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SUPREME COURT
OF THE STATE OF WASHINGTON

Jack M. Navlet, et al, individually
and on behalf of a class of others
similarly situated,

Plaintiffs/Appellants,

v.

The Port of Seattle,

Defendant/Respondent.

No. 78866-9

**SUPPLEMENTAL BRIEF OF APPELLANTS
FILED PURSUANT TO COURT'S ORDER**

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I. INTRODUCTION

1. Factual Background

The central fact in this case is that Plaintiffs worked for decades in the Port of Seattle's warehouse under terms of employment that included retiree medical coverage at virtually no cost if they worked at least 15 years,¹ (hereafter, "retiree medical benefits"), and they are now being denied that coverage.

The obligation to provide retiree medical benefits was embodied in collective bargaining agreements ("CBAs") between the Port and ILWU Local 9, the bargaining representative of the employees. The most recent CBA, which was in force until the Port unilaterally adopted new terms of employment in December 2002,² included the Port's agreement to **"continue to provide the same level of coverage currently provided to eligible employees, eligible**

¹ As discussed below, retiree welfare benefits were provided through the ILWU Local 9 Welfare Trust Fund. Under the terms of the Trust's Summary Plan Description, employees were eligible for retiree benefits from age 62 to age 65, at a cost of \$20.35 for the retiree and dependents, if the retiree had 15 years of service under the Pension Fund that covered Port employees, and if employer contributions had been made to the Welfare Trust for 10 years. At age 65, medical coverage for the retiree and dependents cost \$10 per month if the retiree had between 15 and 25 years of service under the Pension Fund, and employers had contributed for at least 10 years under the Welfare Fund. Retiree coverage was free for the retiree and dependent if the retiree had 25 years of service under the Pension Fund. CP 347-48

² CP 70

retirees, and dependents.”³ (Emphasis added) In the CBA, the Port further agreed to contribute to the ILWU Local 9 Welfare Trust Fund, a jointly administered union-management trust fund, in which the Port was the only contributing employer for several years prior to 2003.⁴

In April 2003, after the Port closed its warehouse, retired Plaintiffs were notified their previous retiree medical coverage had ended. The Port then advised them that to obtain coverage through the Port, premiums would increase at least 3000% - from \$20.35 to between \$798.07 and \$964.33 for a pre-65 retiree and spouse, and from \$10 to at least \$310.06 for an age 65 retiree and spouse.⁵

2. Composition of Putative Class

Plaintiffs represent a putative class that includes retirees with at least 15 years of service as warehousemen for the Port of Seattle,⁶ whose retiree medical benefits were terminated effective April 1,

³ 1997-2000 Collective Bargaining Agreement between Port of Seattle and ILWU Local 9, Article XVIII (CP 57)

⁴ Other than Port employees, the only active participant in the Plan was the Business Manager of ILWU Local 9. (CP 288 at ¶6) As discussed below, that contributions were made on a single union employee is not material for the analysis of this case.

⁵Exh. 3 to Affidavit of Arthur Camp, CP 323-28.

⁶ By stipulation, class certification was delayed until after summary judgment motions were decided. Because the Plan interjected HPPAA objections to Plaintiffs' pre-class certification request for the identity of those receiving retiree medical benefits, Plaintiffs do not know how many retirees with at least 15 years of service for the Port were receiving retiree medical benefits as of April 2003.

2003, and a group of approximately 35 Port employees who have completed the 15 years of service at the Port required to qualify for retiree medical benefits, but have not yet retired and reached age 62, at which time retiree medical benefits would have been provided.⁷

3. Procedural Posture

In the trial court, Plaintiffs moved for Partial Summary Judgment that the Port was required to continue to provide retiree medical benefits to current retirees, and also make retiree medical benefits available to other Plaintiffs when they reached age 62. The Port's cross-motion sought dismissing of all claims. The court granted summary judgment for the Port, from which Plaintiffs appealed.

