

IN THE SUPREME COURT OF MISSOURI

No. SC88813

ROBERT H. SIHNHOLD,

Appellant,

v.

MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

On Appeal from the Circuit Court of Cole County
Hon. Richard Callahan, Circuit Judge

BRIEF OF RESPONDENT
MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM

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ARGUMENT

I. The Circuit Court correctly held that the 1999 amendment to RSMo § 287.815, which lowered the age for administrative law judges to receive retirement benefits from age 65 to 62, does not apply to Plaintiff, whose employment as an administrative law judge ended in 1989, and that, consequently, Plaintiff is entitled to receive retirement benefits at age 65, not age 62, because:

(A) RSMo § 287.845 provides that the version of § 287.815 in effect when Plaintiff's employment as an administrative law judge terminated in 1989 applies to Plaintiff and that version of § 287.815 entitles Plaintiff to receive retirement benefits at age 65, not age 62; and

(B) article III, § 39(3) and § 38(a) of the Missouri Constitution prohibit applying the 1999 amendment to § 287.815 to Plaintiff to allow him to receive retirement benefits at age 62 instead of age 65 in that this would result in the State of Missouri granting extra compensation to Plaintiff after he rendered his service as an administrative law judge.

(Responds to Point I)

Plaintiff-Appellant Robert Sihnhold was born on June 26, 1943. He was an administrative law judge ("ALJ") for the State of Missouri from May 1975 to August 1989. He is a member of the state ALJ retirement plan, which Defendant-Respondent the Missouri State Employees' Retirement System ("MOSERS") administers.

In August 1989, when Plaintiff's employment as an ALJ terminated, Plaintiff was 46 years old and RSMo § 287.815 provided that Plaintiff would be eligible to receive retirement benefits at age 65. In 1999, ten years later, the Missouri General Assembly amended § 287.815 to lower the age at which an ALJ is eligible to receive retirement benefits from 65 to 62, three years earlier than under the previous version of § 287.815. As a result, Plaintiff contends in this lawsuit that he is eligible to receive retirement benefits at age 62 instead of age 65 even though his service as an ALJ ended in August 1989, ten years before the 1999 amendment to § 287.815 was enacted.

The Circuit Court entered summary judgment in favor of MOSERS and against Plaintiff, ruling that the 1999 amendment to § 287.815 does not apply to Plaintiff and that Plaintiff is entitled to receive retirement benefits at age 65, not age 62. This Court reviews the Circuit Court's summary judgment de novo. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 736 (Mo. banc 1993).

The Circuit Court correctly entered summary judgment in favor of MOSERS and against Plaintiff. Under Missouri law, Plaintiff is eligible to receive retirement benefits at age 65, not age 62, because that is what the law provided when he terminated his service as an ALJ in August 1989. The Court, therefore, should affirm the Circuit Court's judgment.

A. RSMo § 287.845 provides that the version of § 287.815 in effect when Plaintiff’s employment as an administrative law judge terminated in 1989 applies to Plaintiff and that version of § 287.815 entitles Plaintiff to receive retirement benefits at age 65, not age 62.

While the Circuit Court ruled that the 1999 amendment to § 287.815, as applied to Plaintiff, is unconstitutional under article III, § 39(3) and § 38(a) of the Missouri Constitution, the Circuit Court’s judgment can be affirmed on an alternative basis without reaching the constitutional issue. (The Court does “not address constitutional issues when a case can be otherwise resolved.” State ex rel. Director of Revenue v. Gabbert, 925 S.W.2d 38 (Mo. banc 1996).) Another statute, RSMo § 287.845, precludes application of the 1999 amendment to § 287.815 to Plaintiff. Section 287.845 provides that the retirement benefits of an ALJ are determined by the law in effect at the time the ALJ’s employment was terminated: “The system [MOSERS] shall calculate the annuity for an administrative law judge ... based on the law in effect at the time the administrative law judge’s employment was terminated.” MOSERS must determine the starting date for retirement benefits—whether at age 62 or age 65—in order to “calculate the annuity” due to an ALJ. Plaintiff’s employment as an ALJ terminated on August 31, 1989. Under § 287.845, the law in effect in 1989 governs Plaintiff’s right to retirement benefits. See Atchison v. Retirement Board of Police Retirement System of Kansas City, 343 S.W.2d 25 (Mo. 1960) (police officers who retired before time when police pension

statutes were repealed and re-enacted, substituting a new formula for computing pensions, were not entitled to have their pensions calculated by the new, more favorable formula). In 1989, § 287.815 entitled an ALJ to receive retirement benefits at age 65. Accordingly, Plaintiff is eligible to receive retirement benefits at age 65, not age 62. The Circuit Court correctly entered summary judgment in favor of MOSERS.

