

IN THE SUPREME COURT OF MISSOURI

GILBERT L. ALDERSON, et. al.)
)
)
v.) Appeal No. SC89370
)
)
STATE OF MISSOURI, et. al.)

APPEAL FROM THE CIRCUIT COURT OF THE 19TH JUDICIAL
CIRCUIT OF MISSOURI, COLE COUNTY, MISSOURI
HONORABLE RICHARD G. CALLAHAN, PRESIDING

APPELLANTS' REPLY BRIEF

Theodore R. Allen, Jr. #26771
Attorney for Appellants
P.O. Box 100
Hillsboro, MO 63050
636-797-5350
636-797-5090 (Fax)
theodore.allenJr@courts.mo.gov

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ARGUMENT

I.

THE HOLDING IN *SMITH V. THIRTY SEVENTH JUDICIAL CIRCUIT*, 847 S.W.2D 755 (MO. BANC 1993), DID NOT ESTABLISH THE RIGHT TO CONTROL AS THE TEST FOR COUNTY EMPLOYEE STATUS AS PRECEDENT FOR ADOPTION OF THAT TEST BY CERF AND THE GENERAL ASSEMBLY IN CONSTRUCTION OF SECTION 50.1000. (8), RSMo (1994), AND THE CODIFICATION OF THAT TEST IN THE 1998 AND 2001 AMENDMENTS TO SECTION 50.1000. (8), TO EXCLUDE COUNTY PAID JUVENILE OFFICE PERSONNEL IN SINGLE COUNTY JUDICIAL CIRCUITS LOCATED IN COUNTIES OF THE FIRST CLASSIFICATION WITHOUT A CHARTER FORM OF GOVERNMENT. THE ADOPTION OF THE RIGHT TO CONTROL TEST TO DEFINE EMPLOYEE STATUS FOR CERF ELIGIBILITY OF JUDICIALLY APPOINTED, COUNTY PAID JUVENILE OFFICE PERSONNEL IN SINGLE COUNTY JUDICIAL CIRCUITS LOCATED IN A COUNTY OF THE FIRST CLASSIFICATION WITHOUT A CHARTER FORM OF GOVERNMENT IS ARBITRARY, WITHOUT A RATIONAL BASIS TO A LEGITIMATE LEGISLATIVE PURPOSE, AND VIOLATES EQUAL PROTECTION OF THE LAWS GUARANTEED BY AMENDMENT XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, OF THE CONSTITUTION OF MISSOURI. (RESPONDING TO POINT I.)

This case involves the exclusion of judicially appointed, county paid personnel from membership in the County Employee's Retirement Fund. Specifically, it involves the exclusion from CERF of a Juvenile Officer, a Chief

Deputy Juvenile Officer, and an attorney for a juvenile office of a single county judicial circuit located in a county of the first classification without a charter form of government.

CERF was created in 1994 to provide benefits for county officeholders and county employees, other than those located in first class counties with a charter form of government and St. Louis City. (L.F. 92).

As they pertain to juvenile office personnel appointed by and under the control of the circuit court, there are essentially three possible retirement plan scenarios:

(a) Since July 1, 1999, juvenile office personnel in judicial circuits comprised of more than one county have been considered state employees, eligible for membership in the Missouri State Employees' Retirement System (MOSERS); any retirement benefit of those employees accrued prior to July 1, 1999, when their benefits came from the counties of their judicial circuit, were transferred to MOSERS; Section 211.393, RSMo. (2000).

(b) Since July 1, 1999, juvenile office personnel in single county judicial circuits located in a county of the first classification with a charter form of government have been eligible for whatever retirement system the county provides since they are now statutorily denominated county employees, but excluding CERF since CERF never covered employees of any charter county;

(c) Precisely relevant to this case, juvenile office personnel located in the six single-county judicial circuits without a charter form of government, including

Appellants, are also eligible for whatever retirement system the county provides, in Appellants' case LAGERS, because they are now statutorily denominated county employees for all purposes including any applicable county retirement plan, but are excluded from CERF.