After briefing, the Court of Appeals certified the case to this Court, and identified the issue as follows:

Is a negotiated retiree medical plan for employees of a municipal corporation a "governmental plan" not subject to ERISA and are the benefits under the plan a form of deferred compensation that may not be unilaterally cancelled by the employer?

The Certification accurately identifies the two questions to be resolved in this appeal. The answer to the first question is there is no federal jurisdiction because the Port, not the Plan, is liable, and also

⁷Arthur Camp affidavit, Exh.1, CP 314-15

because the ILWU Local 9 Welfare Trust (“the Welfare Plan”) was a “governmental plan,” not subject to ERISA.

As to the second question, under Washington State Law, because the employer offered benefits to be earned by length of service, and Plaintiffs provided the required service, retiree medical benefits constitute deferred compensation that could not be denied after the requisite service had been provided.

ARGUMENT

A. STATE LAW GOVERNS THE PORT’S OBLIGATIONS TO PLAINTIFFS; THAT BENEFITS WERE PROVIDED THROUGH THE WELFARE PLAN DOES NOT RESULT IN FEDERAL JURISDICTION

Before addressing why there is no federal jurisdiction over this claim, it should be noted that benefits were promised by the Port, as employer. The Welfare Plan was, in effect, the delivery device for benefits promised by the Port.

1. The Roles of the Port and Welfare Plan in Providing Benefits

As noted above, the promise to continue to “continue to provide the same level of coverage currently provided to . . . eligible retirees and dependents” was embodied in the CBA. In that CBA, the Port also agreed to be party to the Agreement and Declaration of Trust of

the Welfare Plan, and to pay [to the Trust] the premium necessary to maintain the current level of benefits.⁸

As the CBA reflects, the Port paid “premiums” to the Welfare Trust in much the same way an employer might pay premiums to an insurer. The precise parameters of retiree medical coverage that the Port agreed to continue were set out in the Welfare Plan, just as they would have been in an insurance policy. The Welfare Plan had only the funds it received from the Port.

2. The Status of the Welfare Plan as a Governmental Plan

The role of the Plan in delivering benefits cannot result in federal jurisdiction, because the Welfare Plan is a governmental plan, and is therefore not subject to ERISA.

Congress determined that ERISA’s provisions were not necessary for governmental plans, both because governmental plans were typically more generous than private plans in protecting the rights participants had earned by their service, and because governments were generally not subject to the financial instability that could undermine benefit guarantees. *Rose v. LIRR Pension Plan*, 828 F.2d 910, 914 (2d Cir. 1987)

⁸ 1997-2000 CBA, Article XVIII (CP 57)

For reasons stated in prior briefing, the Welfare Plan is a governmental plan. To briefly reiterate, under ERISA, a “governmental plan” is defined in ERISA as including “a plan established or maintained for its employees by . . . the government of any State or political subdivision thereof. . .” ERISA §3(32), 29 USC §1002(32).

Governmental plans include plans, like the Welfare Plan, that are established pursuant to collective bargaining, and jointly administered by an equal number of employer and union trustees. *Feinstein v. Lewis*, 477 F. Supp. 1256 (SD NY 1979); *ERISA Opinion Letter 86-22A* (Sept. 9, 1986); *ERISA Opinion Letter 79-83A* (1979).⁹

Neither the fact that the Welfare Plan documents contemplate contributions by non-governmental employers, nor the fact that contributions were made to the Welfare Plan by ILWU Local 9 for one union employee change its governmental plan status, in light of the fact that, for several years prior to 2002, all contributions to the Plan (except those for the one Local 9 employee) were made by the Port.¹⁰ *Id.*, *Triplett v. United Behavioral Health Systems, Inc.*,

⁹ Copies of DOL materials were appended to Appellant’s Opening Brief to the Court of Appeals, and are not appended to this brief.

