RENDERED: AUGUST 30, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000622-MR

JOHN AUBREY, INDIVIDUALLY
AND IN HIS CAPACITY AS SHERIFF
OF JEFFERSON COUNTY; MARK
MATTHEWS, IN HIS OFFICIAL CAPACITY
AS SHERIFF OF BOURBON COUNTY;
LEEROY HARDIN, IN HIS OFFICIAL CAPACITY
AS SHERIFF OF BOYLE COUNTY; TODD PATE,
IN HIS OFFICIAL CAPACITY AS SHERIFF OF
BRECKENRIDGE COUNTY; STAN HUDSON, IN
HIS OFFICIAL CAPACITY AS SHERIFF OF
CALDWELL COUNTY; JERRY COFFMAN, IN HIS
OFFICIAL CAPACITY AS SHERIFF OF CASEY
COUNTY; LIVY LEAVELL, JR., IN HIS
OFFICIAL CAPACITY AS SHERIFF OF CHRISTIAN
COUNTY; BERL PERDUE, IN HIS OFFICIAL
CAPACITY AS SHERIFF OF CLARK COUNTY;
KEITH CAIN, IN HIS OFFICIAL CAPACITY AS
SHERIFF OF DAVIESS COUNTY; C.E. DILLS, II,
IN HIS OFFICIAL CAPACITY OF SHERIFF OF
GRANT COUNTY; ED BRADY, IN HIS OFFICIAL
CAPACITY OF SHERIFF OF HENDERSON
COUNTY; DANNY CRAVENS, IN HIS OFFICIAL
CAPACITY OF SHERIFF OF HENRY COUNTY;
KEVIN CORMAN, IN HIS OFFICIAL CAPACITY OF
SHERIFF OF JESSAMINE COUNTY; CHUCK
KORZENBORN, IN HIS OFFICIAL CAPACITY OF
SHERIFF OF KENTON COUNTY; GARRETT ROBERTS,
IN HIS OFFICIAL CAPACITY OF SHERIFF OF
LAWRENCE COUNTY; DONNIE HOGAN, IN HIS
OFFICIAL CAPACITY OF SHERIFF OF LEE COUNTY;
CURT FOLGER, IN HIS OFFICIAL CAPACITY OF

SHERIFF OF LINCOLN COUNTY; WALLACE WHITTAKER, IN HIS OFFICIAL CAPACITY OF SHERIFF OF LOGAN COUNTY; KENT MURPHY, IN HIS OFFICIAL CAPACITY OF SHERIFF OF LYON COUNTY; KEVIN BYARS, IN HIS OFFICIAL CAPACITY OF SHERIFF OF MARSHALL COUNTY; PATRICK BOGGS, IN HIS OFFICIAL CAPACITY OF SHERIFF OF MASON COUNTY; JON HAYDEN, IN HIS OFFICIAL CAPACITY OF SHERIFF OF MCCRACKEN COUNTY; WILLIAM BUTCH KERRICK, IN HIS OFFICIAL CAPACITY OF SHERIFF OF MEADE COUNTY; RONALD SHIRLEY, IN HIS OFFICIAL CAPACITY OF SHERIFF OF METCALFE COUNTY; FRED SHORTRIDGE, IN HIS OFFICIAL CAPACITY OF SHERIFF OF MONTGOMERY COUNTY; MIKE NEWTON, IN HIS OFFICIAL CAPACITY OF SHERIFF OF NELSON COUNTY; STEVEN SPARROW, IN HIS OFFICIAL CAPACITY OF SHERIFF OF OLDHAM COUNTY; CRAIG PEOPLES, IN HIS OFFICIAL CAPACITY OF SHERIFF OF PENDLETON COUNTY; JOHN BURGETT, IN HIS OFFICIAL CAPACITY OF SHERIFF OF PERRY COUNTY; MICHAEL PETERS, IN HIS OFFICIAL CAPACITY OF SHERIFF OF ROCKCASTLE COUNTY; JERRY GAINES, IN HIS OFFICIAL CAPACITY OF SHERIFF OF WARREN COUNTY; FRANKIE SPRINGFIELD, IN HIS OFFICIAL CAPACITY OF SHERIFF OF WEBSTER COUNTY; FRATERNAL ORDER OF POLICE, DEPUTY SHERIFF'S LODGE 25; KENTUCKY STATE FRATERNAL ORDER OF POLICE; KENTUCKY ASSOCIATION OF FIRE CHIEFS; KENTUCKY FIREFIGHTERS ASSOCIATION; KENTUCKY PROFESSIONAL FIREFIGHTERS; KENTUCKY SHERIFF'S ASSOCIATION; LOUISVILLE PROFESSIONAL FIREFIGHTERS UNION, LOCAL 345; and EUGENIA A. GLOVER APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-00087