In determining who was eligible for enrollment in the County Employee's Retirement Fund, the General Assembly:

- originally did not define "county employee" in Section 50.1000 (8), RSMo. (1994);
- amended Section 50.1000 (8) in 1998 to define as county employees only "any county elective or appointive officer or employee who is hired and fired by the county and whose work and responsibilities are directed and controlled by the county and who is compensated directly from county funds . . . Section 50.1000. (8), RSMo. (2000);
- later amended Section 50.1000 (8) in 2001 to define as county employees only those who are hired and fired by the county or by the circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS, whose work and responsibilities are directed and controlled by the county or circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS . . . Section 50.1000 (8), RSMo (Cum. Supp. 2007).

All of these amendments came after Respondents CERF adopted the "right to control test" as the sole factor in determining who was an employee eligible for CERF membership in July 1995, (L.F. 74). CERF later codified that decision by administrative rule 16 CSR 50.2.010(1)(L), to exclude from the definition of employee "individuals who receive some pay from a county but who are subject to the hiring, supervision, promotion or termination by an independent administrative body (such as the circuit court) . . ."

Respondents argue that their July 1995 adoption of the right to control test as solely determinative of the status of employee, the later adoption of CSR 50.2.010(1) (L), to that effect, and the statutory amendment to Section 50.1000. (8), RSMo in 1998, merely followed and codified what Respondents submit was the holding of this Court in *Smith v. Thirty-Seventh Judicial Circuit*. 847 S.W.2d 755 (Mo. banc. 1993). Respondents assert that the similarity of the language between the original version of Section 50.1000. (8) and Section 105.800, RSMo, construed in *Smith*, indicates that the right to control should determine who would have been deemed a county employee under original 50.1000. (8). Respondents' Brief, 19. Respondents read *Smith* over broadly. The *Smith* court was "careful to point out that the opinion is based on interpretation of traditional worker's compensation law." *Boone County v. County Employee's Retirement Fund*, 26 S.W.3d 257, 263 (Mo. App. W.D. 2000). *Smith* held that worker's compensation definition of employee status was based on "the law of master and servant and the relationship, duties, rights, and limitations arising out of the same." 847 S.W.2d at

758. By this analysis, this Court determined that Smith, as a deputy juvenile officer appointed by the circuit court, could have been covered under the Section 105.800, RSMo, definition of "state employee" for worker's compensation purposes, but also could have and in fact was considered a county employee for worker's compensation purposes since the counties of Smith's circuit court had purchased coverage for him within the budget provided the circuit court by the counties under Section 50.640 *et. seq. Id.* at 759.

Contrary to Respondents' assertion, neither the General Assembly nor this Court have focused on the right to control test in determining whether a person working for government is an "employee," when the issue in controversy is pay or benefits other than worker's compensation. Rather, when the statute in question is whether an individual is a state employee, he or she has been deemed to be so if the source of compensation is the state treasury. *See, Hawkins v. Missouri State Employees' Retirement System*, 487 S.W.2d 580 (Mo. App. 1972) (court reporter paid by the state held to be state employee); *Cates v. Webster*, 727 S.W.2d 901 (Mo. banc. 1987) (bailiff paid by county but appointed and controlled by court held not to be state employee for coverage under State Legal Defense Fund); *Smith v. Thirty-Seventh Judicial Circuit*, 847 S.W.2d 755, 761 (Price, J., concurring).

In the context of juvenile court personnel appointed by the circuit court but paid by the county, this court has always determined that these persons are county employees when the issue is pay and benefits. *See, e.g., Hastings v. Jasper*

County, 282 S.W.700 (Mo. 1926); *State ex. rel. Weinstein v. St. Louis County*, 421 S.W.2d 249 (Mo. banc 1967).

In sum, contrary to Respondents' argument, analysis of case law in situations where the issue in question has been pay and benefits, establishes that juvenile office personnel were always considered county employees prior to the 1999 takeover by the State of juvenile office personnel who work in judicial circuits composed of more than one county. In single county judicial circuits, juvenile office personnel were under that case law, and are now under Section 211.393, RSMo, deemed county employees for all purposes except CERF eligibility. The question here is whether the General Assembly can classify juvenile office personnel in single county judicial circuits located in a county without a charter form of government, appointed by the circuit court, county employees for all purposes except CERF consistent with equal protection.

Appellants submit not.

