

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

JOSEPH BOVA,
Plaintiff,
vs.
CITY OF MEDFORD, an incorporated
Subdivision of the State of Oregon, and
MICHAEL DYAL, City Manager of the City
of Medford, as an Individual, and in his official
capacity,
Defendants.

CASE NUMBER: 08-1663-E7

**OPINION AND ORDER ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court upon plaintiff's Motion for Summary Judgment and the Court having reviewed said motion and accompanying points and authorities, as well as defendants' Response to the motion and plaintiff's Reply to the Response, and further having conducted oral argument on said motion on June 9, 2009, and having considered the argument of counsel, George P. Fisher on behalf of plaintiff's motion and Robert E. Franz, Jr. on behalf of defendants' opposition to the motion, and being otherwise fully advised in the premises, the Court sets forth the following Opinion and Order.

OPINION

Defendant previously moved for partial summary judgment in this matter. In that proceeding, the Court made numerous rulings which eliminated several of the affirmative defenses raised by defendants' answer. In that prior ruling, this Court also found against defendants' request for summary judgment on their affirmative defense that there is no statutory

OPINION AND ORDER

1 requirement under ORS 243.303 to provide health care benefits to retired persons. There, it was
2 defendants' position that the defendants were not required to provide such benefits because it
3 was "impossible" as a matter of law and undisputed fact. The Court stated, "defendants have not
4 presented the Court with undisputed evidence that no entity providing health care insurance was
5 (and is) willing to provide such coverage for both current and retired employees of the City of
6 Medford." During the subsequent discovery proceedings, plaintiff solicited evidence from the
7 appropriate City representative that it was, indeed, possible for the City to contract for, or
8 otherwise provide, health benefit insurance for both current employees and retired employees.
9 Though the City protests that the additional costs for such coverage are an important factor to
10 consider, this Court also previously ruled that "... the City may not rely on the cost of insurance
11 coverage as indicating 'impossibility.'" Plaintiff now files this Motion for Summary Judgment
12 on each of his claims, seeking Declaratory and Injunctive Relief requiring the City to identify
13 and enter into an insurance contract that provides continued health benefit coverage for plaintiff
14 and all other members of the class upon their retirement as employees of the City.
15
16
17

18 In response, defendants' only argument regarding the facts is to demean plaintiff's
19 reliance on a single response from Risk Manager Robert Caulkins to the effect that "well, yes it's
20 possible." Defendant directs the Court to no other evidence from which this Court could identify
21 a disputed issue of material fact that would preclude granting plaintiff's motion as a matter of
22 law. It is apparent from the record that other insurance which provides bridge coverage for
23 retirees indisputably is and has been available. Instead of disputing this dispositive fact, the
24 defendants characterize the language of ORS 243.303 as ambiguous, justifying their submission
25 of additional legislative history for the Court's consideration. It should first be noted that
26 legislative history was presented and argued in connection with defendants' earlier Motion for
27

28 OPINION AND ORDER

1 Partial Summary Judgment. Defendants did not present in that earlier motion any legislative
2 history regarding the 1981 Legislative Assembly in respect to the bill which led to ORS 243.303
3 in the first place. Now, the Court having ruled that the legislative history supports the plaintiff's
4 view in regard to this statute, defendants belatedly present legislative history regarding the 1981
5 Legislative Assembly. Their evidence is both a back-door request for reconsideration and
6 unpersuasive. There is no dispute that the statute that passed in 1981 was permissive. The
7 question this Court dealt with in ruling on defendants' Motion for Partial Summary Judgment
8 (and that is at issue and relevant to this case) is the effect of the 1985 amendment to ORS
9 243.303. The Court previously addressed and ruled on this issue and the import of the 1985
10 Legislative Assembly's determination to change the word "may" to "shall." Bova is entitled to
11 summary judgment on the merits of his claim that because the City provides health insurance to
12 its active employees, it must also offer that insurance to its retirees, by utilizing providers whose
13 coverage for current employees extends to retirees as well.
14