B. Article III, § 39(3) and § 38(a) of the Missouri Constitution prohibit applying the 1999 amendment to § 287.815 to Plaintiff to allow him to receive retirement benefits at age 62 instead of age 65 because this would result in the State of Missouri granting extra compensation to Plaintiff after he rendered his service as an administrative law judge.

Assuming that § 287.845 does not preclude the application of the 1999 amendment to § 287.815 to Plaintiff, the Circuit Court correctly held that article III, § 39(3) and § 38(a) of the Missouri Constitution prohibit applying the 1999 amendment to § 287.815 to Plaintiff to allow him to receive retirement benefits at age 62 instead of age 65 because this would result in the State of Missouri granting extra compensation to Plaintiff after he rendered his service as an administrative law judge. Article III, § 39(3) of the Missouri Constitution provides: “The general assembly shall not have power: ... (3) To grant ... any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into

and performed in whole or in part.” Article III, § 38(a) provides: “The general assembly shall have no power to grant public money or property ... to any private person”

These constitutional provisions prohibit the government from increasing the retirement benefits (a form of compensation) of a government employee, such as Plaintiff, after his employment with the government terminates.

In State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. banc 1975), this Court held that provisions of a state statute giving retroactive retirement benefits to judges who had ceased holding office prior to the effective date of the statute were unconstitutional under article III, § 38(a) and § 39(3) as attempting to grant public money to private persons and to grant extra compensation to judges after services had been rendered. In Police Retirement System v. Kansas City, 529 S.W.2d 388, 393 (Mo. banc 1975), this Court held that a statute that provided cost-of-living adjustments to police officers who retired prior to the effective date of the statute was unconstitutional, ruling that adding to pensions “after retirement ... constitutes ‘extra’ or ‘add on’ compensation and violates Art. III, § 39(3).”

In Police Retirement System of St. Louis v. City of St. Louis, 763 S.W.2d 298 (Mo. App. E.D. 1989), a retired police officer challenged a statute that allowed active police officers to obtain a refund of their contributions to the police retirement system upon their future retirement but did not allow already-retired police officers to recover their contributions to the police retirement system. Rejecting the plaintiff’s challenge, the

court held that the statute could not have allowed the plaintiff and other already-retired police officers to recover their contributions because this would violate article III, § 39(3): “Whether a pension is regarded as a gratuity or deferred compensation, ‘adding’ to the pension or retirement benefits after retirement, in the absence of express authority, constitutes an ‘extra’ or ‘add on’ benefit in violation of Art. III, § 39(3).” *Id.* at 303.

If the 1999 amendment to § 287.815 lowering the retirement benefit age from 65 to 62 were applied to Plaintiff, the statute would grant “extra compensation” to Plaintiff—in the form of three years worth of additional retirement benefits—after Plaintiff rendered his service as an ALJ. Such an application of the amended § 287.815 to Plaintiff would violate article III, § 39(3) and § 38(a) of the Missouri Constitution. The reduced retirement eligibility age in the 1999 amendment to § 287.815 cannot be applied to Plaintiff and other ALJs who terminated their service prior to the effective date of the 1999 amendment. Plaintiff is eligible to receive retirement benefits at age 65, not age 62.

