SUPREME COURT OF WISCONSIN

CITY OF MILWAUKEE,

Defendant-Respondent-Petitioner,

Appeal Case No. 2007AP000587
Circuit Court Case No.: 2005CV011346

v.

ALBERT NICHOLAS LOTH,

Plaintiff-Appellant.

PETITION FOR REVIEW AND APPENDIX

Appeal From Reversal Of The Order For Judgment Sustaining Defendant's Motion For Summary Judgment Entered January 30, 2007 In The Circuit Court For Milwaukee County, The Honorable Patricia D. McMahon, Presiding.

ALAN M. LEVY
State Bar No. 1010285
LINDNER & MARSACK, S.C.
411 E. Wisconsin Ave., Suite 1800
Milwaukee, Wisconsin 53202
(414) 273-3910
(414) 273-0522 (Facsimile)

Attorneys for the Defendant-Respondent-Petitioner,
City of Milwaukee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether active service until age 60 is a necessary element of eligibility for the 1973 Resolution's benefit payable only to those "general city employees" who satisfied all three conditions of (1) retirement "…with an unreduced 'retirement allowance'" from the City's pension plan (2) taken "between ages 60 and 65," and (3) were credited with at least "15…years of city service"?

   Answer by the Trial Court: Yes.

   Answer by the Court Of Appeals: No.

2. Whether Defendant-Respondent-Petitioner City of Milwaukee (hereinafter, the "City") can apply a modified version of its 1973 Resolution to those who had neither retired nor reached age 60, but had completed 15 years of City service when the amendment took effect?

   Answer by the Trial Court: Yes.

   Answer by the Court of Appeals: No.

3. Whether the City satisfied its 1973 Resolution extending no-premium-cost health insurance to employees who met all eligibility requirements by providing the same insurance to retirees as to active employees, including one plan for which the retiree pays

no premium and alternative plans for which the retiree must pay the portion of the premium which exceeds that of the lower cost plan?

Answer by the Trial Court: Yes.

Answer by the Court of Appeals: No comment.

STATEMENT OF CRITERIA SUPPORTING REVIEW

Health insurance costs in the Milwaukee area are scandalously out of control. Monthly premiums in Milwaukee average 23% higher than those in Madison, "Hospitals, doctors set pace,", Milwaukee Journal Sentinel, pp. 1D-2D (1/21/08). "[H]ealth care inflation moderated to about 6% in 2007, down from double digits a couple of years back, but still roughly double the rate of inflation in the country." J. Torinus, "Market will ease health care costs," Milwaukee Journal Sentinel, p. 3D (1/20/08). Nationally, medical costs "jumped to an average of $6,924 for employers and $1,872 for employees" in 2007, 16 Benefits & Compensation Management Update, No. 1, p. 7, BNA (1/2/08), citing *Guide to Health Care Cost Control 2008*: *Employer Strategies, Tactics, and Benchmarks*, Institute of Management and Administration (12/03/07). In response to these costs, "the percentage of large firms offering retiree health coverage for pre-Medicare eligible retirees had declined from 46 percent to 23 percent" between 1993 and 2004, according to the Congressional Research Service report "*Health Insurance Coverage for Retirees*." (RL32966), 33 Pension & Benefits Reporter, No. 16, p. 6 (4/18/06).

In 2002, the City addressed the spiraling costs of retiree health insurance, the needs of employees, and the limits of its own municipal budget by treating Plaintiff Albert Loth the same way as an active employee and as a retiree. Under an earlier resolution, the City paid the insurance premium for those who retired at

age 55 with 30 years of service or age 60 with 15. The 2002 Resolution provided that the City would pay the full premium of its least expensive program (an HMO), and allow the retiree to enroll in a more expensive plan if he/she would pay the difference in premium costs. Unlike the 77% of pre-Medicare retirees with no employer-paid health insurance, Loth could choose between a free HMO or a different plan for which he paid only a portion of the premium. What never changed were the eligibility requirements to obtain this incentive for those employees who stayed with the City as long as they were able to provide valuable service, but not so long as to discourage an employee's expectation of a reasonable retirement date.

