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Mark L. Johnson and Carol Ann Nielson, on behalf
of themselves and as representatives of all others
similarly situated v. Utah State Retirement Office, a
Utah State Agency : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

MARK L. JOHNSON and CAROL ANN
NIELSON, on behalf of themselves
and as representatives of all
others similarly situated,

Plaintiffs-Appellants,

v.

UTAH STATE RETIREMENT OFFICE, a
Utah State Agency,

Defendant-Respondent.

Case No. 20534

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE SUMMARY JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE JAMES S. SAWAYA, JUDGE

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IN THE SUPREME COURT OF UTAH
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MARK L. JOHNSON and CAROL ANN)	
NIELSON, on behalf of themselves)	
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Plaintiffs-Appellants,)	
)	
v.)	
)	
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Utah State Agency,)	
)	
Defendant-Respondent.)	
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SUMMARY OF ARGUMENT

The issue for determination by this Court is whether Utah Code Ann. § 49-10-24 applies to plaintiffs, a group of former State employees who were disqualified from participation in the Utah State Retirement system when their public employer was sold to a private entity. Plaintiffs have submitted to the Court their argument that the statute does not apply because mass disqualification caused by an entire unit being forced to withdraw was neither anticipated nor contemplated by the provisions of the Retirement Act. In their brief, plaintiffs set forth the following four-part analysis showing the inapplicability of § 49-10-24 and demonstrating plaintiffs' right to restitution of employer contributions made on their behalf. Plaintiffs submit that this un rebutted analysis compels reversal of the summary judgment rendered below.

1. Plaintiffs' employer contributions were compensation in the form of "deferred wages".
2. Plaintiffs' interests in their deferred wages are entitled to legal protection even before plaintiffs attain "vested benefits".
3. Although plaintiffs normally would have to satisfy the pension system's statutory vesting schedule before enjoying their deferred wages, unanticipated circumstances which render such satisfaction impossible give plaintiffs an immediate equitable claim for restitution.
4. The Retirement Act completely failed to contemplate the mass disqualification and forfeiture caused by the sale of Payson City Hospital to an ineligible private corporation.

Plaintiffs do not wish to further burden the Court with a detailed discussion of the points made in its initial brief.

Instead, plaintiffs note only that they are relying on the sound analysis presented above and discussed in detail in their initial brief and herein will discuss only briefly defendant's unfounded collateral objections.

Defendant has chosen to sidestep almost completely plaintiffs' four points, instead attempting to distract the Court from the main issue by raising collateral issues, using unfounded scare tactics about the possible effect of a ruling in plaintiffs' favor, making sweeping unsupported generalizations and bald conclusions, and misinterpreting and misapplying case law.

Defendant makes unjustified quantum leaps of logic to arrive at its conclusion that summary judgment should be upheld. First, demonstrating either bravado or its inability to rebut plaintiffs' arguments, defendant refuses to "distinguish or attack the legal sanctity" of plaintiffs' private retirement system cases, observing that public retirement systems are not private retirement systems. (Respondents' Brief at 3). Plaintiffs show in Section I that the unanticipated mass withdrawal presents identical problems in public or private systems and that the law allows recovery of employer contributions in such instances.

Second, defendant proposes that because the Utah State Retirement System is a Defined Benefit Plan that plaintiffs' desired recovery is somehow inappropriate. In Section II, plaintiffs demonstrate that their analysis is entirely consistent with a "Defined Benefit Plan" and that this issue is a "red herring" having little, if anything, to do with the issues before this Court.

Third, defendant submits that Bryson v. Utah State Retirement Office 573 P.2d 1280 (Utah 1978), is controlling in this case. Section III will show that not only is defendant's all-or-nothing reliance on Bryson seriously misplaced but also defendant's other cited cases miss the mark, dealing either with demands by individual terminated employees in the face of statutes expressly forbidding any refund, or with claims for denied pension benefits -- neither applicable in this instance.

Fourth, defendant argues that somehow "equity" cannot be relied on by plaintiffs because "he who seeks equity must do equity." (Respondent's Brief at 12) While it is difficult to understand defendant's equity argument, it appears to be an attempt to quantify the amount of harm (benefit) Payson City's withdrawal had on the retirement system. Plaintiffs show in Section IV that this issue must await trial and is not now before this Court for determination.

Finally, defendant argues that the enactment of § 49-10-11 indicates that the 1967 Retirement Act did not contemplate mass termination and forfeiture. Plaintiffs' final section will show that, at best, the 1983 modification was a recognition of the deficiency in § 49-10-24 which plaintiffs claim entitles them to relief.