Plaintiff tries to distinguish the cases cited above on the basis that in these cases, “the individuals or individuals as a group had already retired and were receiving benefits,” (Pl.’s Br., p. 13), whereas the 1999 amendment to § 287.815 occurred after he terminated his service as an ALJ, but before he was eligible to begin receiving retirement benefits. This is a distinction without a difference. The plain language of article III, § 39(3) expressly provides that “[t]he general assembly shall not have power: ... (3) To grant ... any extra compensation, fee or allowance ... after service has been rendered”

(emphasis added). The relevant point of time for this constitutional prohibition is when a government employee terminates his government employment, not when he begins receiving retirement benefits. Article III, § 39(3) and § 38(a) prohibit the Missouri General Assembly from granting a former government employee any additional retirement compensation after he has rendered his service, regardless of whether the former government employee is drawing retirement benefits at the time and regardless of whether the additional retirement compensation is payable immediately or in the future.

Plaintiff points out that the 1999 amendment to § 287.815 did not change his monthly retirement benefit amount (\$2,401.31 per month). While that may be true, the 1999 amendment to § 287.815, if applied to Plaintiff so as to allow him to receive retirement benefits three years earlier, would increase his total retirement compensation by \$86,447.16 (\$2,401.31 per month multiplied by 36 months). Granting Plaintiff three additional years worth of retirement benefits—amounting to \$86,447.16—after he terminated his service as an ALJ would amount to “extra compensation ... or allowance after service has been rendered” in violation of article III, § 39(3).

Plaintiff argues that this Court’s decision in Breshears v. Missouri State Employees’ Retirement System, 362 S.W.2d 571 (Mo. banc 1962), “suggests that the Legislature may alter or amend any criteria affecting active, vested members up until the day they retire.” (Pl.’s Br., p. 16). There is no such holding or suggestion in Breshears, which held that application of a statutory amendment increasing benefits for already retired state employees was unconstitutional under article I, § 13 of the Missouri

Constitution because this statutory amendment impaired the contractual rights of members of MOSERS who had not yet retired and were continuing to make contributions to MOSERS. The Court did not remotely suggest that the Missouri General Assembly could grant extra retirement compensation to a government employee such as Plaintiff after he left his government employment but before he begins to receive retirement benefits. Indeed, the Court expressly noted that it did not need to address article III, § 39(3) in that case, noting that “[i]f the State wishes to provide for such an increase [of retirement benefits] solely out of its own funds, then we will have a question calling directly for a construction of § 39(3), Article 3 of our Constitution.” Id. at 577.

Plaintiff asserts that the application of the 1999 amendment to § 287.815 to him and other ALJ’s whose service ended before then should be allowed because, he maintains, this would not affect the actuarial soundness of MOSERS. Plaintiff did not present this argument to the Circuit Court and there is no evidence in the record to support this argument. Accordingly, the Court should not consider this argument. See Smith v. Shaw, 159 S.W.3d 830, 836 (Mo. banc 2005) (argument not raised before trial court is waived); Jones Company Custom Homes of Tennessee, Inc. v. Commerce Bank, N.A., 116 S.W.3d 653, 659 (Mo. App. E.D. 2003) (“Arguments not presented to the court below are not preserved for appeal.”). Even so, there is no exception in article III, § 39(3) and § 38(a) for grants of extra retirement compensation that do not affect the actuarial soundness of the retirement system.

* * *

In sum, the Circuit Court correctly ruled that the 1999 amendment to § 287.815 does not apply to Plaintiff and that Plaintiff is entitled to receive retirement benefits at age 65, not age 62. This Court, therefore, should affirm the Circuit Court’s judgment in favor of MOSERS and against Plaintiff.

II. The Circuit Court correctly held that the General Assembly could not “waive” the prohibition in article III, § 39(3) and § 38(a) against the State of Missouri granting extra compensation to Plaintiff after he rendered his service as an administrative law judge. (Responds to Point II).

In his second point relied on, Plaintiff argues that the Circuit Court erred in ruling that article III, § 39(3) and § 38(a) of the Missouri Constitution prohibit applying the 1999 amendment to § 287.815 to Plaintiff to allow him to receive retirement benefits at age 62 instead of age 65 because, Plaintiff maintains, “a legislature can constitutionally waive the right[s] of the state” and the General Assembly intended the 1999 amendment to § 287.815 to apply retrospectively to ALJs such as him who retired before the effective date of the 1999 amendment. (The Court need not consider Plaintiff’s second point relied on if it agrees, as set forth in Section I.A., supra, that § 287.845 precludes application of the 1999 amendment to § 287.815 to Plaintiff.) The Circuit Court correctly rejected Plaintiff’s novel argument.

