

No. 49876-6-II

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs/Respondents,

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant/Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor/Appellant.

PLAINTIFFS'/RESPONDENTS' RESPONSE BRIEF

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I. INTRODUCTION

This response brief is submitted by the plaintiffs/respondents, *i.e.*, the class of King County public defenders that our Supreme Court held are eligible for PERS benefits. *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011). The public defenders are submitting this brief in response to two erroneous legal statements made in the briefing. The public defenders are not taking a position on the underlying dispute between the County and DRS. The public defenders role here is similar to *amicus curiae* on the two legal issues that are discussed in this brief.

The first erroneous legal statement in the briefing is that the retroactive service credit received by the public defenders is contrary to “the three-year statute of limitations.” App. Br. at 38, 6, 9. The three-year statute of limitations on an employee’s claim for state pension rights, however, begins to run three years from the date the employee retires and the pension payments become due and payable, not when the employer should have originally enrolled the employees. See, *e.g.*, *Bowles v. Department of Retirement Systems*, 121 Wn.2d 52, 847 P.2d 440 (1993); RCW 41.50.130(1) (DRS can correct eligibility errors “at any time”).

The second erroneous legal statement in the briefing is that the Legislature passed a bill “effectively reversing the Supreme Court’s” *Dolan* decision. King Co. Resp. at 46, 7, 46-47. The 2012 bill did not reverse *Dolan*; the Legislature instead passed the bill to allay DRS’s and

the County's concerns that the opinion could be construed to make practically all government contractors eligible for PERS. The Legislature's 2012 bill did not reverse the Supreme Court's ruling that whether an employer-employee relationship exists is based on objective facts and not contracts and labels. *Dolan*, 172 Wn.2d at 314, 322.

II. ARGUMENT

A. **The Three-Year Statute of Limitations on an Employee's Claim for State Pension Rights Runs From Retirement, i.e., the Time the Pension Payments Become Due and Payable.**

DRS states that King County should pay interest because, among other reasons, the County "waived" the statute of limitations defense against the public defenders receiving retroactive credit farther back than three years before the lawsuit was filed in 2006. App. Br. at 6, 9, 38. DRS says a "favorable ruling" on this statute of limitations defense would have "substantially reduced the retroactive service credit, the amount of the late pension contributions, and the interest due on the late contributions." *Id.* at 9.

King County points out that DRS stated that it wanted to intervene in the action to assert the statute of limitations defense and "DRS could have pursued a ruling on this issue from the trial court." King Co. Resp at 40. The County says "DRS made the tactical decision not to seek a ruling on the statute of limitations defense or otherwise contest the amount of retroactive service credit." *Id.*

More than 20 years ago our Supreme Court addressed the statute of limitations for “actions alleging a breach of state employee pension rights” and when that statute of limitations begins to run. *Bowles*, 121 Wn.2d 52 (1993). The Supreme Court explained in *Bowles* that it had recently held that the statute of limitations is three years and it runs from retirement:

A 3-year statute of limitations applies to actions alleging a breach of state employee pension rights. *Noah v. State*, 112 Wn.2d 841, 774 P.2d 516 (1984). In *Noah*, this court recognized that this limitations period begins to run upon the employee’s retirement from service. [Court’s emphasis.]

Bowles, 121 Wn.2d at 78.

The Supreme Court explained in *Bowles* that it would adhere to its holding in *Noah* that the limitation period runs from retirement: “We decline to overrule *Noah*. This opinion, written only 3 years ago, unequivocally establishes the applicable statute of limitations and the date upon which the limitations period begins to run.” *Bowles*, 121 Wn.2d at 79.

Noah, 112 Wn.2d at 846, in turn relied on *Martin v. Spokane*, 55 Wn.2d 52, 345 P.2d 1113 (1959), which also applied the three-year statute of limitations to a claim for larger pension payments, but only to bar retroactive collecting larger pension payments paid more than three years before the suit was filed (it was 14 years after Martin retired). *Bowles*, *Noah* and *Martin* all followed the normal rule that a pension claim accrues and the statute of limitations begin to run when the employee is due to

receive a pension payment, not when paychecks are issued while working before retirement.