The gravamen of the opinion below is that the 1973 Resolution's benefit becomes vested upon completion of one of its three eligibility criteria, assuring benefit payment in the earlier form even though it was modified in 2002, before Plaintiff had satisfied the other two conditions. If this "vesting" did not occur, Plaintiff must comply with the 2002 Resolution.

The Court of Appeals never addressed the continuation of Plaintiff's entitlement to a no-premium-cost benefit even after the 2002 changes or the City's argument that age is as important an eligibility requirement as years of service. The majority below only considered whether eligibility under the service requirement alone was enough to require payment of the benefit. Then it noted that a handbook, which Plaintiff did not receive until after he had been hired and begun work, created some sort of reciprocal understanding that the benefits it

described would never be changed. The majority relied on cases about benefits which were denied to people with contract rights, about people already retired when their benefit was eliminated, and on the notion that service alone effectively vests a benefit, regardless of any age requirements. Their conclusion ignores the facts, misapplies the precedents, and forces enormous costs on the employer for a benefit which the employee had never earned.

Two of the Court of Appeals judges would deny full effect to the City's 2002 Resolution on the theory that work performance alone vests a benefit which also requires work to a specific retirement age. They do not rely on promissory estoppel, Pet. App. 5, ¶ 7, n. 2, but hold that the 1973 benefit, was vested "upon the work the employee performed, not the employee reaching a particular age." Pet. App. 7-8, 10-11, ¶¶ 11-12, 16-17. They also rely on a handbook description of the 1973 benefit (which Plaintiff received only after he was hired and began work) to "reasonably" infer "that the parties intended to bind each other regarding this benefit." Pet. App. 12-13, ¶¶ 19-20.

These positions applied earlier decisions which required enforcement of contract benefits *after retirement or termination* to this case, where the plaintiff, had *not yet retired* and who had failed to meet all of the eligibility requirements both when the 2002 Resolution was adopted or when it later took effect. The decision of the majority below created a new set of employee rights, collapsed the distinction between retirees and active employees, and curtailed the legislative

body's ability to amend prior ordinances in order to address the needs of the citizens and taxpayers it represents.

The decision of the Court of Appeals should be reviewed and reversed because:

(1) it cannot be reconciled with the decision in *Dunn v. Milwaukee County*, 2005 WI App. 27, 279 Wis. 2d 370, 693 N.W.2d 82, which correctly held that a municipal ordinance does not constitute a contract, *Dunn*, *supra*, ¶¶ 7-21; Pet. App. 8-9, ¶ 13, that non-pension benefits are not vest prior to retirement. *Dunn*, *supra*, ¶ 17; Pet. App. 10-11, ¶¶ 16-17, and overextends *Champine v. Milw. Co.*, 2005 WI App. 75, 280 Wis. 2d 603, 696 N.W.2d 245, review denied, 2005 WI 134, 282 Wis. 2d 722, 700 N.W.2d 273.

(2) the majority's decision incorrectly applied precedent about the vested status of retiree benefits for people who have already retired to active employees who have not yet completed all requirements for, and were not eligible to receive a benefit at the time it was modified; this position differs from well settled principles established in other states and the federal system, and it will adversely affect all Wisconsin public employers.

(3) Wisconsin municipalities are presently confronted by a combination of budgetary limitations and economic problems which require reduction of costs and expenses; all local governments need the ability to modify benefits for those of their employees who have not yet retired or

terminated after satisfying earlier benefit eligibility rules. The need for budgetary responsibility in times of limited resources warrants reexamination of any case law which might prevent such economic and fiscal reforms. Unless the majority below is reversed, Wisconsin will require its public employers to provide a costly and unique form of vesting for non-pension benefits, a position which is in conflict with the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq*. ("ERISA"), the majority of decisions in other states, and the needs of the citizenry.

The Court of Appeals has created a right in perpetuity to a benefit for employees who were not eligible to receive it when it was revised. That is reversible error.

STATEMENT OF THE CASE

Employers hire people with the expectation that the investment in their training, performance and education will be returned with a long period of productivity and competence as an employee. *Zwolanek v. Baker Mfg. Co.*, 150 Wis. 517, 525, 137 N.W. 769 (1912). A career-end benefit supports this expectation by encouraging the employee to stay with the employer as long as he/she is able to contribute. Requiring both age and service periods to achieve the benefit balances life-long retention with a reasonable anticipation that the benefit distribution can be accomplished.