15
16 The City seeks to avoid this result by arguing that plaintiff resigned as a "regular
17 management employee" in the summer of 2008, and subsequent to that time has no longer been a
18 member of the City's management group, and thus no longer has standing to assert any claim as
19 a member of the management group. The City also asserts that because the terms of plaintiff's
20 employment since August 2008 are governed by a new contract (Exhibit 2 to plaintiff's affidavit
21 in support of his motion for summary judgment) that was entered into at a time when he was
22 aware of the City's agreement with OTET to provide health care insurance for employees such
23 as plaintiff, but not to retirees, he has no claim left. Finally, the City asserts that since plaintiff
24 has yet to request coverage as a retired employee and has never been denied coverage by any
25 potential insurer, he is therefore not entitled to bring any damage claim against the City.
26
27
28

OPINION AND ORDER

1 Plaintiff is not a “retired” employee, as defined by ORS 243.303(1)(c). Therefore, he
2 has not lost standing to present his claim on that ground. There is no evidence in the record to
3 support a finding that plaintiff is not an employee for purposes of proceeding with his claims.
4 Indeed, his current employment contract is of record.

5 Other than costs and fees, plaintiff is not seeking damages from the City. Instead, he
6 seeks declaratory and injunctive relief. His status as an employee based on his current contract
7 does not deprive him of the ability to proceed with his equitable claims as representative of the
8 class of current City employees.

9
10 Bova’s Motion for Summary Judgment is well-taken. Oregon’s declaratory judgment
11 statute specifically provides for a declaration of rights “either before or after there has been a
12 breach” of an alleged contract. ORS 28.030. The statute also authorizes courts to declare rights
13 generally, ORS 28.010 and ORS 28.050, which includes statutory rights. Oregon’s decisional
14 law is to the same effect. *Gaffey v. Babb*, 50 Or App 617, 621, 624 P2d 616, 618 (1981).

15
16 Because the City of Medford provides health care insurance to its current employees and
17 it is possible for that coverage to be provided by carrier(s) whose policies include retirees,
18 Medford is required by ORS 243.303, as currently written, to provide that same coverage to
19 retirees. The Court will enter judgment to that effect.

20
21 Defendants submit the history of their involvement with OTET and argue that this history
22 and the current status of relationships prevent the Court from directing the City of Medford to
23 obtain insurance in conformance with plaintiff’s prayer. The Court disagrees. Plaintiff’s first
24 claim for relief – that the city is in violation of ORS 243.303 – seeks declaratory and injunctive
25 relief. Bova and the class he represents are entitled to such relief.

26
27
28 OPINION AND ORDER

1 Accordingly, pursuant to the provision of ORS 243.303, if the City makes available
2 health care insurance coverage for its current employees at the time Bova or another member of
3 the class retires, the City is obligated to offer the same coverage as an option for the retiring
4 member of the class, including Bova, and the City is enjoined to take the actions necessary to
5 comply with ORS 243.303 as declared herein.
6

7 Br prior order of the Court, Bova's second claim was dismissed.

8 The Court finds that material issues of disputed fact remain regarding the issue of
9 whether Bova's age was a substantial factor in the City's decision about whether to contract for
10 coverage for its employees precluding summary judgment on the third claim.
11

12 The Court finds that Bova is not entitled to judgment as a matter of law on either of his
13 contract claims (fourth and fifth claims). Neither claim is ripe for adjudication.

14 WHEREFORE, Bova's motion for summary judgment is granted as to his First Claim
15 and denied as to each of the remaining claims.
16

17
18 DATED this _____ day of July, 2009.
19

20
21 _____
22 MARK SCHIVELEY
23 Circuit Court Judge

24 cc: Mr. George P. Fisher
25 Mr. Robert E. Franz, Jr.
26 Mr. Steven Brischetto
27

28 OPINION AND ORDER