The Court of Appeals in *Sethre v. Wash. Education Ass'n*, 22 Wn. App. 666, 671-72, 591 P.2d 838 (1979), explained why the statute of limitations begins to run only at retirement. *Sethre* said that any other rule “would put an almost intolerable burden on employees covered by pension plans” to be “constantly vigilant against possible abuses or errors [.]” would result in “piecemeal challenges” prior to retirement causing “great waste of judicial resources[.]” and the retirement system “could, *at any time*, reverse its stated position [.]” *Id.* at 671-72 (emphasis added).

Indeed, under RCW 41.50.130(1) DRS can correct eligibility errors “at any time.” *City of Pasco v. Department of Retirement Systems*, 110 Wn.App. 582, 584, 42 P.2d 992 (2002). There, the employee sought to correct an erroneous eligibility determination made by his employer 20 years earlier. DRS determined that the employee was correct and reversed the erroneous eligibility determination. The employer city sought judicial review, contending that the employee’s request for reversal of the employer’s much earlier eligibility decision was time-barred. The Court of Appeals disagreed, holding that “the Department may correct a flawed eligibility determination ‘at any time,’ whether it does so on its own initiative or at the request of an enrollee.” *Id.*, at 596.

The rule in *Bowles* is followed in other courts in similar situations

where public employers fail to enroll employees in pension plans and make the required pension contributions. *State Employees Ass'n of New Hampshire v. Belknap County*, 448 A.2d 969, 973 (N.H. Sup. Ct. 1982); *State ex rel. Teamsters Local Union 377 v. City of Youngstown*, 364 N.E.2d 18, 20-22 (Oh. Sup. Ct. 1977). In these cases the courts rejected the employer's statute of limitations defense and required the employer to enroll employees and make pension contributions for the employees' previous service even though the service spanned a 20 to 30-year period.

In *State Employees of New Hampshire*, a class action was brought in 1980 to compel Belknap County to enroll employees that it had improperly excluded from the State Retirement System *since 1946* and to make pension contributions for their service. 448 A.2d at 971. Belknap County argued that the New Hampshire statute of limitations prohibited the employees from obtaining service credit and employer contributions for time periods beyond six years from filing suit. *Id.* at 973. The New Hampshire Supreme Court rejected this argument, holding that the statute of limitations did not begin to run until the employee's "death or retirement." The Court explained (*id.*):

Initially, we note that benefits are payable only upon the death or retirement of a qualifying employee; they are not payable prior to these events. Although employees obtain a vested right to benefits upon the commencement of their permanent employee status, *the statute of limitations does not begin to run until the time that the payments become due – the date of death or retirement.* Thus, the six-year statute of limitations would bar only the actions of

employees whose suits were not commenced within six years after their death or retirement. (Citations omitted; emphasis added.)

The Court also held (*id.*) that the employees did not have to wait until they retired to sue because Belknap County was breaching its continuing duty to enroll the employees and make contributions:¹

The trial court, moreover, correctly ruled that the period during which suit was permissible was not limited exclusively to the six-year period following each employee's death or retirement. As a result of the county's breach of its continuing obligations to enroll eligible employees in the retirement system and to make the requisite contributions, the employees could have elected, consistent with the doctrine of anticipatory breach, to sue the county at any time prior to their respective deaths or retirements.

The Court similarly rejected Belknap County's argument that it suffered "prejudice" because of the employees' delay in bringing suit. 448 A.2d at 973. The Court found that any purported knowledge by the employees of their rights was immaterial because the County had a duty to enroll the employees and make contributions. *Id.*

Similarly, in the *Youngstown* case, the City had for over twenty years failed to enroll sanitary employees in Ohio's public employee pension system and failed to make required pension contributions. *Teamsters Local Union v. City of Youngstown*, 364 N.E.2d at 19. The

