That judgment affirmed the denial by the Board of Trustees of the Firemen's Pension Fund of the City and County of Denver ("Board") of Mrs. Birdie L.. Branson's application for pension benefits pursuant to § 31-30-509, C.R.S. This statute governs pension benefits for the survivors of deceased firemen. However, it denies pension benefits to the surviving spouse of a retired fireman whose marriage occurred after the fireman's retirement.

Course of Proceedings. Mrs. Branson brought a Rule 106 appeal challenging the Board's action in denying her application for pension benefits. Simultaneously, Mrs. Branson sought through declaratory relief an order that § 31-30-509, which the Board had relied upon in denying her application, was unconstitutional. Mrs. Branson moved for summary judgment on the latter claim. The defendants contended that § 31-30-509 was constitutional, and therefore that the Board had acted properly in denying Mrs. Branson's claim for benefits. The District Court heard oral argument on both the motion for summary judgment and the Rule 106 appeal.

Disposition in District Court. The District Court held that Mrs. Branson's request for declaratory relief was barred by the statute of limitations. However, in considering Mrs. Branson's Rule 106 appeal, the Court addressed the constitutionality of § 31-30-509. The Court applied the rational relationship test and held that the statute did not violate either the federal or state Constitutions. It therefore

affirmed the Board's decision, and dismissed Mrs. Branson's complaint.

STATEMENT OF FACTS

The material facts in this case are undisputed. The primary parties are Birdie L. Branson and the Board of Trustees of the Firemen's Pension Fund for the City and County of Denver ("Board"). Mrs. Branson is the 76-year old surviving spouse of Mr. William L. Branson, a retired firefighter for the City and County of Denver. The Board is an administrative body that administers the pension fund of the Fire Department of the City and County of Denver ("Fund").[1]

After serving over 20 years with the Denver Fire Department, William L. Branson retired and began receiving a disability retirement pension from the Fund effective January 16, 1959. Approximately four years after his retirement, Mr. Branson married the plaintiff-appellant Birdie L. Branson, on February 7, 1963. The couple remained married for 13 years until the death of Mr. Branson on April 26, 1976.

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[1] The Fund and Board were initially created and established by the Colorado Legislature in 1903, and adopted by the City and County of Denver in Section 242 of the 1904 City Charter, which is Article 5, § C5.36 of the present Charter. The Legislature has since created a statewide pension system, which is governed by the Board of the Fire and Police Pension Association. See Sections 31-30-1004 to 1005, C.R.S. (Supp. 1983). However, the benefits relating to employees who retired before April 7, 1978, are still determined by the local board. See Section 31-30-1003, C.R.S. (Supp. 1983).

Mrs. Branson has not remarried. Monthly social security payments in the amount of $362.00 are her sole source of income. After her husband's death, Mrs. Branson made inquiries concerning whether she was entitled to continue receiving her husband's retirement benefits after his death. She was orally informed by representatives of the Retired Firemen's Association that she was not entitled to continue receiving benefits, and that an application by her for such benefits as a surviving widow would be fruitless.[2]

In 1979, the firemen's pension statute was substantially revised. These revisions, however, did not affect spouses in situations similar to Mrs. Branson. When it became apparent that Mrs. Branson's situation would not be remedied, a representative of the Retired Firemen's Association assisted Mrs. Branson in contacting counsel. In December 1982, based on the advice of counsel, Mrs. Branson filed for benefits.

Mrs. Branson's application for benefits was based on § 31-30-509 of the Firemen's Pension Act. That section provides for a monthly annuity to the surviving spouse of a firefighter. However, the statute arbitrarily defines a surviving spouse as a person who married a firefighter prior to the firefighter's retirement. The statute states in part as follows:

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[2] The Retired Firemen's Association is not officially affiliated with the City and County of Denver or the Denver Fire Department.

> If any [firefighter] dies from any cause while in the service or while on the retired list, leaving a surviving spouse whom such [firefighter] married previous to his application for retirement . . . such surviving spouse shall be awarded a monthly annuity . . . .