KENTUCKY RETIREMENT SYSTEMS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: The subject of this appeal is an underlying declaratory judgment that addressed the validity of Kentucky Revised Statute (KRS) 61.637(17), as amended in 2008; for various reasons discussed below, the above-captioned appellants (collectively, the "Aubrey Plaintiffs") contested the statute's constitutionality. The Franklin Circuit Court rejected their challenge, upheld the validity of the statute, and accordingly granted summary judgment to the appellee. This appeal followed. Upon review, we affirm.

In its dispositive order of March 29, 2018, the circuit court set forth most of the relevant factual and procedural history of this matter:

> On June 27, 2008, the Kentucky General Assembly enacted House Bill 1 (HB 1). In the drafting of that bill, the legislature enhanced KRS 61.637(17). The Court incorporates by reference HB 1's amendment of KRS 61.637(17), as of June 27, 2008, to this Opinion and

Order. The change caused multiple effects on the statutory scheme. First, HB 1 imposed a one month waiting period for hazardous duty employees between retiring from a participating employer and new full or part time employment with another participating employer. The amendment similarly imposed a penalty for violating the waiting period, in which resuming employment before the expiration of the period the member's retirement will void the employer's benefit eligibility and the member will be liable for repaying the benefits received. The statute change requires employees to certify that he or she did not have a prearranged agreement for future reemployment prior to the employee's initial retirement. Finally, HB 1 imposed a penalty on the employee if no certification occurred that a prearranged agreement did not exist.

Eugenia "Toni" Glover served as a police officer at the Louisville Metro Police Department (LMPD). During the summer of 2008, around the time of the enactment of HB 1, Glover was approaching 20 years of service in CERS [County Employee's Retirement System]. Throughout the majority of her employment, no law existed to prohibit a pre-retirement arrangement for returning to work with another participating employer, nor did a penalty exist for having a pre-retirement arrangement, nor did a rule exist that a bona fide separation must occur prior to resuming employment. Glover retired from LMPD on August 1, 2008. However, on June 27, 2008, the same day HB 1 took effect, Glover contacted the Jefferson County Sheriff's Office (JCSO) to inquire about future vacancies and completed an employment application.

On July 9, 2008, Sheriff Aubrey offered Glover employment as a full-time deputy with JCSO. Glover reported for duty at JCSO on September 2, 2008. JCSO notified KRS of Glover's hire. Jennifer Steele of the Kentucky Retirement Systems informed Sheriff Aubrey and Margaret Newton, JCSO's human resources

> supervisor, of HB 1 and the amendments to KRS 61.637(17) precluding a member from having a prearranged agreement to return to employment with another member employer. Steele informed JCSO that if Glover worked on a full-time basis, her retirement would be voided and she would have to repay all benefits received from that employment. On February 5, 2009, Sheriff Aubrey offered Glover a part-time deputy position to work 100 hours per month without health insurance or other benefits. This position complied with KRS 61.637(17).

Thereafter, Glover and the other Aubrey Plaintiffs initiated the instant declaratory action against the above-captioned appellee, challenging the validity and constitutionality of KRS 61.637(17) in its amended form. The opposing parties ultimately filed cross-motions for summary judgment; and in its March 29, 2018 order, the circuit court summarized the bulk of their arguments, stating in relevant part as follows:

> The enactment of KRS 61.637(17), according to Plaintiffs, violates the statutory, inviolable contract of employee retirement benefits:
>
> > It is hereby declared that in consideration of the contributions by the members and in further consideration of benefits received by the county from the member's employment, KRS 78.510 to 78.852 shall, except as provided in KRS 6.696 effective September 16, 1993 constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall, except as provided in KRS 6.696, not be subject to reduction or impairment by alteration, amendment, or repeal.