The City sought this balance by providing an insurance benefit for retirees who completed a full career or who were hired later in life but worked as long as could be reasonably expected. Thus, its 1973 Resolution provided benefits to those who may have been hired later in life but worked for at least 15 years and until age 60, and it was later balanced by reducing the life-long commitment requirement to age 55 if the person had been an employee for 30 years. R. 18, Pet. App. 42-68. People who started work in their twenties could retire with the benefit of age 55 to 60, but people who started later had to work until age 60 and for at least 15 years.

The original benefit itself was a continuation with premium payments by the employer of the only health insurance program available to active employees. Over the years after 1973, the City began offering various alternative insurance programs, and in more recent years, active employees have paid part of the

premium for some of these options. In 2002, the City adopted a resolution, to be effective July 1, 2004, which continued to provide qualified retirees with one health insurance option at no premium cost and other, more expensive variants for which the new retiree had to pay only the premium cost in excess of that for the no-premium-cost alternative. R. 25, Pet. App. 17; R. 18, Pet. App. 50.

When the challenged resolution was adopted in July, 2002, Plaintiff was not entitled to the age 55/30 year service benefit or the age 60/15 year benefit. When the resolution took effect January 1, 2004, he was not eligible for either benefit. In April, 2005, Loth finally satisfied the requirements for the age 60/15 year benefit, and he could have received a no-premium-cost health plan (if he had selected it during "open enrollment" at the end of the prior year). R. 25, Pet. App. 20. Instead, Plaintiff wants the more expensive plan so he can receive coverage in Florida, which is not available under the HMO. *Id.*, Pet. App. 23-24. Because he construes the requirement that he pay the national plan's premium to the extent it exceeds that of the HMO to be a violation of the 1973 Resolution, Loth initiated this litigation in the Circuit Court of Milwaukee County on December 23, 2005.

The parties filed cross-motions for summary judgment before the Honorable Patricia D. McMahon. On January 30, 2007, the Circuit Court granted judgment for the City and dismissed Loth's Complaint. R. 27, Pet. App. 25-26. The Court ruled that the 1973 Resolution "explicitly states that employees must meet all of the qualifications" including age, that Plaintiff had not "satisfied all three requirements as set forth in the 1973 Resolution when the 1973 Resolution

was still in effect", and that he had neither a contract nor a promissory estoppel basis for claiming the 1973 version of the benefit. R. 25, Pet. App. 18, 20, 21-23. In addition, the Circuit Court found as a matter of law, "that Plaintiff was already working for the City and committed to the job before he received documentation regarding retirement [health insurance] benefits", and that "Plaintiff cannot claim that the City failed to follow through on its promise of a no-premium-cost retiree health insurance benefit simply because the City will not permit Plaintiff to choose any health care provider in any state he wants." *Id.*, Pet App. 23-24.

Plaintiff timely appealed the dismissal of his actions, and on December 27, 2007, the Court of Appeals, by a two-to-one ratio, reversed and remanded the Circuit Court's decision. Pet. App. 1-15. The majority did not consider any promissory estoppel argument nor find the 1973 Resolution to be a contract, but said Loth earned the benefit by working 15 years before the 2002 Resolution was adopted. The majority characterized the benefit as a "promise", a "form of deferred compensation", and a "promise", which is to be "inferred" from an employee handbook Loth did not see or discuss until after he had taken the job and begun working. Pet. App. 11-12, ¶¶ 18-19. The dissent "would [have] adopt[ed] the trial court's thoughtful decision in which the court painstakingly sets out the flaw in Loth's logic and distinguishes his circumstances from those of the cases he cites." Judge Curley would not have disregarded the age requirement and treated the benefit as earned simply by 15 years of service. Pet. App. 15, ¶ 24.

The City sought to retain the employees it had trained and developed for the rest of their productive career. One way to measure that productive career was by long service (30 years) and another was continuing until full retirement age (age 60). When Loth finally satisfied the latter requirement, he was provided a no-premium-cost health insurance benefit. The City met its "promise", and Loth was not entitled to anything more.