(Emphasis added). Therefore, although Mrs. Branson was clearly the surviving spouse of a firefighter, she was automatically excluded from benefits because she married Mr. Branson after he retired. The Board relied on this provision in denying her application for benefits.

Pursuant to C.R.C.P. 106, Mrs. Branson appealed the Board's decision to the District Court. She claimed the Board's action was an abuse of discretion because the statute on which it relied violated equal protection of the law. Simultaneously with her Rule 106 appeal, Mrs. Branson sought a declaratory judgment that § 31-30-509 was unconstitutional. She challenged the statute under both the Fourteenth Amendment of the federal Constitution and Article II, § 25 of the Colorado Constitution.[3] She alleged that the statute was unconstitutional both on its face and as applied to her.

In upholding its constitutionality, the District Court found three justifications for the statute. First, the Court indicated that excluding post-retirement spouses

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[3] Inherent in the due process clause of the Colorado Constitution is a requirement of equal protection. Millis v. Board of County Commissioners, 626 P.2d 652, 657 (Colo. 1981).

contributed to the "fiscal certainty" of the pension fund by establishing "a definite class of individuals entitled to pension benefits." Second, the Court stated that the Legislature could rationaly distinguish between groups of firefighters depending on the population of the area in which they worked. Thus, although the arbitrary definition of "surviving spouse" does not apply to firefighters employed in cities under 100,000 in population, see § 31-30-407(2), the Court nonetheless found the distinction rational in the provision applicable to firefighters in Denver.

Third, the Court stated that the Legislature could have considered the hazards of a particular occupation in awarding benefits, and that the Legislature's judgment in this regard may vary from occupation to occupation. Therefore, although other sections of Title 31, such as those providing for survivor benefits to the surviving spouses of police officers, do not exclude post-retirement marriages, the Court nonetheless felt the distinction was rational for firefighters.

These justifications might be valid in the abstract, but the Court's reliance upon them assumes the question presented for review -- does the distinction drawn by the Legislature regarding surviving spouses rationally advance or relate to any of the stated objectives.

SUMMARY OF ARGUMENT

The Colorado Legislature has arbitrarily defined a "surviving spouse" under § 31-30-509 according to when the marriage in question took place. A surviving spouse who married a fireman before he retired is eligible for benefits after the fireman dies, while a spouse who married a fireman after he retired is not. Section 31-30-509 is the only pension provision of Title 31 containing this definition of "surviving spouse." No rational basis for this whimsical definition exists. The statute irrationally treats similarly situated persons differently, and thus violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, and the equal protection component of the due process clause of the Colorado Constitution, Article II, § 25. In relying on this statute to deny Mrs. Branson's application for benefits, the Board abused its discretion, and acted arbitrarily, capriciously, and beyond its jurisdiction. The District Court erred both in upholding the Board's action and in finding the statute constitutional.

The District Court also erred in finding that Mrs. Branson's action for a declaratory judgment was barred by the statute of limitations. The Court properly found that the Board had waived this defense by not relying upon it to deny Mrs. Branson's application. Since the statute of limitations was not available as a defense to the underlying claim, the

Court should not have applied it to the declaratory judgment action.

ARGUMENT

A. The applicable constitutional standard is the rational basis test.

The constitutional right of equal protection is a guarantee of like treatment for all similarly situated persons. J. T. v. O'Rourke, 651 P.2d 407, 413 (Colo. 1982). In the case at bar, identically situated people - surviving spouses of Denver firemen - are treated differently based solely on the timing of their marriages. To survive constitutional challenge, the differential treatment mandated by § 31-30-509 must be reasonable and must bear a rational relationship to a legitimate state objective. Id.[4] This standard of review is commonly referred to as the rational basis test. See Carter v. Firemen's Pension Fund, 634 P.2d 410, 411 (Colo. 1981). In determining the constitutionality of this statute, the Court must consider the following factors:

> The character of the classification in question; the individual interest affected by the classification; and the governmental interest asserted in support of the classification.

