No. 16-0735 - *Edward E. Harris and Sandra L. Harris v. The County Commission of Calhoun County*

FILED
February 21, 2017
released at 3:00 p.m.
RORY L. PERRY, II CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, J., dissenting:

I respectfully dissent to the majority opinion; I would have held that the trial court correctly determined that the statute of limitations in the instant case began to run when the employee was damaged at retirement through the receipt of less advantageous retirement benefits than he would have received if he had been timely enrolled.

While the majority opinion accurately recognizes the general rule that a statute of limitations begins to run on a contract claim when the breach occurs, a number of jurisdictions have adopted a much sounder approach, supportive of a modification of that rule where the specific issue involves failure to enroll an employee in a retirement system and resulting harm to the employee upon retirement. This approach utilizes principles directly supportive of the trial court's determination in the present case and addresses the concept of *accrual* of a cause of action for breach of contract within a particular context. In *State Employees' Association of New Hampshire, Inc. v. Belknap County*, 448 A.2d 969 (N.H. 1982), for instance, a county had breached its obligation to enroll eligible employees in the retirement system and make the requisite contributions. In addressing a statute of limitations

defense, the Supreme Court of New Hampshire reasoned that the statute of limitations on claims for failure to enroll eligible employees in a pension plan began to run on the dates the eligible employees would have been *entitled to receive* pension payments, *not* on the dates they became eligible to be enrolled. Specifically, the court held "the trial court correctly determined that the six-year statute of limitations . . . did not preclude all claims concerning the county's noncompliance. . . ." 448 A.2d at 973. The court observed "benefits are payable only upon the death or retirement of a qualifying employee; they are not payable prior to these events." *Id.*

> [T]he statute of limitations does not begin to run until the time that the payments become due—the time of death or retirement. *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 462–63, 326 P.2d 484, 499 (1958); *see* 4 Corbin on Contracts § 989, at 966–67 (1951); *cf. General Theraphysical, Inc. v. Dupuis*, 118 N.H. 277, 279, 385 A.2d 227, 228 (1978); *Blanchard v. Calderwood*, 110 N.H. 29, 35, 260 A.2d 118, 122 (1969). 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.

Id; s*ee also California Teacher's Assn. v. Governing Bd.*, 214 Cal. Rptr. 777, 782 (Cal. App. 1985) ("[T]eachers' entitlement to service credits would not accrue until retirement benefits became payable upon retirement and, since service credits are dependent in part upon employer contributions, teachers' right to compel District to make additional contributions to the Teacher's Retirement Fund, likewise accrues only upon retirement."); *State ex rel. Teamsters v. City of Youngstown*, 364 N.E.2d 18, 21 (Ohio 1977) (holding right to receive benefits accrued when employee elected to retire; thus, applicable statute of limitations did

not begin to run until that time).

In *Richey v. Borough*, 2015 WL 1650873 (D. Alaska April 14, 2015), the District Court encountered allegations of failure of a Borough to enroll employees in the Public Employees Retirement System. The District Court examined the *Belknap* reasoning, finding it "particularly on-point and persuasive" and "in accord with black-letter contract law." *Id.* at *3. Although the Borough argued "that the statute of limitations began to run on plaintiffs' claims each time the Borough failed to make a PERS contribution on each plaintiff's behalf[,]" the District Court held that the "payment of such benefits is not due until an employee's death or retirement. . . ." *Id.* Thus, the statute of limitations did not begin to run when the errors occurred or when the employees arguably should have been aware of such errors.

The court in *Richey* also noted, with approval, the dissenting opinion in *Jiricek v. Woonsocket School District*, 489 N.W.2d 348 (S.D. 1992). In *Jiricek*, a former school superintendent had brought an action against the school district seeking contribution to his public retirement fund. Although the majority found his action barred by a six-year statute of limitations, the dissenting opinion, by Justice Wuest, presented a comprehensive evaluation of the accrual of a cause of action for this type of breach of contract and the statute of limitations on such claims, concluding that "Jiricek's cause of action does not

accrue for purposes of the statute of limitations until he elects to retire." *Id*. at 353 (Wuest, J., dissenting). The dissenting opinion further noted "[t]he majority opinion fails to acknowledge or address this persuasive authority." *Id*.

Although some cases do support the approach adopted by the majority opinion in this case,[1] the substantial number of jurisdictions which utilize the one for which I advocate are better-reasoned, more persuasive, and much fairer.

In the instant context, it is grossly unfair to punish the employee for the failure of a public employer to adhere to its legal obligation to make retirement contributions in a timely manner. This is especially aggravated in a situation such as the instant case, where the employee is an illiterate janitor who not only would be unaware of the employer's failure, but also who would not have any knowledge of the harm visited upon him by the employer's failure until such time as he seeks to retire. A panoptic evaluation of this issue compels the conclusion that the cause of action accrues when the benefits of the contract become due and owing; thus, the statute of limitations should not begin to run until that time.

[1]*See, e.g., Bailey v. Shelby Cty*., 2013 WL 2149734 (Tenn. Ct. App. May 16, 2013) (finding statute of limitations bars claim where employees should have known of error prior to retirement).