

**IN THE UNITED STATES FOR THE DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

KENNETH FITCH, et. al., *

Plaintiffs, *

v. * Case No.: 18-02817-PJM

STATE OF MARYLAND, et. al., *

Defendants. *

* * * * *

FITCH PLAINTIFFS' REPLY

On August 30, 2023, the Defendants responded to Plaintiffs contentions that the Fitch Plaintiffs paid in advance for benefits they did not receive. Instead of addressing these contentions, the Defendants assert that summary judgment should be entered in their favor because of the decision of the Fourth Circuit in AFSCME Maryland Council 3 v. Maryland, 61 F. 4th 143 (4th Cir. 2023) that indicates that a statutory contract can only be created bilaterally. The Plaintiffs memorandum brief outlined alternative causes of action as opposed to an action for breach of contract as requested by the Court.

I. There Exists Material Facts in Dispute

Defendants contend that Plaintiffs arguments rely on an erroneous premise, that Plaintiffs are entitled to a “fringe benefit” in the form of a dedicated state contribution for retiree health benefits that “was paid forward just like a pension benefit” and then questioned the existence of fringe benefits and the Plaintiffs contention that the State of Maryland made contributions to the Retiree Health Benefit on behalf of the Plaintiffs. (ECF 228 at 2.) In fact, the Defendants contend that “the record” establishes otherwise. Defendants are being disingenuous.

A. Defendants Knowingly Failed to Protect Benefit.

Pensions are not paid from general operating revenues but from trust funds to which the State of Maryland and the Plaintiffs contributed during their working years. When the State of Maryland took money earmarked *for the Plaintiffs* for this retirement health insurance subsidy they were prefunding this benefit for later use *by the Plaintiffs*. However instead of placing these funds in trust for the benefit of Plaintiffs, the Defendants used a “PAYGO”¹ system that remarkably shares the same characteristics as a Ponzi scheme. PAYGO or “pay as you go”² takes the State subsidy contribution of an active employee and diverts these funds to another person, i.e., a current retiree, so the Defendants became dependent on active employees to pay for the benefit of a retired employee, making any reduction in a full-time benefited workforce a triggering event that would signal the demise of the system. The Defendants recognition of the instability of the house of cards that they built, was manifest when an OPEB Trust Fund was established once the necessary IRS clearance was given for the creation of an irrevocable trust.³ This information was not made available to the Plaintiffs while actively employed. Nor was this a part of the Defendants’ “record”. The actions of the Defendants show a concerted effort to conceal the illusory nature of the benefit promised at the time of employment. It is a material fact that this was part of the “circumstances” which induced the creation of the statutory contract at dispute here and precludes the entry of summary judgment on this issue.

B. Fringe Benefit Program Does Exist.

¹ Public Employees and Retirees’ Benefits Sustainability Commission, Funding OPEB Liabilities, page 21 “ Like almost all states, Maryland previously accounted for and funded its retiree health benefits on a PAYGO basis.

² Public Employees and Retirees’ Benefits Sustainability Commission, Funding OPEB Liabilities, page 22 “PAYGO: pay as you go.

³ Public Employees and Retirees’ Benefits Sustainability Commission, Funding OPEB Liabilities, page 21 “In an effort to begin prefunding its OPEB liabilities, the State set aside funds in fiscal 2007, 2008, and 2008. The fiscal 2007 budget set aside 100.0 million into the Dedicated Purpose Account, which was later transferred to the OPEB trust fund once it obtained the necessary IRS clearance as an irrevocable trust.”

The Department of Budget & Management website proclaims that a fringe benefit program does exist and this fringe benefit was offered to Plaintiffs “over and above their salaries” as an inducement to work for the State and used as encouragement to continue working and that these benefits “include retirement, health insurance, and employer Social Security contributions.”⁴ In fact, Fringe benefits is touted as one of the reasons why a person should work for the State of Maryland even in 2023.⁵

As indicated previously, fringe benefits are the additional benefits offered to an employee, by the employer above the stated salary. Some fringe benefits such as social security and health insurance are required by law, while others are voluntarily provided by the employer.⁶ The Retiree Health Insurance Subsidy was one of the fringe benefits that was offered at the time of employment as an insurance to new employees that they would have health benefits during retirement. See Affidavit of Fred Banks.