Ky. Rev. Stat. 78.852. Petitioners assert that the General Assembly could have made prospective changes to CERS statutes, however any retrospective changes, such as those in KRS 61.637(17), violate the long recognized inviolable contract. *See Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710, 713 (Ky. 1995). The Kentucky Constitution further prevents the impairment of contracts between state agencies and individuals in Kentucky. KY. CONST. § 19(1), *Covington v. Sanitation District of Campbell and Kenton Counties*, 301 S.W.2d 885 (Ky. 1957). Plaintiffs aver that every employment relationship constitutes a contract and therefore cannot be subject to retrospective impairment. *Walker v. Abbott Labs*, 340 F.3d 471, 476 (7th Cir. 2003); *Union Gas and Oil Company v. Diles*, 254 S.W. 205, 207 (Ky. 1923).

Conversely, Defendant argues that KRS 61.637(17) constitutes an integral part of the inviolable contract. The inviolable contract does not include a guarantee of re-employment. Rather, according to Defendant, the inviolable contract is for the benefits provided by the retirement plan in which an employee participates. *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995). Defendant argues that the unmistakability doctrine does not suggest that KRS 78.852 unmistakably provides CERS members a right to re-employment or precludes the General Assembly from amending the terms of pension upon re-employment. Defendant further argues that the legislature has an obligation to strengthen the Kentucky Retirement pension program so the Commonwealth may sustain all pension payments the inviolable contract demands. The entire statutory scheme outlining the Kentucky Retirement System, Defendant contends, constitutes an employee's inviolable contract. The scheme, which the legislature may alter, contains provisions that may void future retirement benefits if employees do not follow all

> the included retirement guidelines. This now includes regulations set out by KRS 61.637(17).
>
> . . . .
>
> Defendants also argue that Plaintiff Glover never experienced a vested interest in her future re-employment because Plaintiff lacked an entitlement to the future retirement benefit from re-employment. Further, the date of HB 1's enactment was over a month prior to Plaintiff Glover's retirement, so she had full notice of the change in retirement policy.

In sum, the Aubrey Plaintiffs primarily argued that the post-2008 version of KRS 61.637 – specifically subsection 17 of the statute – impermissibly and retroactively impaired their contractual rights and violated the impairment of contract clause of the Kentucky Constitution.[1]

Upon consideration, the circuit court disagreed, largely for the reasons urged by the appellee. This appeal followed.

STANDARD OF REVIEW

When a declaratory judgment has been entered "and no bench trial held, the standard of review for summary judgments is utilized." *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010). Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). It involves only

[1] Ky. Const. § 19.

questions of law with the simple determination of whether a fact question exists. *Allstate Ins. Co. v. Smith*, 487 S.W.3d 857, 860 (Ky. 2016). Our review is *de novo*. *Furlong Dev. Co., LLC v. Georgetown-Scott Cty. Planning and Zoning Comm'n*, 504 S.W.3d 34, 37 (Ky. 2016).

ANALYSIS

On appeal, the Aubrey Plaintiffs repeat the arguments they made below. As indicated, this case primarily concerns legislative action that allegedly violated the impairment of contract clause set forth in the Kentucky Constitution. In *Maze v. Bd. of Dirs. for the Commonwealth Postsecondary Ed. Prepaid Tuition Tr. Fund*, 559 S.W.3d 354 (Ky. 2018), the Kentucky Supreme Court indicated that the three-stage analytical framework for determining whether legislative action violates the federal impairment of contract clause[2] applies with equal force to similar claims made under the contract clause of the Kentucky Constitution. *Id*. at 368. Paraphrasing *United States Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977), our Supreme Court described the three-stage analytical framework as follows:

> (1) whether the legislation operates as a substantial impairment of a contractual relationship; (2) if so, then the inquiry turns to whether there is a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem; and (3) if, as in this case, the government is a

[2] U.S. Const. Art. I § 10, cl. 1.

> party to the contract, we examine whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers, and we determine if the impairment is upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.

Id. at 369 (quotation marks omitted).