¹⁰ Declaration of Tony Hutter, ¶6 (CP 288)

1999 U.S. Dist. LEXIS 4108 (E.D. Pa. 1999), citing *U.S. Dept. of Labor Op. Letter 95-27A*, at 3-4; *ERISA Op. Letter 2000-04A*.

The Port relies entirely on the recitation in the Welfare Plan documents that the plan is subject to ERISA. But such recitations do not change governmental plan status. *Krystyniak v. Lake Zurich Community Unit District No. 95*, 783 F. Supp. 354, (ND Ill. 1991)

In previous briefing, the Port claimed that federal jurisdiction was proper because Plaintiffs were seeking an order that the Port continue the Welfare Plan, and provide retiree medical benefits to employees of non-governmental employers that had contributed to the Plan in the past. Both factual predicates for that argument are wrong. Plaintiffs do not seek an order that the Port must continue the Welfare Plan, but rather an order that the Port either pay for or provide retiree medical benefits comparable to what the Welfare Plan offered. If there were any retirees of non-governmental employers receiving retiree benefits from the Plan prior to April 1, 2003, Plaintiffs are not seeking benefits on their behalf.¹¹

¹¹ If there were such retirees, it would not alter the governmental character of the Plan, which is based on *current* contributors being governmental entities. This conclusion is implicit in *Rose v. The Long Island Railroad Pension Plan*, 828 F.2d 910, 920 (2d Cir. 1987), which held that a pension plan created by a private employer became a governmental plan when the entity sponsoring the Plan was taken over by a public entity. Doubtless, the LIRR Plan continued to provide pensions to retirees who earned benefits when the railroad was a private employer.

The Port's motion implies there is exclusive federal jurisdiction because the issues are whether the Board of Trustees could properly terminate the Plan, and "continuance of retiree medical benefits beyond the expiration of a collective bargaining agreement." This is yet another attempt to falsely frame the issues. Plaintiffs do not challenge the decision by the Trustees to terminate the Plan when the Port ceased all contributions, effectively bankrupting the Plan. While the Plaintiffs assert that the Port's obligation to provide retiree medical benefits survived the termination of the last CBA, there is no federal court jurisdiction over a dispute as to the obligations of the Port functioning as employer.

B. RETIREE MEDICAL BENEFITS ARE DEFERRED COMPENSATION, TO WHICH PLAINTIFFS HAVE AN ENFORCEABLE RIGHT BASED ON THEIR LENGTH OF SERVICE

Elimination of retiree medical benefits has a catastrophic impact on the effective retirement income of former Port employees. For example, a 62 year old retiree with 25 years of service at the Port, who had been receiving retirement benefits of \$2,500 per month from the Pension Plan,¹² who had been receiving retiree

¹² Second Affidavit of Tony Hutter states that retirement benefits under the Pension Plan were \$100 per year of service. (CP 455-57)

medical benefits for employee and spouse at no cost,¹³ is now required to pay up to \$964 for that coverage, effectively reducing his retirement income by over 39%, to \$1,506.

Washington Law does not permit the Port to impose this hardship on employees whose terms of employment included receiving retiree medical benefits at substantially no cost. Washington has long adopted the “modern view” – which is based in sound public policy – that when an employer has offered a future benefit if certain conditions are met, the employer cannot modify or eliminate the benefit after the conditions are met. Other courts that adhere to the modern view have protected the retiree medical benefits of both private and public employees. While no Washington State decision has addressed the status of retiree medical benefits, under the reasoning of a series of Washington decisions, such benefits are entitled to protection as deferred compensation for service previously rendered.

1. The Port Promised Retiree Medical Benefits as a Term of Employment

A lynchpin of the Port’s argument is that the promise of retiree medical benefits was made by the Welfare Trust, not by the Port. In

¹³ CP 347-48

fact, the Port itself agreed to provide retiree medical benefits. The collective bargaining agreement between the Port and Local 9 stated:

The Port shall maintain the current level of medical, welfare, dental and related benefits during the duration of this contract and shall continue to provide the same level of coverage currently provided to eligible employees, eligible retirees, and dependents.¹⁴

Although it is not necessary to the analysis, it should be noted that, as to this promise, there was no “reservation of rights.”