For each state benefited position there is a budgeted line item in the fringe benefit column specifically for retirement health benefits. The budget code for this contribution is 0154. See B.14 FY 2020 Rates & Codes. For the information obtained so far, for every year of Plaintiffs employment, the State contributed a percentage of the employees salary for the retiree health benefit. This money was to be set aside for use of the Plaintiffs during their retirement, similar to the process for pension benefit.⁷ Therefore, each agency had to budget enough money not only for an employee’s salary, but also for the fringe benefits for each position.⁸ Every year the

⁴ <https://dbm.maryland.gov/budget/Pages/glossary.aspx>.

⁵ <https://dbm.maryland.gov/jobseekers/pages/benefitsemployment.aspx> Why work for the State of Maryland?

⁶ www.irs.gov Publication 5137, Fringe Benefit Guide, Page 1

⁷ <https://dbm.maryland.gov/jobseekers/Pages/FringeBenefits.aspx> , Employers Cost of Benefits for a Typical State Employee in the State Personnel Management System, Fiscal Year 2021.

⁸ See June 2, 2015, July 11, 2017, June 24, 2020, June 28, 2023 Comptroller Letters (“Collectively Comptroller Letters”).

Comptroller of Maryland would send out a memo to tell agencies what percent of the salaried position would go for this line item. See Comptroller Letters. The latest percentage that the State will contribute to an active employee's Retiree Health Insurance subsidy is 78% of that employee's salary. Its little wonder that employees' wages were so low, since a large portion of an employee's compensation was the State contribution to their fringe benefits. To reiterate, these State contributions were assessed and calculated every year during an employee's career without foreknowledge of the Plaintiffs.

That is because the Defendants did not wish to disclose the amount of the State contribution to this subsidy. That information was deliberately removed from the Plaintiffs' pay stub. See Comptroller Letters. As both the June 2, 2015 letter and the July 11, 2017 letter state, "[t]he Special Subsidy (retiree health subsidy) will appear on each Agency total page of the payroll and check register, the cost tape and subsequent R*STARS transaction. It will not appear on the employees' earnings statement (pay stub)".⁹ The Plaintiffs have obtained four such letters from 2015, 2017, 2020 and 2023 which outlines the fringe benefit calculation for that year, leading to the inference that every year the percentage of the fringe benefit was calculated and distributed to State Agencies. The bottom line is that the State contribution, which is exclusive to the pin assigned to each position and a part of the Plaintiffs overall compensation, was purposely and knowingly hidden. Plaintiffs contend that the Defendants misrepresentation was intentional and designed to mislead the Plaintiffs as to the true nature of their benefits. But it gets better. Under IRS Section 105 or Section 106 respectively, qualified health plan benefits for public employees are nontaxable or tax deferred¹⁰. In addition, both Section 105 & 106 excludes the employer

⁹ See July 11, 2017 letter from the Comptroller of Maryland to All State Agencies under Special Subsidy, page 1. See June 2, 2015 letter from the Comptroller of Maryland to All State Agencies under Special Subsidy page 1.

¹⁰ www.irs.gov.com, Publication 5137, Fringe Benefit Guide, Page 2-3

contribution from the income of an employee, spouse or dependent.¹¹ So the State of Maryland was able to dodge tax laws while diverting employee funds. As a result, the Plaintiffs now argue that the money diverted from them should be returned after a full accounting.

C. The Fringe Benefit is a part of Plaintiffs' wages.

The Central Payroll Bureau of the Office of the State Controller provides for the payment of all wages to the Plaintiffs and maintains all supporting payroll records for the payment of wages. Md. Code Ann. State Personnel & Pensions §2-402(a) & §2-402(b). Maryland law defines wage as “all compensation that is *due* to an employee”. Md Code Ann. §2-402(c)(i) (emphasis added). Maryland law also defines what encompasses wages under State employment. “Wage” includes a bonus, a commission, *a fringe benefit*, overtime wages, premium pay and any other remuneration promised for service. Md. Code Ann. § 2-402(c)(ii) (emphasis added). Fringe benefits are a part of the Plaintiffs' wages.