The classification at issue is economic and does not infringe upon any fundamental liberty interest or target a suspect class. Accordingly, to pass equal protection muster, the classification must only relate to a legitimate legislative interest. *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997). But, the reason for the classification must be capable of explanation, even if hypothesized by a reviewing court. *Id.* Contrary to Respondents' position, Respondents' Brief at 17, intuition does not suffice. A legislative exclusion of a group from benefits afforded another group not based on

differences in the two groups is arbitrary discrimination in violation of equal protection. *Pettit. v. Field*, 341 S.W.2d 106, 109 (Mo. 1960).

Respondents' multiple defenses of 16 CSR 50.2.010 (1) (L), the 1998 and 2001 amendments to Section 50.1000. (8), RSMo, the 2001 amendment to Section 50.1010, RSMo, and Section 211.393, RSMo, are reminiscent of quicksand: ever shifting, never solid. First, Respondents argue with the trial court that it was "intuitively rational" in 1998 for the legislature to amend the definition of employee found in Section 50.1000 (8), RSMo, to include only those persons hired, fired, and under the control of a county elected officeholder. Section 50,1000. (8), RSMo. (2000). Respondents' Brief at 23. Other than a reference to maintaining the fiscal solvency of CERF, Respondents' Brief at 17, Respondents never explain why control by a county elected officeholder of a person who works in the juvenile office and who has, and whose predecessors have, always been considered county employees for pay and benefits because the judiciary has no appropriation or taxing power, relates to the legislative end of providing retirement benefits to county employees. And, with regard to the goal of maintaining fiscal solvency of the program, Respondents' arguments are not persuasive. First, contrary to Respondents' allegation in their Brief at 21, the record supports that the actions by CERF and the General Assembly in excluding Appellants and similarly situated juvenile office personnel from CERF arose early into the program from the discovery by CERF that estimates of persons entitled to coverage were erroneously low. Ms. Maxwell's affidavit indicates that by

November 2002, approximately eight years after commencement of the program, the number of persons eligible for CERF coverage had increased from 7,342 to 10,244, a number described by her as explosive. (L.F. 68). Further, CERF's argument that the granting of the relief sought by Appellants will cause a decrease in the benefit amount to current eligible members by more than ten percent, (L.F. 64), depends upon Ms. Maxwell's speculation that 1, 500 new members would be eligible for membership. (L.F. 60). As noted by Ms. Maxwell, approximately 425 persons are in the same situation as Appellants: county paid, judicially appointed juvenile office personnel in single county judicial circuits located in counties of the first classification without a charter form of government. (L.F. 60). That others may seek entry into CERF based upon a ruling by this Court in this case does not mean that they will have the same legal precedent, *i.e.*, the case law that has consistently held that for purposes of pay and benefits, juvenile office personnel appointed by the circuit court have been considered county employees.

Shifting to another point, even if it were assumed for argument's sake that the right to control by a county elected officeholder reasonably relates to the goal of providing retirement benefits to county employees, (L.F. 92), the General Assembly abandoned this principle by its 2001 amendment to Section 50.1000. (8), RSMo, which made eligible for CERF membership persons hired by the circuit court "located in a county of the first classification without a charter form of government which is not participating in LAGERS. . . ." Certainly, these individuals are not subject to control by a county officeholder. Respondents

attempt to argue that these individuals are distinguished from Appellants and other juvenile office personnel of single county judicial circuits located in a non-charter county, because Appellants have access to LAGERS, while the court appointed, county paid, individuals who benefited from the amendment, do not. Yet, the CERF statute expressly contemplates that CERF members may also receive LAGERS, if their county of employment offers LAGERS. Section 50.1160, RSMo. (2000). This establishes that the General Assembly's purpose in the 2001 amendment was not to confine CERF benefits to personnel who had no other retirement plan, which was found to be reasonable in *Massey v. McGrath*, 965 S.W.2d 678 (8th Cir. 1992).