Plaintiff fails to explain how the state “waived” any rights that it otherwise had when it enacted the 1999 amendment to § 287.815. By lowering the retirement benefit

eligibility age from 65 to 62, the state incurred a greater financial obligation and burden. The state did not waive any rights that it had against anyone.

Plaintiff cites two cases—Savannah R-III School Dist. v. Public School Retirement System of Missouri, 950 S.W.2d 854, 858 (Mo. banc 1997), and American Family Mut. Ins. Co. v. Fehling, 970 S.W.2d 844, 848-49 (Mo. App. W.D. 1998)—to support his waiver argument. Neither case is apposite. In Savannah and Fehling, the courts addressed article I, § 13 of the Missouri Constitution, which provides that no law retrospective in its application can be enacted, and held that the prohibition on retrospective laws does not preclude the state from passing retrospective laws that waive the rights of the state or its subdivisions (e.g., school districts). The courts did not address the prohibition in article III, § 39(3) and § 38(a) against granting extra compensation to government employees after they render their service. Nor did the courts hold that the Missouri General Assembly may waive the limitations set forth in article III, § 39(3) and § 38(a) as to its power.

Plaintiff's argument is based on the flawed premise that compliance with one constitutional provision (e.g., article I, § 13) in itself amounts to compliance with other constitutional provisions (e.g., article III, § 39(e) and § 38(a)). Article I, § 13, article III, § 39(3), and article III, § 38(a) each contain separate limitations on the power of the General Assembly. The General Assembly cannot violate any limitations on its power. Even if the General Assembly did not violate article I, § 13 in enacting the 1999 amendment to § 287.815, that does not mean that the General Assembly did not violate

article III, § 39(3) and § 38(a). Assuming, arguendo, that article I, § 13 does not prohibit retroactive application of the 1999 amendment to § 287.815 to Plaintiff's situation, article III, § 39(3) and § 38(a) do.

The Missouri General Assembly cannot “waive” constitutional provisions—such as article III, § 39(3) and § 38(a)—that limit the General Assembly's power and prohibit certain kinds of legislative action. Otherwise, the constitutional provisions would be a nullity and the General Assembly would be free to do whatever it wants irrespective of the limits that the people of Missouri have imposed on their government through the Missouri Constitution.

III. The Circuit Court correctly did not treat Plaintiff as a “special consultant” and thereby apply the 1999 amendment to § 287.815 to him because:

(A) Plaintiff never presented his “special consultant” argument to the Circuit Court and there is no evidence in the record to support it; and

(B) the Circuit Court had no power to create a statute allowing Plaintiff to be treated as a “special consultant” such that the 1999 amendment to § 287.815 could apply to him and he could receive retirement benefits at age 62 instead of age 65.

(Responds to Point III)

In his third and final point relied on, Plaintiff argues that he should be entitled to the lower retirement benefit age of the 1999 amendment to § 287.815 because, he maintains:

- (a) this Court, since its decision in State ex rel. Dreer v. Public School Retirement System of City of St. Louis, 519 S.W.2d 290 (Mo. 1975), has allowed the Missouri General Assembly to circumvent the constitutional prohibition in article III, § 39(3) and § 38(a) against granting extra compensation after service has been rendered by allowing former employees to be employed as “special consultants” in legislation that increases their retirement compensation;

- (b) there is no evidence that such “special consultants” have ever provided any service to the state in consideration of the extra retirement compensation granted to them; and
- (c) he should be treated like such a “special consultant,” even though there is no “special consultant” statutory provision concerning the 1999 amendment to § 287.815.

Plaintiff has waived his “special consultant” argument because he never presented it to the Circuit Court and there is no evidence in the record to support it. See Smith v. Shaw, 159 S.W.3d 830, 836 (Mo. banc 2005) (argument not raised before trial court is waived). “Arguments not presented to the court below are not preserved for appeal.” Jones Company Custom Homes of Tennessee, Inc. v. Commerce Bank, N.A., 116 S.W.3d 653, 659 (Mo. App. E.D. 2003).