Carter, 634 P.2d at 411 (quoting Dunn v. Blumstein, 405 U.S. 330, 335 (1972)).

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[4] The parties agree on the standard under which the statute must be evaluated.

The Fourteenth Amendment provides a constitutionally mandated level of protection for individual rights, which the states cannot violate. In addition, Colorado courts "are free to construe the Colorado Constitution to afford greater protections that those recognized by the United States Constitution." Millis v. Board of County Commissioners, 626 P.2d at 657. Although this Court often uses the same language as the United States Supreme Court in formulating the rational basis test, the Court stated in Millis that a Colorado court must determine "whether our own state constitution requires more extensive protections than those mandated by the Fourteenth Amendment." Id. Therefore, since the Colorado Constitution must provide as much protection as the federal Constitution, and possibly more, see, e.g., City and County of Denver v. Nielson, 194 Colo. 407, 572 P.2d 484 (1977), plaintiff-appellant will concentrate primarily on Colorado cases and their interpretation of equal protection.

B. No rational basis for the classification exists.

This Court has previously considered the statute at issue here. In Carter v. Firemen's Pension Fund, the Court held unconstitutional that part of § 31-30-509 which denies benefits to a "surviving spouse" unless the marriage was "legally performed by a duly authorized person." This Court held that no rational basis existed for the statute's

distinction between statutory and common-law marriages. 634 P.2d at 411-12. The Court rejected the Fund's arguments that statutory marriages are easier to prove and that the distinction protected a fireman's minor children by a previous marriage from a potentially spurious pension claim by a common-law wife.

The Court should also hold unconstitutional the distinction in this statute between post- and pre-retirement marriages. The statute redefines the term "surviving spouse" in a manner contrary to common sense. No rational basis for the definition exists. In Carter, the Court referenced other sections in the pension provisions for firemen and policemen that do not exclude common-law marriages, and concluded that these provisions further demonstrated the irrationality of denying benefits to common-law wives. Similarly, except for the provision at issue here, none of the pension provisions of Title 31 define a "surviving spouse" according to the time of the marriage. See § 31-30-321(1)(c), C.R.S. (Supp. 1983)(policemen generally); § 31-30-407(2) (Supp. 1983)(firemen in cities with less than 100,000 population); § 31-30-608(2) (Supp. 1983) (policemen in cities over 100,000). These other sections simply provide for benefit payments to "surviving spouses," without arbitrarily limiting the meaning of that term.[5] None

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[5] The new pension scheme, §§ 31-30-1001 et seq., has changed the method for determining survivor benefits. See § 31-30-1006. Importantly, a fireman who retires with a dis-

of the rationales advanced by the District Court justify the arbitrary definition of "surviving spouse" contained in § 31-30-509, especially when compared with these other provisions of Title 31.

1. Fiscal certainty does not justify the definition of "surviving spouse."

The Court's order notes that "in government employment, such as the current case, pension benefits are established by law." The Court then stresses that "fiscal certainty is absolutely essential" in a pension system. Apparently, the Court felt that in excluding post-retirement spouses, the Legislature was contributing to the fiscal certainty of the pension fund. However, even though fiscal certainty may be a legitimate state objective, see Dawson v. Public Employees' Retirement Association, 664 P.2d 702, 709 (Colo. 1983), the Court fails to indicate how the distinction drawn by the Legislature is rationally related to that objective.

Any classification that excludes a potential beneficiary contributes to fiscal certainty by limiting the amount of money paid out from the pension fund. In this sense, the Legislature's exclusion of common law spouses, which this Court previously found unconstitutional, contributes to fiscal

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(Footnote Continued)

ability, as did Mr. Branson, and subsequently marries, is eligible to make an election that would qualify his spouse for pension benefits. See § 31-30-107(5)(b)(I).