As the first stage of this analysis indicates, "[t]he Contract Clause protects only those rights which are embraced in the contract at the time it is entered into." *Ward v. Harding*, 860 S.W.2d 280, 288 (Ky. 1993) (citations omitted). It is here that the Aubrey Plaintiffs' claims fail. To be sure, KRS 78.852, by its own plain terms, is an "inviolable contract" and thus provides contractual rights to a specified group of beneficiaries (*i.e.*, retired Kentucky Employee Retirement Systems (KERS) members such as Glover). As to the scope of the inviolable contract, "[a]t the simplest level, [KERS members] have the right to the pension benefits they were promised as a result of their employment, at the level promised by the Commonwealth. This right does not include oversight of every aspect of the process; its essence is the receipt of promised funds." *Jones v. Bd. of Trs. of Kentucky Retirement Sys.*, 910 S.W.2d 710, 715 (Ky. 1995).

That said, the Aubrey Plaintiffs assert the inviolable contract includes another right, one perhaps best described as the "right" to "future statutory reemployment opportunities as they existed during their employment under prior legislative enactments." They also assert that the General Assembly could not alter

or burden that "right" without breaching the "inviolable contract" and offending the contract clause of the Kentucky Constitution. At its heart, their theory is that pension benefits should be conceived of as deferred compensation, and not simply a form of retirement security the entitlement to which decreases in the presence of other sources of income.

But, the Aubrey Plaintiffs point to no statute or other authority establishing a retiree's "right" to obtain post-retirement reemployment from the Commonwealth. No such statute or authority exists. And, absent such a guarantee, post-retirement reemployment with the Commonwealth or any of its subdivisions or agencies cannot be considered a vested right of any kind because it is always optional with both parties: The Commonwealth is not obliged to offer it, and the retirees are not obliged to accept it if it is offered. Thus, if the retirees do accept the offer of reemployment, they must accept it according to the Commonwealth's terms. Here, when appellant Glover accepted JCSO's offer of post-retirement reemployment, one of the terms included with that offer was, as a matter of law, KRS 61.637(17).[3]

[3] This would apply equally to the Sheriff appellants and the appellant organizations associated with them; for the same reasons, they also lacked any "vested right" to employ retirees. That aside, the circuit court determined below that these appellants altogether lacked standing in this matter – a point these entities chose not to list as an issue in their pre-hearing statement, and consequently cannot contest. *See* Kentucky Rule of Civil Procedure (CR) 76.03(8).

Boiled down, the Aubrey Plaintiffs are merely arguing that, in deciding to retire, appellant Glover relied upon the potential availability of future employment offers from the Commonwealth, its subdivisions, or agencies pursuant to the pre-2008 version of KRS 61.637. They are not alleging that an employment agreement made before the enactment of that statute has been interfered with, or that compensation earned prior thereto has been forfeited. They are suing to enforce Glover's *expectation* of receiving future reemployment opportunities consistent with prior versions of the statute.

But, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601, 611 (1984). Likewise, mere reliance by benefited parties on legislative enactments and their unilateral beliefs concerning what the statute will mean to them in the future – no matter how reasonable their beliefs may seem at the time – cannot create an enforceable contractual right that is not otherwise manifest in the words of the legislation. Indeed, if reliance determined the contractual nature of such legislative enactments, then few (if any) statutory changes would be permissible in the administration of pension-benefit schemes. To quote and incorporate the persuasive reasoning of another tribunal that resolved an issue practically identical to the one at bar (*i.e.*, whether state reemployment opportunities formerly available

to public pensioners under prior legislative enactments is a type of benefit that should be considered an enforceable right):

> The mere fact that a state enacts laws that benefit the interests of some people does not automatically create contract rights to those benefits. *See National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432, 446 (1985). Rather, a statute will be treated as creating a binding contract with its beneficiaries only when the language and the circumstances of the statute's enactment evince a clear legislative intent to create private and enforceable contract rights against the state. *E.g.*, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 1515 n. 14, 52 L.Ed.2d 92, 106 n. 14 (1977); *Brennan* [*v. Kirby*, 529 A.2d 633, 638 (R.I. 1987)]. Moreover, there is a strong presumption against construing a statute to create such contractual obligations, and individuals alleging its creation bear the heavy burden of overcoming this presumption. *E.g.*, *National Railroad Passenger Corp.*, 470 U.S. at 466, 105 S.Ct. at 1451–52, 84 L.Ed.2d at 446; *Brennan*, 529 A.2d at 638.
>
> We believe that converting the reemployment opportunities formerly available to these public pensioners into legally enforceable contract rights would "play [ ] havoc with basic principles of contract law, traditional contract clause analysis, and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification." *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803, 808 (1985); *see also Fumarolo v. Chicago Board of Education*, 142 Ill.2d 54, 153 Ill.Dec. 177, 200, 566 N.E.2d 1283, 1306 (Ill. 1990). We think the better approach to gauging the legal status of this type of public-pension benefit is to start with the presumption that it creates no private contractual rights