STANDARD OF REVIEW

A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The appellate courts apply the same methodology as the circuit courts to review *de novo* the grant or denial of summary judgment. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 261 Wis. 2d 333, ¶¶25, 30-31, 661 N.W.2d 789 (2003).

ARGUMENT

Loth could receive no-premium-cost insurance if, as with active employees, he selected participation in the "low cost health maintenance organization." R 18, Pet. App. 28-36. Loth, however, wants to live in Florida (outside the HMO's coverage) and to receive a broader indemnity plan at additional City expense, so his insurance is available there as well. The 1973 Resolution never mentioned any insurance except a "Blue Cross – Blue Shield and Major Medical" program which has not existed for decades, yet Loth contends that language requires the City to

provide him with a "no-premium-cost" plan in Florida now. R. 25, Pet. App. 61; 23-24.

The majority of the Court of Appeals not only voided the age requirement for this benefit. but ignored the HMO which Loth could have received at no premium cost. Instead of acknowledging that this option satisfied the 1973 Resolution, the majority has created a form of vested benefit based only on years of service, and then pointed to a handbook, which Plaintiff did not see until well after he began work, as the proof of a mutual intention to pay the benefit regardless of the eligibility requirement.

The majority's decision should be reversed as contrary to law, if it rests on the "performance of work" theory, or it should be remanded if it is based on the handbook Loth never saw or the adequacy of the HMO plan which he could receive at no premium cost.

I. The Benefits Age Requirement Is As Important As Its Credited Service Rule.

The Trial Court found that Plaintiff had to satisfy three eligibility requirements to receive "no-premium-cost health insurance" as a retiree:

> "The resolution explicitly states that employees must meet *all* of the qualifications; that is, the employee must be between ages 60 and 65, have completed 15 or more years of creditable city service, and retire from the City with an unreduced retirement allowance. There is *no indication* in the language of the 1973 resolution that satisfying only one of the qualifications entitled the employees to benefits."

R. 25, Pet. App. 18 (emphasis added). When the 1973 Resolution was amended in July, 2002 and when that amendment took effect on January 1, 2004, Loth was not entitled to receive the 1973 Resolution's benefit because he was neither age 60 nor retired with the necessary pension.

This combination of requirements is fully consistent with the classic reason for a career-end benefit. Employers invest a great deal in the training, performance development, and education of their workforces. As employees gain skills, institutional knowledge and memory, and understanding of their employer's operations, they become more and more valuable. All employers want to retain people who have reached that performance level; losing such employees prematurely is a significant cost to any operation.

Minimum age and service requirements for a benefit are both an incentive and a control by which employers seek to retain the fully developed employee long enough to compensate for the cost of that development.

> "If the employee's pension entitlement can be made contingent upon continuing employment with the firm, … [t]he employee would have an incentive to remain with the firm and to perform well, thereby sparing the employer the costs of recruitment and training that result from employee turnover, as well as lowering the costs of monitoring and supervising the employee. The employer, in turn, is more likely to invest in training an employee who has a greater incentive to remain with the firm … Thus, paying some compensation in a contingent form is value-enhancing both to the firm and to the employee."

John H. Langbein and Bruce A. Wolk, *Pension and Employee Benefit Law* (2d Ed) 30 (Foundation Press, Inc.) (1995) (citations omitted).

The earliest case relied upon in the majority's decision below made the same point:

> "While the practice initiated by the defendant is beneficial to its employees, it is not difficult to see wherein it is also beneficial to the employer. It tends to induce employees to remain continuously in the employ of the same master and to render efficient services so as to minimize the possibility of discharge. It also tends to relieve the employer of the annoyance of hiring and breaking in new men to take the place of those who might otherwise voluntarily quit, and to insure a full working force at times when jobs are plentiful and labor is scarce."

Zwolanek v. Baker Mfg. Co., *supra*, 521.