certainty. Similarly, a distinction that excluded left-handed firemen, or surviving spouses whose last names began with the letter "B," would help achieve fiscal certainty. However, that would not make such classifications constitutional. Once the state decides to provide benefits, "the scheme by which the benefits are determined must have a rational basis." Kistler v. Industrial Commission, 192 Colo. 172, 556 P.2d 895, 897 (1976). It begs the question to say that the Legislature is justified in denying benefits to one party because it saves money which in turn can be paid to another party. Fiscal certainty alone does not provide a rational basis for the distinction drawn by the statute.[6]

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[6] One might interpret the District Court's order as addressing a different kind of fiscal certainty. The order vaguely relates "the amount of benefits which will be paid out and the needed assessments to fund such benefits" with a need for a "definite class of individuals entitled to pension benefits." Since this "definite class" is established, for the most part, upon a fireman's retirement, perhaps the Court is suggesting that assessment and benefit decisions are tied to the class of beneficiaries identifiable at the time of retirement. Actuarial evaluations of these potential beneficiaries could be used to make assessment and benefit decisions. Indeed, many pension systems, including the Firemen's Pension Act passed in 1979, §§ 31-30-1001 et seq., are based on such an actuarial system. However, the statute in this case is not. The statute does not provide that assessments and benefits be tied to an actuarial evaluation based on potential beneficiaries at the time of a fireman's retirement. Indeed, the need for an actuarial-based system is what led the Legislature to enact the Pension Reform Act of 1978. See § 31-30-802. Therefore, any suggestion that exclusion of post-retirement widows is tied to benefit and assessment decisions simply ignores the statute.

2. The population of a city is unrelated to the definition of "surviving spouse."

Section 31-30-509 applies to firemen in cities with populations over 100,000. The statute applicable to firemen employed in cities with populations under 100,000 does not contain a similar arbitrary definition of surviving spouse. See § 30-31-407(2). The Court's reasoning regarding this difference in treatment of spouses based on the population of cities suffers the same flaw as the fiscal certainty argument. The Legislature could undoubtedly make distinctions based on the population of the city in which a fireman works. For example, if the Legislature chose to vary the benefit amounts based on the size of a city, this might be rational because of cost-of-living differences. The population of a city, however, has nothing to do with a distinction drawn between post- and pre-retirement widows. A widow is a widow, whether she is in Durango or Colorado Springs.

3. The hazardous duty of a firefighter is not a rational basis for the statute.

The only rationale advanced by the Court's order arguably relating to the surviving spouse distinction is the hazardous duty argument. Aaccording to the defendants, a spouse who married a firefighter prior to his retirement "shared the hazard" of the firefighter's occupation, and therefore is more deserving of a benefit. On this basis, the Legislature could rationally distinguish between post- and pre-retirement widows. The Court's order goes on to state:

> [T]he judgment of the Legislature in this regard can vary from occupation to occupation, such as firefighters in contrast with police officers.

The Court's order fails to explain this reasoning. A distinction based on the hazardous work of a firefighter compared to a sanitation worker or an office clerk might be rational. To suggest, however, that the hazards involved in firefighting vary enough from the hazards of law enforcement to warrant different treatment for the surviving spouses of members of those occupations is ludicrous.

Neither does the Court explain the different treatment accorded surviving spouses in smaller cities. If "sharing the hazards of a firefighter's life" is the basis for denying benefits to a post-retirement spouse, then this rationale should apply in Lamar or Grand Junction as well as Denver. Yet § 31-30-407(2), which applies to firemen in cities with populations under 100,000, does not exclude post-retirement spouses from benefits. Moreover, both divorce and remarriage end the right to pension benefits. See, e.g., § 31-30-509; § 31-30-321(1)(c). Therefore, a spouse could share a firefighter's hazards year after year, and then promptly be cut off from benefits. This casts serious doubt on whether the Legislature was actually relying on the hazardous duty distinction.

