NOTICE
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2018 IL App (4th) 170056-U

NO. 4-17-0056

FILED
March 2, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KATHLEEN P. KONICKI, Plaintiff-Appellant, v. ILLINOIS MUNICIPAL RETIREMENT FUND; EXECUTIVE DIRECTOR LOUIS KOSIBA; Trustees NATALIE COPPER, JOHN PIECHOCINSKI, TOM KUEHNE, WILLIAM STAFFORD, GWEN HENRY, JEFFREY A. STULIR, SHARON U. THOMPSON, SUE STANISH, DAVID MILLER; and THE COUNTY OF WILL, a Body Politic and Possible Party of Record By and Through Its State's Attorney James Glasgow, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 14MR32 Honorable John W. Belz, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding Public Act 91-0685 does not violate the pension protection clause of the Illinois Constitution.

¶ 2 Plaintiff, Kathleen P. Konicki, appealed to the Illinois Municipal Retirement Fund (IMRF) Benefit Review Committee (Committee), alleging Public Act 91-0685 (Pub. Act 91-0685 (eff. Jan. 26, 2000)) was unconstitutional. In July 2015, the Committee decided it did not have the authority to decide the constitutionality issue, and this decision was reaffirmed by the

IMRF Board of Trustees. Plaintiff appealed the decision to the circuit court, and the court found Public Act 91-0685 was constitutional.

¶ 3 On appeal, plaintiff argues Public Act 91-0685 (Pub. Act 91-0685 (eff. Jan. 26, 2000)), as applied to her and others similarly situated, is unconstitutional pursuant to article XIII, section 5 of the Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, § 5). We affirm.

¶ 4 I. BACKGROUND

¶ 5 In December 1996, plaintiff was elected to the Will County Board and served in that capacity until December 2012. She elected, at the outset of her tenure on the board, to participate in IMRF (40 ILCS 5/7 (West 1996)) and began making the required 4.5% contributions in January 1997.

¶ 6 In June 1997, Public Act 90-0032 (Pub. Act 90-0032 (eff. June 27, 1997)) created an "alternative annuity for county officer" plan (Original ECO). 40 ILCS 5/7-145.1 (West 1998). (ECO is a commonly used acronym for the "elected county officials" plan.) In order for a county official to join Original ECO, the county had to pass a resolution adopting the plan. Once the plan was adopted, an eligible official had to exercise an option to first opt into IMRF and then to opt into Original ECO. After exercising that option, the elected official was required to contribute an additional 3% of his or her earnings above the 4.5% employee contribution under IMRF, equaling a total employee contribution of 7.5%. Original ECO provided a different calculation for final rate of earnings than IMRF, which resulted in higher pensions since Original ECO could be applied to elected officials even after they left office for higher paying jobs. The Original ECO final rate of earnings was calculated as of the final day of participation, while the IMRF rate was the highest 4 years over the last 10 years of service.

¶ 7 The Will County Board passed a resolution to adopt Original ECO in May 1998. In June 1998, plaintiff filed paperwork to enroll herself in Original ECO. However, a few days later, before she was actually enrolled, she declined to be part of the plan and continued to make her regular 4.5% payments to the IMRF plan.

¶ 8 In January 2000, a revised "alternative annuity for county officials" plan through the passage of Public Act 91-0685 (Pub. Act 91-0685 (eff. Jan. 26, 2000)) took effect (Revised ECO). See 40 ILCS 5/7-145.1 (West 2000). The legislature changed the law to resolve documented abuses of Original ECO, such as elected county officials taking significantly higher paying jobs to achieve a higher final rate of earnings, which undermined its original intent. The public act (1) changed the formula for calculating the final rate of earnings from the salary on the last day of participation to the average salary over the last four years; (2) allowed counties to repeal Original ECO after they had adopted it with respect to people who had not paid any additional contribution before the date of revocation; (3) changed the ECO vesting period to eight years in the same county office; and (4) allowed ECO service credit only for time served as an elected official.

¶ 9 In 2007, seven years after Revised ECO took effect, plaintiff chose to exercise her option to Revised ECO and convert her IMRF service to ECO service credit, and she began making extra contributions. Plaintiff left work in November 2012, ending her IMRF participation, and was advised she could convert her service to Revised ECO, not Original ECO. In February 2013, Kathy O'Brien, general counsel for IMRF, sent a letter to plaintiff detailing why plaintiff could only participate in Revised ECO. The letter stated she was eligible only for Revised ECO because she began making contributions in 2007, when Revised ECO was the only plan in existence.