The Defendants state that when the General Assembly acted in 2011 to eliminate state retiree prescription drug benefits as of fiscal year 2020, it did so through ordinary legislative process for all to see. Again, the Defendants are disingenuous. In 2011, the General Assembly presented two bills to eliminate prescription drug coverage, Senate Bill 628 and House Bill 1155. See Attached HB 1155 & SB 628. Both were soundly defeated after concerned citizens were given the opportunity to comment on the impact of the legislation through the legislative process. See HB 1155 Voting Record & SB 628 Synopsis.

The elimination of this benefit for State Retirees took place at the end of the 2011 Session with the passage of the Budget Reconciliation and Financing Act of 2011 (HB 72/SB87) when this was inserted at the last minute. See 2011 Budget Reconciliation and Financing Act. Consequently,

¹¹ www.irs.gov.com, Publication 5137, Fringe Benefit Guide, Health and Medical Benefits, Page 17

notice was not given because the normal legislative process that allows for notice and hearing was not followed. At its elementary level due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). The insertion of this provision *after* the legislative process to pass this law was defeated supports Plaintiffs contention that proper notice was not given. As a result, this issue of notice from retirement counselors to any employee contemplating retirement from July 2011 to December 2018 is a valid one which cannot be excused with a statement that the legislative process was an open and visible to all concerned. This is a material fact that again supports Plaintiffs assertions that summary judgment in this case would be premature.

Lastly, the Plaintiffs filed a claim under the Maryland Tort Claims Act in 2020. See Receipt and Certified Mail Receipt. The claim was sent to the Treasurer of the State of Maryland by certified mail on August 18, 2020 alleging that the Defendants diverted funds from the Other Post Employment Trust Fund to the General Fund. See attached Claim. The Plaintiffs never received a denial letter. It was only upon further investigation that the Plaintiffs were able to determine that the benefit system used to induce individuals to accept employment with the State and continue their employment after vesting was misrepresented. It was only upon further investigation that the Plaintiffs were able to determine that the information about the elimination of the state subsidy was withheld from prospective retirees who were weighing their retirement options.

Although the Plaintiffs initially filed action in State Court, it was the Defendants who removed this action to federal court to establish immunity from its actions. Pennhurst State Sch & Hosp v. Halderman, 465 U.S. 89 (1984). Nonetheless the Plaintiffs assert that the failure of the

Defendants to properly notify the Plaintiffs that the State contribution to their retiree health subsidy was diverted or that the Maryland General Assembly failed to follow the normal legislative process, or that DBM failed to notify prospective retirees of the definite and imminent elimination of the State subsidy support the Plaintiffs' claim of due process violations and fraud.

II. Conclusion

The Defendants violated a duty of good faith towards the Plaintiffs by depriving them of information that would affect their decision to accept employment, continue employment or retire. The Plaintiffs argue that because employers are so integral to an employee's health care decisions, the Defendants play a unique role in managing choices that go to the core of employees personal and family lives and have a duty to their employee. An employer exercises discretion over the employees' practical interests and critical resources as well as controlling the fruits of the employee's labor. Therefore, the Plaintiffs' vulnerability is a critical feature that the Defendants have disregarded and this neglect plays an important role in the retirement viability decisions of the Plaintiffs.

The Defendants failure to notice, failure to inform, misrepresentation and omissions of crucial information support Plaintiffs assertion that there are material facts in dispute that carry the indicia of fraud to preclude entry of summary judgment.

Respectfully submitted,

September 14, 2023

/s/ Deborah Holloway Hill

Deborah A. Holloway Hill

Federal Bar No.: 28384

P.O. Box 465

Cockeysville, MD 21030

O: 410.428.7278

F: 866.499.6906

dahhlaw@outlook.com

Plaintiffs' Attorney

**IN THE UNITED STATES FOR THE DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

KENNETH FITCH, et. al.,

*

Plaintiffs,

*

v.

*

Case No.: 18-02817-PJM

STATE OF MARYLAND, et. al.,

*

Defendants.

*

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September 2023 the foregoing was served by CM/ECF on all registered CMF users and by first class mail on those parties who have indicated that they are proceeding pro se.

September 14, 2023
Date

/s/ Deborah A. Holloway Hill
Deborah A. Holloway Hill
P.O. Box 465
Cockeysville, MD 21030