Requiring both a minimum age and minimum service allows the City to retain and utilize younger, long-term employees who have developed valuable skills and knowledge while addressing the reality that older people may leave sooner if the incentive is not attainable by normal retirement age. Someone hired at 40 or 45 may feel a 30 year requirement is too distant to hold him/her past age 60, while someone hired at age 25 may feel that a career ending at age 55 is very attractive. City employees between the ages of 55 and 59 need 30 years of service - a full career with the City – to be eligible for the no-premium-cost retiree health insurance while employees like Plaintiff, whose City career began too late in life to make 30 years of service realistic, must work at least until age 60 to obtain the same benefit. This balance of age and service ratios provides the City with a fair period of maximum utility from all employees, a reasonable return on the City's training and development investment.

When the 2002 Resolution was adopted, Plaintiff had not completed his side of the balance between the costs of his training and development and a reasonable period of continued service utilizing those skills; his failure to meet both age *and* service requirements is the measure of that imbalance. Until Loth had worked 30 years or had reached age 60 with 15 years of employment, he had not "earned" the benefit he claims.

II. The Age And Service Balance Created By The Full Resolution Cannot Be Destroyed By Treating Service Alone As The Only Requirement For Benefit Payment.

There is no dispute that Loth could not have received the benefit he seeks if he had applied for it at the time of the July 2002 change or when that change took effect on July 1, 2004. If Loth had ceased work on either of those dates, he would have needed 30 years of service to obtain the benefit, but he started working for the City too late in his career to accumulate that amount of service.

Nevertheless, the majority below ignores the age and normal pension requirements of the 1973 Resolution and grants the benefit solely because Loth had already worked 15 years at the time the 2002 Resolution was adopted. Contending that employees "who have performed the work required [must]…receive benefits unilaterally provided for such work…", the opinion renders all other eligibility conditions void. Pet App. 6, ¶ 10.

Plaintiff abandoned his argument based on promissory estoppel. *Id*., Pet. App. 5, ¶ 8, fn. 2. The majority below did not characterize its position as

based in contract; indeed, an ordinance (which to the majority equates to a resolution, *Id*., Pet. App. 6, ¶ 9) is not a contract between a municipality and an individual. *Dunn v. Milwaukee County, supra*, ¶¶ 8-9. The Circuit Court rejected both the contract and promissory estoppel arguments which Plaintiff had made to it. R 25, Pet. App. 21-24.

Instead, the Court of Appeals majority spoke of a "promised benefit for those who had performed the work before the promised benefit was withdrawn." Pet. App., 9, ¶ 13. Saying that a "promise of specific retirement benefits, conditioned on performing work, is a form of deferred compensation." *Id*., Pet. App. 10, ¶ 16, but not a contract or an estoppel, the majority based this new "right" simply on what it considered to be fair and just.

A. The Retiree Health Benefit Does Not Vest Before All Eligibility Criteria Has Been Satisfied.

This case is not about the reduction of benefits for people who have already retired. Although cited in Plaintiff's support, *Roth v. City of Glendale*, 2000 WI 100, 237 Wis. 2d 173, 614 N.W.2d 467, and its predecessor, *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), did not deal with the facts presented here. Those decisions only held that retiree benefits could not be diminished *after* retirement, when the benefits had already been earned in full; the retirees in *Roth* and *Schlosser* had done everything

necessary to achieve benefit eligibility and upon retirement, their benefits vested.[1] These retirees could not be expected to rearrange their lives *after* they have earned the benefit and ended their active employment. In contrast, Loth "had not complied with all the conditions entitling him to the benefit of the 1973 Resolution prior to the time the benefit was withdrawn…," R 25, Pet. App. 17, nor did the 1973 Resolution suggest that he was excused from two eligibility criteria if he satisfied a third. See also, Pet. App. 15, ¶ 24, (Curley, P.J., dissenting).