Defendant's attempts to flavor its vapid arguments by sweeping unsupported statements, i.e. "It would be a direct reversal of the law in this jurisdiction and in every other jurisdiction in these United States (where it was followed) as it relates to public

defined benefit plans." (Respondent's Brief at 7.); "The whole funding base would have to be reconsidered and recalculated." (Respondent's Brief at 7.); "Neither law nor equity is of aid to these plaintiffs' as they seek to recover sums universally denied public employees under defined benefit plans in the jurisdictions of the United States." Respondent's Brief at 15; fail to breathe life into defendant's arguments, none of which are of value in determining whether § 49-10-24 of the Utah State Retirement Act contemplated the mass disqualification of plaintiffs. In fact, defendant has admitted that the 1967 Legislature had never expressly considered this possibility. (Statement of Proceedings For Which No Transcript Was Made, Addendum to Brief of Appellants 2-4).

The summary judgment below must be reversed and plaintiffs allowed to prove the amount, if any, to which they are entitled.

I. PRIVATE PENSION CASES ARE APPLICABLE

Because defendant has chosen not to discuss or dispute plaintiffs' cases involving private retirement systems, such case law stands unrebutted before this court if defendant's distinction between private and public cases is faulty. Plaintiffs submit that such distinction is not only faulty, it is almost nonexistent.

At page 3 of its Brief, defendant states its only basis of distinction -- a public retirement system is "created and governed by legislative authority and not 'negotiation' and 'contract' as in private systems." On this thin reed of distinction hangs defendant's response and plaintiffs' only obstacle to relief, for the cases of Lucas v. Seagrave, 277 F. Supp. 338 (D. Minn.

1967), Kenneke v. First National Bank of Chicago, 105 Ill. App. 3d 630, 434 N.E.2d 495 (1982), prior appeal 65 Ill. App. 3d 10, 382 N.E.2d 309 (1978), and Longhine v. Bilson, 159 Misc. 111, 287 N.Y.S. 281 (1936), as well as Bernstein, Employee Pension Rights When Plants Shut Down, 76 Harv. L. Rev. 952 (1963) are authority directly on point allowing plaintiffs' recovery.

Defendant's bald assertion notwithstanding, it is clear that public pension systems are contractual as well as statutory.

The relationship of the parties under the Utah State Retirement Act is contractual as well as statutory. Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 422, 434, 142 P.2d 657, 659, 664 (1943); City of West Jordan v. Utah State Retirement Office, Civ. No. C82-6157, Memorandum Decision, at 6 (3d. Jud. Dist. Ct. Utah July 29, 1983) (record at 319). The defendant argued below that private pension cases such as Lucas, Longhine and Kenneke are irrelevant in an action against a public pension fund. This Court, however, specifically rejected that argument in Driggs, 105 Utah at 427-28, 142 P.2d at 661-62.

Brief of Appellants at 22, n. 3.

As has been previously pointed out, under Utah's retirement system the proportion of contributions paid by employees and employers is the subject of negotiation at the legislative level. For example, participating public employers contribute more than employees in the Public Safety Retirement System, the Firemen Retirement System and the Judges' Retirement System; but employer and employee contributions are equal in the Public Employees Utah State Retirement System. Deposition of Burt Hunsaker at 43, 44. Defendant has admitted that the basis for the discrepancy between the retirement funds is "[n]egotiation by the individual groups when

establishing a program. The law being an effort at the legislature, a compromise between employer and employees." Id.

The promise of a particular contribution level by employer and employee acts as inducement to prospective employees to become employees. Employees rely on the represented level of contribution when they accept the offer of employment. Attempts to change the terms of this contract without the employees' consent have failed. See e.g., Driggs, 105 Utah 417.

It should be noted that even the cases cited by the defendant (Brief of Respondent at 9), although irrelevant for determining the scope of plaintiffs' rights in a mass termination suit, note that public pension systems are by nature contractual.

It is therefore clear that the public retirement system, while created by legislative authority, is also subject to "negotiation" and "contract" as in the private system. Plaintiffs' private cases are thus applicable and controlling in the absence of authority to the contrary. Plaintiffs submit that Lucas, Kenneke and Longhine should be examined carefully by this Court as they are sufficient authority for plaintiffs to prevail in this case.^{1/}

^{1/} Defendant's statement that restitution has not been awarded to employees suffering mass termination in any public pension case is true because the principles recognized in plaintiffs' private pension cases have not been advanced against a public pension in any reported case. It is equally true that there is no public case supporting defendant's position. However, in light of Driggs and in the absence of any reasoning in defendant's brief, plaintiffs' private pension cases must control and dictate relief for plaintiffs.