¶ 10 In May 2013, plaintiff appealed the determination of the Committee, alleging Public Act 91-0685 was unconstitutional. The Committee determined it did not have authority to declare the public act unconstitutional, plaintiff could not convert her service to Original ECO, and the matter was not time-barred. In December 2013, the IMRF Board of Trustees affirmed the decision. Plaintiff appealed the decision to the circuit court, which remanded the case to IMRF to allow participation by Will County and the Illinois Attorney General. In May 2015, both parties were notified by mail. The Illinois Attorney General declined to intervene. The Will County State's Attorney objected to the jurisdiction of the Committee due to lack of notice of the proceedings as required under administrative law, and he believed plaintiff was entitled to Revised ECO, not Original ECO credit. In August 2015, IMRF Board of Trustees held a second administrative hearing, which upheld the determination that plaintiff was entitled to Revised ECO, not Original ECO. In December 2016, the circuit court upheld the decision of IMRF and found Public Act 91-0685 was constitutional. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 A. Constitutionality of Public Act 91-0685

¶ 13 Plaintiff argues on appeal Public Act 91-0685 violates article XIII, section 5 of the Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, § 5) as applied to her and those similarly situated. We disagree.

¶ 14 "[B]ecause resolution of this issue requires us to determine the applicability and effect of the pension protection clause ***, our review is *de novo*." *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 53, 51 N.E.3d 753.

¶ 15 The pension protection clause of article XIII, section 5 of the Illinois Constitution of 1970 states:

> "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. 1970, art. XIII, § 5.

¶ 16 "We presume statutes to be constitutional and must construe enactments by the legislature so as to uphold their validity whenever it is reasonably possible to do so." *Wilson v. Department of Revenue*, 169 Ill. 2d 306, 310, 662 N.E.2d 415, 417 (1996). "[T]he party challenging the validity of a statute bears the burden of rebutting this presumption." *Kanerva v. Weems*, 2014 IL 115811, ¶ 34, 13 N.E.3d 1228. Plaintiff argues she has a vested right to elect to use her option in Original ECO, which had its benefits diminished by Public Act 91-0685.

> "While the pension protection clause guarantees the vested rights provided in the contract that defines a participant's retirement system membership, it does not change the terms of that contract or the essential nature of the rights it confers. Accordingly, the pension protection clause does not transform a nonvested right to retirement benefits into one that is vested." *Matthews*, 2016 IL 117638, ¶ 59.

We must first analyze whether the right to Original ECO was vested and if the pension protection clause is applicable.

¶ 17 "Vesting" may be used in two senses when referring to pension benefits. See *Kraus v. Board of Trustees of Police Pension Fund of Village of Niles*, 72 Ill. App. 3d 833, 836, 390 N.E.2d 1281, 1284 (1979).

> "Vesting in a functional sense refers to a provision in a retirement plan whereby the member's right to a benefit becomes effective upon fulfillment of specified qualifying conditions ***. Vesting in a legal sense, on the other hand, refers to a contractual right to and interest in a pension that may be upheld at law. [Citations.] As used herein, the word 'vesting' is employed only in its contractual sense." *Kraus*, 72 Ill. App. 3d at 836.

¶ 18 While plaintiff joined IMRF in 1997, she did not join the ECO plan until 2007. At the time she started making the necessary additional contributions, the only ECO plan in existence was Revised ECO, as Original ECO was repealed seven years prior. "Because vesting is thus defined in a contractual sense, an employee's 'contractual relationship' with the State incorporates the law which exists at the time when [the] contractual rights to his [or her] pension vest." *Gualano v. City of Des Plaines*, 139 Ill. App. 3d 456, 458, 487 N.E.2d 1050, 1051 (1985). An employee's rights in the system vest when he or she enters the system. See *Gualano*, 139 Ill. App. 3d at 458. As such, plaintiff's right to enroll in Original ECO had not vested because she had not entered the system. Thus, the pension protection clause does not apply and Public Act 91-0685 does not violate the clause.

¶ 19 B. Due Process and Equal Protection Claims

¶ 20 Plaintiff argues the inability to enroll in Original ECO violates her fourteenth amendment right under the United States Constitution (U.S. Const., amend. XIV, § 1) to equal protection under the law and her substantive due process rights. We disagree.

¶ 21 The fourteenth amendment to the United States Constitution states no state shall "deprive any person of life, liberty, or property, without due process of law" U.S. Const., amend.

XIV, § 1. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' " *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 59 (1999). "Intrusion upon a cognizable property interest is a threshold prerequisite to a substantive due process claim." *General Auto Service Station v. City of Chicago*, 526 F.3d 991, 1002 (7th Cir. 2008). "In other words, no abstract right to substantive due process exists under the Constitution." *Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994). "Consequently, the lack of a protected property interest is fatal to a substantive due process claim." *General Auto Service Station*, 526 F.3d at 1002.

¶ 22 As previously stated, plaintiff did not have a vested property right in Original ECO, as she did not contribute to the plan during its existence. Thus, she does not have a protected property interest and her claim fails.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the circuit court's judgment.

¶ 25 Affirmed.