Even if considered, Plaintiff’s argument is without merit and should be rejected because there is no statute that allows Plaintiff to be employed as a “special consultant” and thereby become eligible to receive retirement benefits at age 62 instead of age 65. In Dreer, this Court held that the “special consultant” statute at issue there did not violate article III, § 39(3) and § 38(a) because the statute provided compensation for current employment as directed by the retirement system, not extra compensation for past services rendered:

Even it be assumed that funds held in trust by the respondent-appellant Retirement System are “public funds,” there is no violation of the

constitutional provisions against use of public funds for the benefit of private persons by House Bill 613, because it provides for compensation of only those persons currently employed by the Retirement System who perform such services as directed by the System....

Nor does House Bill 613 violate Article III, Section 38(a), supra, because wherever the expenditure of money is mentioned in House Bill 613, it is in terms of compensation for employment.

Neither does House Bill violate Article III, Section 39(3), supra, because, even if the Retirement System is a county or municipal authority within the meaning of that section, House Bill 613 does not purport to grant any extra compensation for past services rendered or contract performed in whole or in part. Again House Bill 613 provides compensation only for current employment as directed by the System.

519 S.W.2d at 297 (citations omitted). This Court held that “[w]hether relators actually perform services is immaterial,” because they were contractually obligated to perform services if and when the retirement system so directed them. Id.

In the present case, there is no statute authorizing any contractual relationship between Plaintiff and MOSERS (or another governmental entity) for the current employment of Plaintiff to perform services as directed by MOSERS (or any other governmental entity). While the General Assembly has provided for “special consultant” employment arrangements in some statutes, it did not enact such a “special consultant”

statutory provision in the 1999 amendment to § 287.815. The Court cannot create such a statute for Plaintiff and thereby allow Plaintiff to receive retirement benefits at age 62 instead of age 65 through a “special consultant” employment arrangement. See City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189, 192 (Mo. banc 2006) (“This Court cannot add language to the statute that the legislature did not include.”); Board of Educ. of City of St. Louis v. State, 47 S.W.3d 366, 371 (Mo. banc 2001) (“The courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government.”).

IV. Plaintiff is not entitled to attorney’s fees against MOSERS or “past due medical premiums monies” if he prevails against MOSERS.

In the Conclusion section of Plaintiff’s brief, but not in the Points Relied On or Argument section of his brief, Plaintiff summarily contends that he is entitled to attorney’s fees and “past due medical premiums monies” if he prevails on appeal. The Circuit Court has not passed on these issues and should be allowed to do so in the first instance if the Court reverses the Circuit Court’s summary judgment.

Plaintiff is not entitled to attorney’s fees against MOSERS because no statute authorizes any such award. “Absent statutory authority, costs, including attorney fees, cannot be recovered from the State, its agencies, or its officials.” Lipic v. State, 93 S.W.3d 839, 841 (Mo. App. E.D. 2002).

Plaintiff is also not entitled to recover “past due medical premiums monies” from MOSERS, even if he prevails. Plaintiff continues to be under the misapprehension that MOSERS provides health benefits or contributes to the provision of health benefits for retired state employees, including retired ALJs. MOSERS does not. Instead, pursuant to RSMo Chapter 103, the Missouri Consolidated Health Care Plan (“MCHCP”) administers health benefits for active and retired state employees, including ALJs. MOSERS does not contribute funds to MCHCP other than for a retiree’s share of his or her premiums, which MOSERS deducts from the retiree’s monthly benefit payment and remits to MCHCP. (See Supplemental Legal File, pp. 13-14, Affidavit of Scott Simon ¶ 5).

CONCLUSION

For these reasons, the Court should affirm the Circuit Court's judgment in favor of MOSERS and against Plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk have been mailed, United States postage prepaid, to **Roger G. Brown, Esq.**, Roger G. Brown & Associates, 216 E. McCarty, Jefferson City, Missouri 65101 on December 6, 2007.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 4,410 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), and the signature block.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.