II. DEFENDANT'S DEFINED BENEFIT - DEFINED CONTRIBUTION DISTINCTION IS MEANINGLESS

Defendant goes to great lengths attempting to draw a distinction between a defined benefit plan and a defined contribution plan. While such distinction is interesting, it is entirely unhelpful in resolving the issue before this Court and, in fact, seem to be a "red herring" which could distract the Court.

Simply stated, plaintiffs' claims are not dependent upon the nature or type of retirement plan. Plaintiffs seek relief from the plan because their circumstance was not contemplated nor foreseen, they do not seek relief through a defined benefit plan or defined contribution plan. If the defined benefit plan or defined contribution plan provided for mass termination, then the relief sought by plaintiffs is consistent with such plan; but since plaintiffs' claim is that § 49-10-24 does not provide for mass termination, the distinction between the two types of plans is irrelevant.

Other authorities do not distinguish between types of plans. In 26 U.S.C. § 411(d)(3) the ERISA requirements for immediate vesting upon partial termination caused by mass discharge of employees apply regardless of whether the pension plan is defined benefit or contribution. Additionally defendant's purported distinction is not raised in any pension case similar to the present one.

Defendant emphasizes that in a defined benefit plan, the risk of investment is on the State. The corollary to this statement

is that any unanticipated forfeitures inure to the benefit of the State. The Utah State Retirement System is funded on an assumption of normal individual employee turnover. (See Brief of Appellant at 5.) If mass forfeiture by a disqualified class exceeds normal employee turnover, then the State is not required to contribute as much money to fund the pension system. In such a situation the fund has collected money on an assumption that fewer people would leave (resulting in higher contributions) than actually left. When the mass termination occurs, a windfall to the system results. Mass forfeitures permit the employer to save substantial amounts of money in contribution obligations.

Defendant argues that "[t]he actuarial rate is determined and the employer-employee contributions fixed in a defined benefit plan upon the assumption that the employer contribution is in all cases, other than to receive benefits of the plan, nonrefundable." Defendant then predicts severe mischief if the Court disturbs this actuarial assumption. The Lucas decision shows the error in this falsely ominous argument,

[I]t has been asserted that an employer's pension plan contributions are determined by an actuarial formula which assumes that any employee whose employment is terminated forfeits his pension benefits. [citation omitted] However, such an assumption may not cover the occurrence of a group termination. The actuarial formula assumes a reasonable turnover rate for employees established by experience with individual separations over a period of time. Where there is a termination of a substantial number of the plan participants, it seems clear that such a turnover is not anticipated by the formula. The result is that an employer who has discharged a relatively large number of employees receives a windfall, palpably in excess of actuarial assumptions, in the form of

pension credit forfeitures which he can use to relieve for some time his future premium liability for the remaining employees.

Lucas, 277 F. Supp. at 345.

Plaintiffs submit that in any event the actuarial rate issue is not before the Court and consideration of it should be reserved for trial of the amount recoverable by plaintiffs.

III. DEFENDANT'S LEGAL AUTHORITY IS NOT CONTROLLING

Defendant's heavy reliance on Bryson v. Utah State Retirement Office, 573 P. 2d 1280 (Utah 1978) is unfounded. Bryson simply held that it is not a violation of the Equal Protection Clause to provide refunds for policeman and fireman which are different than refunds for other types of public employees. The Court's straight-forward ruling could not be interpreted to stand for the proposition that employee contributions (and therefore employer contributions) are not employee "property". Bryson does not define the scope of employee rights relative to contributions. Its holding rests on a finding of a reasonable classification scheme and not on the existence or non-existence of "property" rights. The nature of plaintiffs' rights to contributions is covered fully in their initial brief and is supported by Utah case law as well as general legal authority. (See, Brief of Appellants at 13-18.)

This case involves no constitutional issues, and none was argued in the summary judgment below. Instead, this case turns upon interpretation of Utah Code Ann. § 49-10-24; specifically whether it contemplated mass disqualification of an entire employee

work force. The Bryson case was simply a different case involving different issues.