Retiree health insurance is a benefit which "arises from the retiree's status as a *past* employee," *Roth, supra*, ¶29 (emphasis added); entitlement is achieved only "*after* an employee has complied with all the conditions entitling him to retirement rights there under." *Schlosser, supra*, as quoted in *Roth*, ¶30; *Dunn, supra*, ¶¶15-17; *Champine, supra*, ¶¶16-17 (emphasis added). Plaintiff, who remained an active employee after adoption of the 2002 Resolution, never achieved entitlement to the 1973 benefit because he had not

[1] Federal cases reach the opposite result. Unless the retiree has a specific contract right to the contrary – and Loth had neither a contract nor a contract right, - the Seventh Circuit presumes the non-pension benefit does not vest. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 604-605 (7th Cir. 1993) ("ERISA does not require the vesting of health or other 'welfare' benefits as it does pension benefits"); *Pabst Brewing Co., Inc. v. Corrao*, 161 F.3d 434 (7th Cir. 1998). Employers are "generally free…for any reason at anytime, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). In *Bidlack, supra*, lifetime health insurance under a collective bargaining agreement was not enforceable where retirees' health benefits had been unilaterally changed numerous times; these evolving programs suggested the retirees did not have a contract right equivalent to vesting for any particular benefit, but "were receiving those benefits as a matter of grace." *Bidlack*, 993 F.2d, at 610. In *Pabst Brewing Co. v. Corrao, supra*, the benefit package "shift[ed]…around and…impose[d]…managed care on retirees," 161 F.3d, 442. A "lifetime" benefit changed from an indemnity plan to one with a Medicare cut-off, then to a PPO, and then to a program with deductibles in *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476 (7th Cir. 2006).

satisfied its age and retirement status requirements while it was in effect. Nothing could vest until he was 60 and he retired. R 25, Pet. App. 19.

B. A Career-End Benefit, Which Is Not Payable Before Normal Retirement At A Specific Age, Is Not "Accrued" Until All Eligibility Criteria Have Been Satisfied.

Neither can this benefit be treated as vested because it somehow "accrued prior to the time that the new policy outlined in the 2002 ordinance became effective." *Champine, supra*, ¶17. *Harnischfeger Industries, Inc. v. DWD*, 270 B.R. 188, (2001), distinguished *Roth* and *Schlosser, supra*, because they dealt with changes *after* retirement, and held that an employer can modify or eliminate a severance benefit so long as the change is only applicable to employees active at the time of its adoption. Where, as here, eligibility requirements included a minimum age and an actual end of active employment through normal retirement, only employees who had reached the minimum age and terminated before the change was adopted had accrued the higher benefit.

The majority below quotes *Champine* for the proposition that "benefits could not be changed retroactively - i.e. after an employee has satisfied all the work requirements during the period when these benefits were in effect." Pet. App. 9, ¶ 14. Thus, they would ignore the two requirements of age and retirement status. This "logic" would allow a person with only 15 years of service to stop working at age 55, wait until he was 60, and then receive the health insurance benefit for which his peers needed twice as much creditable service.

R 25, Pet. App. 20-21. *Champine* does not require that benefits be paid to an employee who was never eligible to receive them.

The other cases cited by the majority below had factors which assured a benefit for work performed, not a creation of rights to which the employer never agreed. *Zwolanek v. Baker Mfg. Co.*, *supra*, involved whether a discharge immediately prior to attainment of eligibility was a pretext to disqualify an employee from the benefit of a "written contract". *Id*., 518, 525. Loth has made no allegations of pretext, arbitrary discharge, or lack of good faith. Here, the employee knew a year and a half in advance that this change would be made, that a no-premium-cost plan would still be available, and that he did not meet the requirements for the 1973 benefit years after the 2002 Resolution took effect in 2006.

Rosploch v. Alumatic Corp. of Am., 77 Wis. 2d 76, 217 N.W.2d 838 (1977) is equally inapposite. Unlike the 1973 Resolution, the profit sharing plan in *Rosploch* specified that it could not be amended in a manner which "deprive[d] any participant of his vested equity". *Id*., at 82. A subsequent plan amendment, then, could not be used to deny the employee the benefit amount already vested. Here, there is neither vesting nor a promise that the 1973 Resolution would never be changed. Indeed, change has been a common and necessary element of the City's employee health insurance program. The 1973 Resolution was a change which extended to certain retirees the same health insurance which the City already offered active employees. Thereafter, the City

has modified health insurance for retirees even after they have met its three eligibility requirements. The number and type of alternative programs available at any one time, the amount of the drug benefit, annual deductibles and co-payments for treatments, and the variety of care covered have all fluctuated since 1973, as have the dollar amount of the City's premium cost. The benefit has not been a constant or a certainty. Compare, *Zielinski v. Pabst Brewing Company, Inc.*, 463 F.3d 615 (7th Cir. 2006) (retiree prescription drug plan which had changed its benefits and participant costs many times, despite language stating the "company shall continue to provide the…benefits described in" its 1981 program does not mean "that the *scope* of the obligation was forever fixed by the terms of the 1971 Blue Cross-Blue Shield program" which had been incorporated by reference, *Id*., at 618.)