¹ Although Dolan was not retired when he brought the lawsuit, his suit was not premature because King County was breaching its PERS duties at that time. Accordingly, under the doctrine of anticipatory repudiation, Dolan could sue at any time rather than waiting for his retirement. *State Employees v. Belknap County*, *supra*, 448 A.2d at 973; *Dill v. PUD No. 2 of Grant County*, 3 Wn.App. 360, 364, 475 P.2d 309 (1970); *Boyer v. City of Yakima*, 156 Wash. 518, 523, 287 P. 211 (1930).

union and employees brought an action in 1976 to compel the City to enroll the employees and make the required pension contributions back to 1953 when the first employee was hired. *Id.* The trial court ruled for the employees, rejecting the employer's argument that the workers were not covered by the system, and it required the City to pay "both the employer's contribution and the omitted members' contributions not made by payroll deduction." *Id.*

The Court of Appeals in *Youngstown* affirmed, but held that Ohio's statute of limitations limited "the deficiency contributions to six years prior to filing the complaint." 364 N.E.2d at 19. The Ohio Supreme Court then reversed and reinstated the trial court's judgment because the statute of limitations does not begin to run until an employee retires and pension payments are due. *Id.* at 20-21. The Ohio Supreme Court explained (*id.*):

Normally, a cause of action does not accrue until such time as the infringement of a right arises. It is at this point that the time within which a cause of action is to be commenced begins to run. The time runs forward from that date, not in the opposite direction, and thus when one's conduct is not presently injurious a statute of limitations begins to run against an action for consequential injuries resulting from such act only from the time that actual damage ensues.

The duty to make a contribution to the retirement fund is one that is continuing in nature, since the statute provides for an employee deduction for each payroll period. Similarly, the employer's obligation to make contributions occurs each time another payroll period elapses. However, *the employee's right to participate in or to receive benefits from the system cannot accrue until such time*

as he or she actually elects to retire. [Emphasis added.]

Consistent with Washington law and the cases cited from other states, to maintain the tax-qualified service of PERS federal tax law also required DRS to recognize the class members' service for all years (not just the three years prior to the date the lawsuit was filed). Under the Employee Plans Compliance Resolution System (EPCRS),² a failure to enroll eligible employees "is not corrected unless full correction is made with respect to all participants and beneficiaries, and *for all taxable years* (whether or not the taxable year is closed)." Rev. Proc. 2013-12, 2013-4 I.R.B. 313, §6.02 (emphasis added). The "permitted correction method" when eligible employees are excluded from a pension plan is "to provide benefit accruals for the employees excluded from [the] defined benefit plan." Rev. Proc. 2013-12, Appendix A, §.05(1). Federal tax law thus required that the class members receive the "benefit accruals" (service credit) that they would have received but for their wrongful exclusion from the plan for *all plan years*. *Id.*

Accordingly, the three year statute of limitations on pension payments begins not while an employee is working, but instead when the pension becomes due and payable.

² The EPCRS is a "revenue procedure" that the IRS enacted to provide a "comprehensive system of correction programs" for retirement plans so that plans can maintain their tax-qualified status after an error is discovered. Rev. Proc. 2013-12, §1.01. The failure to include all eligible employees in a plan, which is what happened in this action, must be corrected for the plan to retain its tax-qualified status. *Id.*

B. The Legislature Did Not Reverse the Supreme Court’s Decision in *Dolan*.

The County states that the Legislature passed a bill, EHB 2771 in March 2012, “effectively reversing the Supreme Court’s *Dolan I* reasoning[.]” King Co. Br. at 46. The County says that many “PERS employers would have incurred retroactive pension liability for their contractors’ employees had the Legislature not rejected the Supreme Court’s holding.” *Id.* at 46, 7.

In the Supreme Court, the County argued that the public defenders worked for independent contractors, not the County, based on “contracts, corporate documents, and tax forms[.]” *Dolan*, 172 Wn.2d at 313. The dissent in *Dolan* agreed with the County: the “contracts should begin, and largely end, our inquiry.” *Id.* at 323; see also *id.* at 325 (“the parties structured their contracts to create an independent contractor relationship primarily because that is what the contracts say.”).