Even if the defendants have properly identified the Legislature's rationale, the approach chosen by the Legislature

is grossly over- and under-inclusive. It is true that the Legislature need not be totally precise and error free in its classifications. At some point, however, the Legislature's "imprecise" classifications can become so divorced from their purpose that they must be considered irrational. Here, a widow who married a firefighter one day before he retired is eligible for benefits. Such a spouse can hardly claim to have shared the hazardous duty of the firefighter. On the other hand, a widow such as Mrs. Branson, who shared for many years the result of this hazardous duty -- Mr. Branson's disability -- gets nothing. In fact, a post-retirement widow who shares the result of her husband's hazardous duty after he becomes disabled is arguably more deserving than any other widow. Yet, she is completely excluded from receiving benefits because of the timing of her marriage. Certainly, if the Legislature wanted to benefit widows on the basis of sharing the hazardous life of a firefighter, "reasonable alternative means" for achieving this objective were available. Carter, 634 P.2d at 412. The Legislature could have based the right to benefits on whether a spouse married a firefighter while he was actually engaged in hazardous work, or after he became disabled because of that work. Instead, the Legislature irrationally chose to "throw the baby out with the bath water" by eliminating benefits for all post-retirement spouses.

Contrary to the defendants' arguments, it is likely that the Legislature chose to eliminate certain potential beneficiaries either to save money, or to prevent abuses of the Fund. Its approach in doing so was irrational. The Firemen's Pension Fund Act was enacted in 1903. As originally enacted the statute did not distinguish between widows according to the timing of their marriage to a fireman. See People ex rel. Albright v. Board of Trustees, 103 Colo. 1, 82 P.2d 765, 767 (1938) (quoting statute). Rather, the statute simply stated that a "surviving widow"[7] was entitled to benefits. In 1945, however, the statute was amended and the distinction in question was made. 1945 Colo. Session Laws Chapter 247, § 6(H) at 703. Since the amendment is nearly 40 years old, no legislative history is available. Therefore, the justifications advanced by the Defendants for the statute are necessarily somewhat speculative. It is apparent, however, that the Legislature was engaged in a deliberate attempt to exclude certain parties from benefits under § 31-30-509 alone since none of the other sections in Title 31 concerning benefits for surviving widows were changed. Significantly, the change brought about in § 31-30-509 affected only common-law wives and a future group of surviving spouses. All spouses who had already

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[7] In 1977 the Legislature made § 31-30-509 sex neutral. "Widow" was changed to "spouse" throughout the section. Since Mrs. Branson is not challenging this section as being sexually discriminatory, the change is irrelevant for present purposes.

engaged in a post-retirement marriage to a fireman were not excluded by the statute. In other words, the Legislature did not adversely change anyone's then identifiable interest. Only women who were not yet married, such as Mrs. Branson, were to be adversely affected. It is easy to ignore the needs of an unknown, and as yet nonexistent, constituency. While perhaps this explains the illogic of the statute, it does not justify its irrational consequences.

The state could arguably deny benefits to all surviving spouses. However, as stated previously, once the state decides to provide benefits, "the scheme by which the benefits are determined must have a rational basis." Kistler v. Industrial Commission, 556 P.2d at 897. In Kistler the Supreme Court invalidated a provision of the unemployment compensation statute that treated workers who quit jobs because of "marital obligations" more severely than workers who quit for no reason at all. It is significant that both Kistler and Carter involved classifications based upon marriage, especially since "[i]t is the declared public policy of this state . . . to promote and foster the marriage relationship . . . ." § 14-12-101, C.R.S. The rational basis test was applied in both Kistler and Carter, and the Court found the statutes in question unconstitutional because of the illogic of denying benefits based on a marital classification.

In the present case, this Court faces a statutory scheme that bases benefits on the timing of legitimate, statutory marriages, the same type of marriages that the Fund expressed a preference for in Carter. The scheme is "not only illogical, it is an impermissible classification under the Equal Protection clause." Kistler, 556 P.2d at 898. It places all post-retirement marriages into the same category and denies benefits to deserving widows such as Mrs. Branson, regardless of circumstances. Mrs. Branson is not given any opportunity to establish whether she is deserving of benefits. This type of "irrebuttable presumption" should not be allowed. See City and County of Denver v. Nielson, 194 Colo. 407, 572 P.2d 484, 486 (1977).