Finally, the majority below was attempted to distinguish *Dunn v. Milwaukee County*, *supra*, and embrace *Champine v. Milwaukee County, supra,* for the proposition that work performed under a benefit program effectively vests the benefit even if other eligibility criteria have not been satisfied. *Champine*, however, "is most unlike the present case." R. 25, Pet. App. 20. The benefit at issue there was a sick leave bank in which credits were deposited each pay period, could be used/withdrawn during active employment, and were subject to cash conversion at retirement. *Champine*, ¶ 3. Loth's retiree insurance neither accrued while he was an active employee nor was subject to any form of usage

prior to retirement. R. 25, Pet. App. 20. If he had ceased working with 14 years and 50 weeks of service, he was not entitled to anything in this program. *Id*.

Champine spoke of a municipality creating a unilateral promise as to pay and benefits, which was something other than a contract, *Champine*, ¶ 13, a benefit which "can be changed, but only as it related to work not yet performed," *Id*., ¶ 16. In *Champine*, the employee's right to use the sick leave benefit was available during active employment and accrued in increments each pay period. However, Loth and others not yet 60 or not yet having served 30 years, had not accrued anything, had no account to draw upon, and were not yet entitled to any benefit when the 2002 Resolution was adopted.

A benefit must be certain and the relevant eligibility criteria satisfied before it can acquire the equivalent of vesting. *Dunn, supra*, held that an ordinance which specified three years of wage increases could be amended to eliminate those raises not already in effect, even though employees had begun to work under its three year schedule. The County having given employees notice of the revocation three months before it took effect, its amendment was sustained regardless of rules for people "whose compliance with requirements for provided benefits was complete at a time when the employer's promise was still in place." *Dunn, supra*, ¶17.

As long as the rule change does not affect those who have already retired, the governmental employer is, and must be, allowed to make whatever changes are "reasonable and necessary to serve an important public

purpose." *State of Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1228 (9th Cir. 1990) (pension changes); *Ramsey v. Bd. of Educ. of Whitley County, Ky.*, 844 F.2d 1268 (6th Cir. 1988) (sick leave reduction); *Parker v. Wakelin*, 123 F.3d 1, 5 (1st Cir. 1997) (pension changes); *Pittman v. Chicago Board of Educ.*, 66 F.3d 1098 (7th Cir. 1995) (salary changes); *Florida State Lodge, Fraternal Order of Police v. City of Hialeah*, 815 F.2d 631, 637, 635 (11th Cir. 1987).

A statutory educational incentive pay program did not create a vested benefit in *Rhode Island Brotherhood of Correctional Officers v. Rhode Island*, 357 F.3d 42 (1st Cir. 2004). Denial of payment for courses already completed, as well as any taken in the future, was sustained when the First Circuit held that "save in the area of pensions – and not always there – governments rarely guarantee that compensation will never be changed." *Id.*, 49. The District Court was affirmed in its specific rejection of the contention that the statute was a unilateral contractual promise:

> "… 'absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985).... Indeed, the primary function of a legislature is to make laws that establish policies for the state rather than to form contracts that would bind future legislatures. *Id.*, at 466. As the Supreme Court has noted, unlike contracts, policies may be freely revised and repealed."

Rhode Island Brotherhood of Correctional Officers v. State of Rhode Island, 264 F. Supp. 2d 87, 95-96 (D.R.I. 2003).

Requiring payment of a benefit when an employee has not yet fully earned it and has not yet satisfied all elements of the eligibility rules simply creates a right which did not exist. There is no basis for such interference with the City's legislative process.