The Supreme Court disagreed with the County’s argument, and the dissent’s reasoning, because it said that under Washington law “[t]he focus is on the substance and not on corporate forms, titles, labels, or paperwork.” *Dolan*, 172 Wn.2d at 314, citing WAC 415-02-110(2)(c). The Supreme Court said that “accepting the county’s argument would elevate form over substance” and “is clearly contrary to the scheme laid out by the legislature and DRS.” *Id.* at 322, citing RCW 41.40.010(12)

and WAC 415-02-110(2)(c). The Supreme Court held that a “government cannot create an agency to perform a government function, incorporate it into its yearly budget process and control it like any other government agency, and claim it is an independent contractor simply because of the form of name or title.” *Dolan*, 172 Wn.2d at 317.

After the Supreme Court issued its *Dolan* opinion, the County, DRS, and other governments sought reconsideration based on their view the *Dolan* decision could effectively qualify numerous employees of government contractors for public pensions and this “generates great uncertainty[.]” CP 843; CP 832-962.³

The Supreme Court denied reconsideration. In an abundance of caution, and to allay their concerns, the County and DRS then successfully lobbied the Legislature in 2012 to pass EHB 2771. The 2012 bill added language to various retirement system statutes declaring that whether a government contractor’s employee works for a PERS “employer” is based on the relationship between the worker and the PERS employer and not on the relationship between the government contractor and the PERS employer. LAWS OF 2012, Ch. 236. The Legislature declared that “the purpose of this act” is to clarify that “entities providing services under government contracts are not, as a result of providing such governmental

³ The amicus motion was filed by the “State of Washington,” but signed by DRS’s attorney Anne Hall. CP 845.

service, eligible for membership in the various public retirement programs.” *Id.*, §1(3) at 1784.

The Legislature said the bill’s intent is to comply with federal tax law: “employees of a private nonprofit or for-profit entity that does not meet the federal law definition of an instrumentality of a public agency may not participate in a federal tax law-qualified governmental retirement plan such as the PERS.” Final Bill Report, EHB 2771, 62nd Legislature (2012).⁴ Consistent with the *Dolan* decision, the Legislature said that employees of a governmental contractor that is an “instrumentality of a public agency” are eligible to participate in a federal tax law-qualified governmental plan such as PERS. *Id.*; See also 26 U.S.C. §414(d) (2017) (county instrumentalities are eligible to participate in governmental plans).

Accordingly, the 2012 bill is intended to address the County’s and DRS’s concerns that under *Dolan* virtually all government contractors providing governmental service would be eligible for PERS. The Legislature did not reject the holding in *Dolan* that whether a worker is an employee for purposes of PERS is based on objective facts and not on forms and labels. *Dolan*, 172 Wn.2d at 314, 322. The Legislature also did not overturn the DRS regulation on which the Supreme Court’s holding is

⁴ The Final Bill Report is found on the Legislature’s website at: <http://lawfilesexternal.wa.gov/biennium/2011-12/Pdf/Bill%20Reports/House/2771.E%20HBR%20FBR%2012.pdf> (last accessed on July 24, 2017).

based, WAC 415-02-110(2)(c). *Dolan*, 172 Wn.2d at 314, 322. And the Legislature did not amend the Public Employee Misclassification Act, RCW 49.44.160 and .170, under which objective circumstances rather than labels and forms control whether a worker is a public employee eligible for benefits. See *Mader v. Health Care Authority*, 149 Wn.2d 458, 475-77, 70 P.3d 931 (2003). The Legislature also recognized that employees of an “instrumentality” of state or local government are eligible for plan coverage under federal tax law. Final Bill Report, EHB 2771.

III. CONCLUSION

The three year statute of limitations on an employee’s claim for pension rights begins to run when the pension becomes due and payable upon retirement.

The Legislature did not overturn the *Dolan* decision. The Legislature passed a bill that clarified employees of a government contractor do not automatically become eligible for PERS because they are providing a governmental service.

Respectfully submitted this 25th day of July, 2017.

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DECLARATION OF SERVICE

I, Claire Faltesek, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows:

On July 25, 2017, I personally delivered a copy of plaintiffs'

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 25, 2017, at Seattle, Washington.

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