2. Prior to ERISA, Washington Adopted the Modern View that Retirement Benefits Could Not Be Eliminated, Even if the Sponsor Had “Reserved the Right” to Modify or Terminate Benefits

Before 1974, when ERISA was passed, state courts routinely addressed the question of whether employers that had promised retirement benefits could later rescind them, based either on the theory that the offer of retirement benefits was a gratuity, or that the employer had explicitly “reserved the right” to eliminate benefits.

The historic view was that promised pension benefits were gratuities, and could be revoked at any time, especially if the employer reserved that right in the documents. For example, the decision in *Kolentus v. Avco*, 798 F.2d 949, 956 (7th Cir. 1986), a

¹⁴ Later in Section XVIII, the Port made the *additional* commitment to be a party to the Agreement and Declaration of Trust of the [Welfare Trust], and “to pay the premium necessary to maintain the current level of benefits to that Trust.” (CP 57)

pre-ERISA decision¹⁵ relied upon by the Port, applied New York law, which permitted employers to terminate pension plans if they had reserved that right in plan documents, even after employees had vested or retired.

Washington has adhered to the “modern view that the promise of a pension constitutes an offer which, upon performance of the required service by the employee, becomes a binding obligation.” *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4 (1st Cir. 1978).

The scope of Washington’s adoption of the modern view is summarized in *Jacoby v. Grays Harbor Chair*, 77 Wn.2d 911, 916, 468 P.2d 666 (1970), where the court stated a pension was a form of deferred compensation for services rendered, and could not be altered after services were rendered, whether the pension was offered in a statute, offered by an employer on its own initiative, or, as in this case, established by a collective bargaining agreement.

The *Jacoby* court adopted the policy rationale of *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 410, 171 N.E.2d 518 (1960), which is that retirement programs are designed to induce long and faithful service, and the employer may not enjoy the service, but then deny benefits. As the *Cantor* court explained:

¹⁵The events disputed in *Kolentus* occurred just prior to the 1974 effective date of ERISA, but litigation evidently continued for many years.

A retirement program has become a basic part of an employee's remuneration even as his wages are a part thereof, and a consideration flows to the employer as well as to the employee through such a program. Clearly, under our present economic system, an employer cannot offer a retirement system as an inducement to employment and, after an employee has accepted employment under such circumstances, withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder. 171 N.E.2d at 523

The *Jacoby* decision also incorporates language from *Cantor* holding that insertion of “reservation of rights” language in a plan does not permit the employer or plan to terminate or reduce benefits:

Therefore, whether a retirement plan is contributory or noncontributory and **even though the employer has reserved the right to amend or terminate the plan, once an employee**, who has accepted employment under such plan, has complied with all the conditions entitling him to participate in such plan, his rights become vested and the employer cannot divest the employee of his rights thereunder. *Jacoby*, 77 Wn.2d at 915, citing *Cantor* (Emphasis added)

3. Retiree Medical Benefits Were an Integral Part of the Retirement Benefit Promised to Port Employees

The retiree medical benefits offered to Port employees were completely integrated into the retirement program for Port employees. In fact, an employee’s eligibility for retiree medical benefits was measured by both participation under the Pension Plan, and contributions under the Welfare Plan. An employee needed both

10 years of contributions under the Welfare Plan, and at least 15 years of service under the Warehouse Industry Pension Trust, to qualify for retiree medical benefits.¹⁶

That retiree medical benefits would be available only at age 62, although retirement was permitted at age 55, was established in the *Pension Agreement* to which the Port agreed to remain bound in the CBA.¹⁷ In fact, the pension trust and retiree medical benefits were so intertwined that the trustees of the Pension Trust sought advice from counsel on whether the Pension Trust might be liable to pay retiree medical benefits.¹⁸