Respondents tacitly acknowledge that the 2001 amendment to Section 50.1000. (8), RSMo, undercuts their argument that the General Assembly's purpose in enacting CERF was to confine benefits to persons appointed by and under the control of a county elected officeholder by their lengthy treatment of the severability of statutory sections found unconstitutional. Respondents' Brief, 26-28. This does not cure the problem for Respondents. The problem is not whether the 2001 amendment permitting enrollment of some judicial appointees in CERF could be severed. The problem is that it demonstrates that the General Assembly had no considered, reasoned, intent to confine CERF membership to appointees of county elected officeholders, even if that intent could be deemed a legitimate legislative purpose under equal protection, but has acted in an *ad hoc*, arbitrary, manner in deciding whom to allow CERF membership. This fails the standard set

forth in *Pettit v. Field*, 341 S.W.2d 106, 109 (Mo. 1960 (exclusion of one group from benefits afforded another group not based on differences in the two groups held arbitrary discrimination in violation of equal protection)).

To conclude on this point, Appellants have met the burden Respondents set for them in Respondents' Brief at 17:

The statutes and regulation at issue violate equal protection because they are arbitrary;

Prior to enactment of the 1998 and 2001 amendments to Section 50.1000 (8) and the 1999 amendment to Section 211.393, RSMo, Appellants belonged to a class that would have been eligible for CERF membership under interpretation of the phrase "county employee" found in the original Section 50.1000 (8), RSMo, based on decisions of this court that culminated in *Smith v. Thirty-Seventh Judicial Circuit*;

CERF's defense of laches does not bar Appellants' claim for the reasons set forth in Appellants' original brief, which will not be reargued here.

II.

APPELLANTS HAVE STANDING TO BRING THIS ACTION BASED ON A THEORY THAT EXCLUSION OF JUVENILE OFFICE PERSONNEL APPOINTED BY A SINGLE COUNTY JUDICIAL CIRCUIT LOCATED IN A COUNTY OF THE FIRST CLASSIFICATION AND PAID BY THE COUNTY FROM CERF BASED ON THEIR APPOINTMENT BY THE JUDICIARY AND NOT BY A COUNTY ELECTED OFFICE HOLDER VIOLATES SEPARATION OF POWERS CONTRARY TO ARTICLE II, SECTION

1 OF THE MISSOURI CONSTITUTION IN THAT APPELLANTS' RIGHTS ARE AFFECTED BY THE STATUTES AT ISSUE HEREIN AND APPELLANTS ARE ENTITLED TO HAVE THE VALIDITY OF SUCH STATUTES DETERMINED UNDER SECTION 527.020, RSMO. (2000), AND ASSERT THAT THE STATUTES NOW UNEQUALLY TREAT JUVENILE OFFICE PERSONNEL LOCATED IN COUNTIES OF THE FIRST CLASSIFICATION WITHOUT A CHARTER FORM OF GOVERNMENT BASED ON THEIR APPOINTMENT BY THE CIRCUIT COURT NOTWITHSTANDING THAT THE CIRCUIT COURT, WITH THE ACQUIESCENCE OF THE COUNTY GOVERNING BODY, CAN ESTABLISH SALARIES FOR APPELLANTS. (RESPONDING TO POINT II).

Under Section 527.020, RSMo, (2000), any person "whose rights, status or other legal relations are affected by a statute" may bring a declaratory judgment action to have determined the validity of the statute. Similarly, under Section 536.050, RSMo, (2000), persons affected by administrative regulations, such as 16 CSR 50-2.010 here, may seek a declaratory judgment in the court system where the issue is the constitutional validity of the regulation. Therefore, Appellants have standing to bring this case as juvenile office personnel appointed by the circuit court in a single county judicial circuit located in a county of the first classification without a charter form of government. This is because 16 CSR 50-2.0210 explicitly prohibits Appellants from CERF membership due to Appellants' appointment by "an administrative body (such as the circuit court). . . . It could not be plainer that the reason for the exclusion of Appellants, who as juvenile office personnel are paid by the county and afforded other benefits from the county by

long-standing judicial precedent and now explicitly by Section 211.393, RSMo, is the sole fact that their appointments to the positions they now hold emanate from the circuit court. Apparently, Respondents believe that only a judge of the circuit court, as the appointing authority for Appellants, could bring this lawsuit. *State ex. rel. Weinstein v. St. Louis County*, 451 S.W.2d 99 (Mo. banc 1970), cited by Respondents, does not support this proposition. Moreover, in addition to the personal impact upon Appellants of the regulation and laws at issue in this case, each of the Appellants have administrative and supervisory responsibilities for other personnel, which includes interviewing and recommending applicants for employment for ultimate appointment by the circuit court. (L.F. 45, 49, 51). As part of the interviewing of applicants, disclosure of the benefits either afforded or not to a prospective applicant should be made, including that the applicant would not be eligible for CERF benefits if hired by the Juvenile Office, but would be afforded those benefits if hired by another department within the county.