C. The Court Erred in Finding That Mrs. Branson's Claim for a Declaratory Judgment was Barred by the Statute of Limitations.

After denying Mrs. Branson's application for pension benefits solely because she married Mr. Branson after he retired from the fire department, the Board asserted on appeal that Mrs. Branson's claim for pension benefits was barred by the statute of limitations. The District Court properly found that the Board had waived this defense by failing to assert it as a reason for the original denial of Mrs. Branson's application.[8] To determine whether the Board had acted properly, the

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[8] Defendants-Appellees have not cross-appealed on this issue.

District Court addressed the constitutionality of the statutory section upon which the Board relied in denying Mrs. Branson's claim. However, the District Court also held that Mrs. Branson's action for declaratory relief was barred by the statute of limitations. This was error for two reasons.

First, it was inconsistent for the Court to hold that the Board had waived its right to assert the statute of limitations for Mrs. Branson's underlying claim for benefits, and at the same time hold that the declaratory judgment action was barred. A declaratory judgment action is a creature of statute. In and of itself, it is neither an equitable nor a legal action. See Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960). Thus, for example, one must look to the underlying claim to determine whether a right to a jury exists in a declaratory action. Id. Similarly, to determine whether the statute of limitations is applicable to Mrs. Branson's claim, the court must look to the underlying action. In this case, that claim was for pension benefits, and the District Court properly held that the Board had waived its right to assert this defense in the Rule 106 appeal. Since the statute of limitations had been waived concerning the underlying claim, it was error to hold that Mrs. Branson's claim for declaratory relief was barred by the statute of limitations.

Second, Mrs. Branson sought declaratory relief both regarding the facial validity of § 31-30-509, and regarding the

statute's constitutionality as applied to her. The statute of limitations should not be applied to limit a facial challenge to a statute. Otherwise, the Legislature could pass a patently unconstitutional statute, and, if it were not challenged within the requisite number of years, it could remain on the books forever. This is particularly true of a statute that discriminatorily limits entitlements, rather than one which penalizes actions. In the latter case, the constitutionality of the statute might be raised as a defense to an enforcement action. In the former situation, however, a party must affirmatively seek relief. If this action were based on newly developed constitutional doctrine, the Legislature could nonetheless assert the statute of limitations as a bar to the action. "The wisdom and constitutional validity of any such ruling would be debatable." Collopy v. Wildlife Commission, 625 P.2d 994, 1004 n. 20 (Colo. 1981).

Neither should the statute of limitations be applied to deny Mrs. Branson's right to a declaratory judgment action regarding the statute as applied to her. By definition, the issue was neither ripe nor did Mrs. Branson have standing to challenge the application of the statute until the Board used it as a basis for denying her claim. When the Board denied Mrs. Branson's application for benefits -- solely on the basis of the statute -- it was then appropriate for Mrs. Branson to challenge its constitutionality.

CONCLUSION

Plaintiff-Appellant respectfully requests this Court to reverse the order of the District Court, and hold § 31-30-509 unconsitutional as a denial of equal protection. Plaintiff-Appellant further requests a remand to the District Court, with directions to return the case to the Board of Trustees of the Firemen's Pension Fund of the City and County of Denver, whereupon Plaintiff-Appellant's application for pension benefits should be granted.

HOLLAND & HART

Bruce W. Sattler, #2639
Kathryn E. Miller, #10614
A. Bruce Jones, #11370

555 Seventeenth Street
Suite 2900
P.O. Box 8749
Denver, Colorado 80201
Telephone: (303) 295-8000

Attorneys for
Plaintiff-Appellant
Birdie L.. Branson

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 1984, I mailed a true and correct copy of the foregoing OPENING BRIEF OF PLAINTIFF-APPELLANT by placing a copy thereof in the United States mail, postage prepaid, addressed to the following:

Darlene M. Ebert
Diane E. Eret
Assistant City Attorneys
1445 Cleveland Place, Room 303
Denver, Colorado 80202

_____