4. Consistent with the Reasoning of Other State Courts, and Prior Washington Decisions, Retiree Medical Benefits Are “Deferred Compensation” that Cannot Be Reduced After the Employee Provides Services

Because ERISA preempted most claims for employee benefits, there are few state law decisions addressing contractual rights to retiree medical benefits. *But see, Sheehy v. Seilon*, 10 Ohio St.2d 242, 242-3, 227 N.E.2d 229 (Ohio 1967), (Based on *Cantor*, employer may not reduce retirees’ medical benefits).

Washington courts have not addressed statutory rights to retiree medical benefits. But most state courts have held that retiree

¹⁶ Exhibit 1 to Oswald Affidavit, at p. 12; CP 347

¹⁷ CBA §XVIII (CP 57); Exhibit 3 to Affidavit of Tony Hutter; CP 300, at ¶5.

¹⁸ Exhibit 5 to Hutter Affidavit; CP 304

medical benefits created by statute are protected under variants of the *Bakenhus* rationale. *Duncan v. State of Alaska*, 71 P.3d 882, n.23 (AK 2003) (collecting decisions from other states), and *Poole v. City of Waterbury*, 831 A.2d at 222, n. 10, (same)

The pattern of Washington appellate decisions applying *Bakenhus* and *Jacoby* strongly suggests that retiree medical benefits are protected as deferred compensation for services already rendered. These include *Frank v. Day's Inc.*, 13 Wn.App. 401, 404 (1975) ("retirement programs" . . . are contractual in nature, and the employer is obligated to pay the pension if the employee fulfills the specific conditions of the agreement."), *Dorward v. ILWU-PMA Pension Plan*, 75 Wash.2d 478, 452 P.2d 258 (consideration for a promise to pay a pension is established when employee has knowledge of pension program and continues his service), *Leonard v. Seattle*, 81 Wn.2d 479, 488 (1975) (right of public employee to pension upon retirement is "like paid up insurance," which has been paid for by the employee's service over time), and *Johnson v. Aberdeen*, 14 Wn.App. 545 (1975) (sick leave payout upon termination is form of deferred compensation that cannot be reduced).

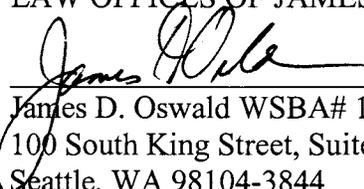
The premise of these cases – that if an employer offers a benefit to be paid after work is completed, and the employee completes the work, the employer may not then eliminate the benefit – is fully applicable here. In fact, because retiree medical benefits are a critical component of retirement security, this case is closely analogous to *Jacoby*. Because Plaintiffs have provided the service to earn retiree medical coverage at virtually no cost, the Port is required to provide that benefit, regardless of any asserted right to modify or terminate it.¹⁹

CONCLUSION

For the reasons stated above, as well as those discussed in briefs to the Court of Appeals, the trial court's grant of summary judgment dismissing Plaintiffs' claims should be reversed.

Respectfully submitted this 22nd day of August, 2006.

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¹⁹ This brief has not addressed the Port's allegation that the retiree medical benefit was provided by the "third party union." Because benefits were provided through a jointly administered trust fund, there is no conceivable basis in the record for that claim.

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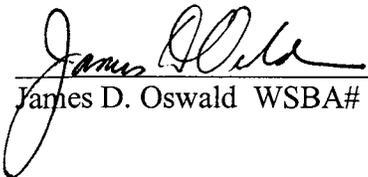
Defendant/Respondent.

On August 22, 2006, I submitted to ABC Legal Messengers for delivery to the
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Appellants' Supplemental Brief Filed Pursuant to Court's Order

Dated this 22nd day of August, 2006.


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