III. A Handbook First Seen After Plaintiff Began Working Cannot Create An Inalterable Employment Right.

To buttress its creation of a "vested" right to a benefit not yet earned, the majority below noted:

> "At the time Loth was hired by the City of Milwaukee, he was informed of this retirement benefit."

Pet. App. 11, ¶ 18. Citing, *Ferraro v. Koelsch*, 124 Wis. 2d 154, 165, 368 N.W.2d 660 (1985), they would find "representation made in an employee handbook may modify an employment at-will relationship." *Id*.,

However, Loth did not receive the handbook until he had already been hired and started working. R. 18, 7/13/06 Dep. of Albert N. Loth, pp. 20-21, Pet. App. 38. Furthermore, the handbook only said "General City retirees 60-65 with at least 15 years service are entitled to City paid health insurance…" *Id*., Ex. 3, Pet. App. 40. It also said:

> "The City will have the right to establish such procedures as it may deem necessary to restrict excessive costs in application of the benefits provided."

Id., Pet. App. 39. This was not a "promise" of a particular insurance program, and it reserved the City's right to modify the program if costs warranted. Today the City still provides a no-premium-cost program, which it has refashioned to deal with the incredible inflation of health insurance costs. If *arguendo*, this handbook was a "promise", the City has not failed to fulfill it under the 2002 Resolution.

More to the point, however, is that the employee in *Ferraro* received the handbook during the hiring process and signed a statement which he understood and accepted "as a condition of my continued employment." *Ferraro, supra*, at 166. When the employee merely knows of a handbook and does not make it part of the contract of employment, it does not bind the parties even if the employee continues working thereafter. *Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 981-982 and Fn. 2, 473 N.W.2d 506 (WI App. 1996). Absent "express promises from which it reasonably could be inferred that the parties intended to bind each other to a different relationship," *Id*., at 979; Pet. App. 11-12, ¶ 18, the benefit could be changed regardless of the handbook. Far from stating an "express promise" of a never-changing health insurance program, this handbook never defined the details of the insurance for retirees and also specified that the benefits could be changed if costs warranted.

The handbook argument of the majority below misconstrues the decision on which it relies, extends the employer's explanations beyond their clear wording, and suggests a lack of confidence in the vesting argument it seeks to reinforce. Neither the facts nor the case law support the division of positions here.

CONCLUSION

The dissent below put is succinctly:

> "The bottom line is that Loth did not qualify for the [1973] no-premium-cost health insurance when the City adopted the 2002 Resolution."

Pet. App. 15, ¶ 24. A self-standing, independent requirement of the 1973 Resolution was attainment of age 60, and Loth did not satisfy it. Working for 15 years while under a 30 year requirement does not create the right to a benefit regardless of its other conditions; neither can such a right be created out of some sense of fairness which ignores the legislative intention.

Employee benefits are neither intended nor required to continue in perpetuity, sometimes ratcheting up, but never allowing the City and its taxpayers to seek an important and necessary cost saving. People who have met all eligibility criteria for a benefit *and* retired on that basis are entitled to protection of the conditions in effect when they left active employment, *Roth*, *supra*, *Schlosser*, *supra*. Plaintiff, however, did not satisfy the 1973 Resolution's requirements of age *and* retirement with an appropriate pension before the 2002 resolution took effect in 2004.

For the reasons offered by the Circuit Court and the dissent below, as well as those set forth herein, the City of Milwaukee requests review, and ultimately, reversal of the decision of the Court of Appeals.

Dated at Milwaukee, Wisconsin this 26th day of January, 2008.

Respectfully submitted,
LINDNER & MARSACK, S.C.

_____
Alan M. Levy (SBN: 1010285)
Attorneys for the Defendant-
Respondent-Petitioner,
City of Milwaukee

P.O. Address:
411 East Wisconsin Avenue, #1800
Milwaukee, Wisconsin 53202
(414) 273-3910
(414) 273-0522 (Facsimile)

CERTIFICATION

I hereby certify that this Petition for Review conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8), for a petition and appendix produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this petition is 6,237 words.

Dated this 26th day of January, 2008.

_____

Alan M. Levy