The fact that Appellant Alderson qualifies for MOSERS benefits on that part of his salary derived from the state under Section 211.393. 2. (1) (b), RSMo (Cum. Supp. 2007), and LAGERS benefits on that part of his salary derived from the county under the same provision, has no relevance to the issue of this lawsuit, as apparently believed by Respondents. Respondents' Brief 37. Nor does the fact that Appellants Polette and Allen have LAGERS retirement benefits on their county funded salaries have any relevance to the issue of this lawsuit. Further, that juvenile office personnel employed in multi-county judicial circuits are members

of MOSERS only, has no relevance to the issues of this case. While it is true that Appellants seek inclusion in a second retirement system, CERF, by this lawsuit, it is also true that they seek only equivalent treatment with other county employees who are now covered by CERF and LAGERS. Again, Appellants ask the Court to remember that the CERF statutes do not prohibit, and indeed contemplate, that county employees who work in a county that provides LAGERS may also participate in CERF. Section 50.1160, RSMo. (2000). The General Assembly, in the 1999 amendments to Section 211.393, RSMo, did not create a single, unified juvenile court system for the purpose of funding the personnel of that system. Rather, it specifically divided juvenile court personnel into two groups for the purpose of pay and benefits, those who serve in multi-county judicial circuits, and those who serve in single county judicial circuits. Appellants submit that having made this election, the General Assembly then cannot deny to Appellants and other juvenile office personnel of a single county judicial circuit located in a county of the first classification without a charter form of government a benefit afforded all others, CERF membership.

Respondents also assert that the circuit court may set Appellants' salaries, as well as those of other juvenile office personnel, and that with that power, "the marketplace has already factored all court employees' benefits into the economic equation by dictating salaries that complement those benefits." Respondents' Brief, 37. Apparently, Respondents believe that the circuit court, by fiat, can simply order the county to pay Appellants and similarly situated person salaries that

would compensate them for their exclusion from CERF. This is not reality. Reality is that the circuit court does not have the power that a business owner has to set the salaries of the business's employees, to calculate what can be paid after an assessment of what can be sold or provided. Contrary to a business in a free market, if such exists, a court has nothing to sell or provide in exchange for cash; a court cannot tax or appropriate funds as can the legislature. Rather, as pointed out by Judge Price's concurring opinion in *Smith v. Thirty-Seventh Judicial Circuit*, 847 S.W.2d 755, 760 (Mo. banc. 1993), a court has "minimal or no money of its own and no taxing power to generate funds" and is dependent on the county or the state for funds. Under Section 50.640, RSMo, the court may order its budget, including the setting of salaries for its employees, but its authority to do so is constrained by the need for the county governing body either to consent or have any conflict resolved by the judicial finance commission.

CONCLUSION

For the reasons set forth in this Brief and in Appellants' original Brief, Appellants pray that the Court reverse the judgment of the trial court that granted summary judgment for Respondents CERF, and enter its judgment for Appellants.

Respectfully submitted,

Theodore R. Allen, Jr. MBE 26771
Attorney for Appellants and Appellant Pro Se
P.O. Box 100
Hillsboro, MO 63050
636-797-5356
636-797-5090 (Fax)
theodore.allenJr@courts.mo.gov

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Appellants' Reply Brief, together with a diskette containing the same, was mailed by first class mail to Mr. Edward F. Downey, Attorney at Law, Suite 101, 221 Bolivar, Jefferson City, MO 65102, in accordance with Supreme Court Rule 84.06 (g), on this _____ day of November 2008.

CERTIFICATE OF COMPLIANCE

The undersigned certifies on this ____ day of November 2008, that this Reply Brief includes the information required by Mo. R. Civ. P. 55.03, and complies with the limitations contained in Mo. R. Civ. P. 84.06 (b), and that the diskette containing this brief has been scanned for viruses and is virus free. The number of words in this brief according to the word count tool of Microsoft Word is 3,868.