> but merely declares legislative policy as of its enactment date. This interpretation accords with the fact that the principal function of the Legislature is to make policy, not to enter into contracts. *See National Railroad Passenger Corp*., 470 U.S. at 466, 105 S.Ct. at 1451, 84 L.Ed.2d at 446; *Brennan*, 529 A.2d at 638. Policy goals of a legislative body are "inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed" would be to circumscribe drastically the core powers of a legislature. *National Railroad Passenger Corp.*, 470 U.S. at 466, 105 S.Ct. at 1451–52, 84 L.Ed.2d at 446 (adding that "'[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation'").

Retired Adjunct Professors of State of Rhode Island v. Almond, 690 A.2d 1342, 1346 (R.I. 1997).

In short, the circuit court correctly determined that the enactment of KRS 61.637(17) was proper and otherwise consistent with the Contract Clause of the Kentucky Constitution, and did not breach any term of the "inviolable contract" described in KRS 78.852. The Aubrey Plaintiffs were not guaranteed a vested "right" to future statutory reemployment opportunities as they existed under prior legislative enactments. At most, they merely relied upon a legislative policy that the General Assembly was at liberty to revise and repeal.

Accordingly, we need not discuss a variety of other points raised by the Aubrey Plaintiffs associated with their view of a "vested right" in this vein, which include attacks upon the constitutionality of the waiting periods described in

KRS 61.637(17); attacks upon the necessity of enacting the 2008 version of that statute as emergency legislation; and a further contention that KRS 61.637(17) arbitrarily restricts the right to earn a living. Suffice it to say that nothing about the statute precludes employment with the state nor vested retirement pension benefits; and even if there was an impairment of the Aubrey Plaintiffs' vested rights – and there was not – it would have been justified by a rational legislative purpose. We find persuasive how other jurisdictions have explained the rational legislative purpose justifying the legitimacy of similar statutes:

> [F]ostering public confidence in the State's retirement system by restricting the proclivity of some public pensioners to indulge in what is colloquially referred to as "double dipping" – that is, the simultaneous receipt by retired public employees of both a salary for state reemployment and a state pension. The [2008] statute limiting the extent of these pensioners' reemployment earnings from the State would serve, among other purposes, to regulate the extent of such double dipping into the public fisc. The General Assembly was entitled to conclude that a practice whereby retired [state employees] continue to be employed at public institutions [. . .] while receiving a full state pension is inconsistent with the purpose of providing public pensions to such retirees in the first place. Given the presumptive legitimacy of such a legislative purpose, any frustration of the retired [state employees'] reemployment expectations would be not only reasonable but arguably necessary to preserve public confidence in the integrity of this pension scheme.

Almond, 690 A.2d at 1347-48; *see also Haworth v. Office of Pers. Mgmt.*, 112 Fed.Appx. 406, 408 (6th Cir. 2004) (citing *Connolly v. McCall*, 254 F.3d 36, 42-43

(2d Cir. 2001) ("Protecting the public fisc by enacting laws against double-dipping by retired employees is a rational legislative decision.")).

Lastly, the Aubrey Plaintiffs contend that KRS 61.637(17) unlawfully discriminates based upon age. Specifically, they note that it only affects those who retire, and they point out that most retirees are forty years of age or older.

As to the validity of this argument, we adopt the reasoning of the circuit court set forth in its March 29, 2018 order:

> The Court holds that this argument fails on its face. First, no age discrimination occurs when an employee seeks retirement. An employee is not faced with hiring or termination hardships due to his or her age. Rather, an employee retires at will. The statute, further, does not target individuals 40 years of age or older, but rather the statute regulates retirement in the state. The legislature has the ability to regulate state employment, and part of that function is to regulate retirement. The General Assembly did not discriminate directly against Plaintiffs; therefore, Plaintiffs' claims fail relating to age discrimination.

CONCLUSION

In light of the foregoing, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David Leightty
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert Kellerman
Frankfort, Kentucky