The other cases cited by defendants are equally inapplicable to the instant case. Defendant cites numerous cases for the proposition that no terminating public employee has received a refund of employer contributions. (Brief of Respondent at 9, 14.) All of the cases cited concern constitutional claims and fall into two entirely distinguishable categories -- claims for denied pension benefits, e.g., Duff v. City of Gardena, 167 Cal. Rptr. 4, (1980), or demands for refunds by individual terminated employees in the face of statutes expressly forbidding any refunds, e.g. Stevens v. Board of Trustees of the Police Pension Fund of the City of Shreveport, 370 S.2d 528 (1979).

All defendant's cases involved terminations of individual employees in the regular course of their employment, none involved mass terminations or unforeseen circumstances. Each is constitutional in nature, attacking the validity of the forfeiture provision rather than the applicability of the provision to unforeseen mass termination.

IV. PLAINTIFFS' EQUITABLE CLAIM IS PROPER

Defendant makes two arguments why plaintiffs should not be entitled to seek relief in equity. First, defendant points to certain liabilities which it has incurred on behalf of employees of Payson City Hospital. These liabilities are not inconsistent with a request for restitution. Defendant's argument simply raises the question of how its unjust enrichment should be measured.

Plaintiffs recognize the possibility that defendant may be entitled to certain set-offs in the ultimate accounting. The propriety of any particular set-off, however, has not yet been briefed by the parties because plaintiffs' motion for partial summary judgment reserved the determination of the amount of recovery for trial. The record indicates that such determination will likely require the assistance of actuarial expertise. (Comparison of testimony by Kent Cannon and Robert Wilcox before the Utah State Retirement Board, record at 143-47.) In any event, the Lucas court clearly stated that recovery in the mass termination context "is actuarially manageable" and "will not act to dilute the interests of the employees who remain participants." 277 F. Supp. at 346.

Second, defendant argues that equitable relief is not available if the statute expressly limits available relief. Obviously, this argument merely begs the question. The very relief sought by plaintiffs in their motion is a declaration that § 49-10-24 is inapplicable under the circumstances.

V. THE 1983 ENACTMENT OF § 49-10-11 DOES NOT
INDICATE THAT THE 1967 RETIREMENT ACT
CONTEMPLATED MASS TERMINATION AND FORFEITURE

Defendant's suggestion that Senate Bill 327 (1983 Utah Laws Ch. 224, §§ 6, 12, codified at Utah Code Ann. § 49-10-11(4)) demonstrates that the Retirement Act has always applied to mass terminations, is unfounded. Defendant relies on the title of Senate Bill 327, not itself law, for the proposition that the new § 49-10-11(4) merely "clarifies" the intended scope of

§ 49-10-24. The time frame of this purported "clarificaton" is extremely important: Section 49-10-24 was passed in 1967. Plaintiffs filed this suit in 1978. This Court issued a written opinion regarding this case, dated November 25, 1980. Finally 16 years after the original legislation was passed and 5 years after this lawsuit was filed and gained considerable attention, the legislature began giving consideration to the problem of disqualified employer units.

Defendant's claim that the 1983 amendment merely expresses what the 1967 legislature clearly understood is not supportable. As set forth in Appellant's Brief (pp. 23-26), defendant has admitted that the 1967 legislature never even thought about the problem involved in this case.

Plaintiffs would agree that the 1983 legislature could choose to place the risk of future employer unit disqualification and mass terminations on the public employees. That is in fact the logical meaning of Senate Bill 327's "clarification." Under no circumstances, however, can risks that were never allocated under the pension system between 1967 and 1983 be retroactively distributed to negate plaintiffs' cause of action. Utah Code Ann. § 68-3-3. This Court must assume that the 1983 legislature acted properly by recognizing an existing problem and then legislating future rights.

Finally, defendant argues that the language of § 49-10-24 is clear in its application to plaintiffs. The Court need only read the forfeiture provisions in Longhine v. Bilson, 159 Misc. 111,

287 N.Y.S. 281 (1936) and Kenneke v. First National Bank of Chicago, 105 Ill. App. 3d 630, 434 N.E.2d 495 (1982) to find equally expansive language which those courts refused to apply to circumstances outside the parties' reasonable anticipation. See also discussion in Lucas v. Seagrove, 277 F. Supp. 338, 342-46 (D. Minn. 1967).

CONCLUSION

Defendant has raised no argument which rebuts plaintiff's four-part analysis showing that plaintiff's are entitled to the relief sought. Plaintiffs are entitled to a reversal of the District Court's Order granting Summary Judgment to defendant and denying plaintiffs' motion for partial summary judgment.

RESPECTFULLY SUBMITTED this 13th day of August, 1985.

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing Reply Brief of Appellants on this 13 day of August, 1985, to:

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