

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE RETIRED PUBLIC)
EMPLOYEES OF ALASKA, INC.,)

Plaintiff,)

v.)

LESLIE RIDLE, in her official capacity)
as Commissioner of the Department of)
Administration,)

Defendant.)

Case No. 3AN-16-04537 CI

DEFENDANT’S TRIAL BRIEF

In granting the Retired Public Employees of Alaska, Inc.’s (“RPEA”) partial motion for summary judgment, the Court held that optional coverage is subject to the diminishment clause, but it did not address the scope of the protected benefit or whether the protected benefit was diminished or impaired in 2014 when the Department of Administration (“Department”) amended the dental coverage offered to retirees.¹ Those are the issues that will be addressed during trial.

BACKGROUND

In 2012, the Department solicited proposals from potential contractors to serve as a third-party administrator for its dental, vision, and audio (“DVA”) insurance plan. The Department sought to address several concerns it had over the health and integrity of the plan. One of the concerns related to increased costs. The Department’s actuaries had

¹ Order Denying Defendant’s Request for Reconsideration, at 2–3 (February 27, 2017).

advised that costs associated with the DVA plan increased sharply in 2010 and 2011. Increased costs result in increased premiums, which are born entirely by the retirees who have opted to participate in the DVA plan.² Increased premiums could result in fewer retirees opting to enroll in the plan exacerbating the problem.

Another concern related to the plan's utilization. In reviewing the plan, the Department learned that a substantial amount of dental care received by retirees, particularly cleanings, were outside of national norms.

Prior to adopting portions of Moda's plan, the Department asked the State's Chief Dental Officer to review the quality of coverage offered through Moda's plan. It did not conduct an actuarial analysis because it did not believe the diminishment clause applied to optional coverage. Instead, the Department focused on providing appropriate coverage while stabilizing costs. In the end, the Department offered a plan that met or exceeded industry standards in most areas of dental coverage while employing features, such as the implementation of a network, to help maintain costs.

ISSUES FOR TRIAL

I. RPEA bears the burden of proof.

RPEA bears the burden of proving that retirees experienced a diminishment of their constitutionally guaranteed benefit.³ There is no question that, even under the

² See AS 39.30.090(a)(10).

³ *Retired Public Employees of Alaska, Inc. v. Mathiashowski*, 2006 WL 4634279 (Sup. Ct. April 27, 2006) ("The plaintiffs bear the overall burden of proof as to each of their causes of action."); see also *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) ("A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation." (internal quotation marks omitted));

protection of the diminishment clause, dental coverage is allowed to change as dental care evolves.⁴ State retirees do not have the right “to receive exactly the same package of health benefits which were offered [at vesting] but rather a right to a reasonable [dental] benefit package, one which is in keeping with the mainstream of such packages.”⁵ To prove the 2014 changes diminished the value of the retirees’ dental coverage as a group, RPEA must put on “reliable evidence.”⁶ This requires more than hypothetical projections or statements by witnesses that the terms of the plan have changed; it requires “solid, statistical data drawn from actual experience”⁷ demonstrating that the value of the plan offered does not equal the value of the accrued benefit.

II. How does the Court value the option to purchase dental coverage?

The Court previously recognized that the option to purchase dental coverage during retirement has value. To determine the value of that option, RPEA assumes that the Court will compare the value of the 2013 version of the retiree plan to the value of

Nicholas v. Penn. State Univ., 227 F.3d 133, 13940 (3rd Cir. 2000) (plaintiff pursuing a constitutional due process claim bears the burden of proof).

⁴ *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 883, 891 (2003) (recognizing that “health insurance benefits must be allowed to change as health care evolves”).

⁵ *Id.* (quoting *Studier v. Mich. Pub. Sch. Employees Ret. Bd.*, File 00-92435-AZ, Circuit Court for Ingham Count, Michigan, pp. 17–18) (Order 2/21/01) (first alteration in original).

⁶ *Id.* at 892.

⁷ *Id.*

the 2014 version.⁸ As discussed above, the value must be determined by “reliable evidence.”⁹

The Supreme Court has already said that actuarial evidence based on accepted actuarial sources is reliable.¹⁰ The State will offer the testimony of actuary Richard Ward, who conducted an actuarial review of the retirees’ dental plan and concluded that the actuarial value of the enhancements offered in the new plan exceeded the actuarial value of the diminishments.

The Supreme Court has also said that the vested right is not the right to receive the same package, but the right to a “reasonable [dental] benefit package, one which is in keeping with the mainstream of such packages.”¹¹ The State will also offer the testimony of Cathye Smithwick. Ms. Smithwick is a nationally recognized consultant in dental benefits. She is familiar with dental plans offered throughout the country, and she will offer testimony that the State’s plan meets or exceeds national standards for a majority of the coverage.

In comparison, RPEA will offer the testimony of Kathleen Farmer, Dr. Jeffrey Rogers, and Dr. Mark McLean. Drs. Rogers and McLean are dentists and

⁸ RPEA’s assumption is based on its desire to equate the option to buy dental coverage with the right to receive major medical coverage under AS 39.35.535(a). But the protected right in this case is defined by AS 39.30.090, and the Court must consider the differences between AS 39.35.535 and AS 39.30.090 when it values the accrued benefit.

⁹ *Duncan*, 71 P.3d at 892.

¹⁰ *Id.*

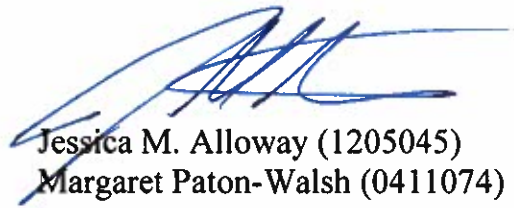
¹¹ *Id.* (internal quotation marks omitted).

will offer testimony on what is dentally necessary. Ms. Farmer is a benefits consultant, and she will offer testimony on the number of retirees allegedly affected by the frequency limits for cleanings and the change in coverage for topical fluoride cleanings. She did not analyze any enhancements to the plan. RPEA has also identified a fourth expert, Todd Allen. Although RPEA represented that Mr. Allen would provide testimony on the value of the retiree dental plan before and after the 2014 changes, his deposition revealed that he is unable to provide such an analysis. The State has filed a motion in limine to exclude his testimony. None of RPEA's experts are actuaries, and RPEA will not offer the Court any statistical analysis that supports its contention that the value of the alleged disadvantages in the 2014 plan exceeds the value of the advantages. In fact, RPEA will not offer the Court any evidence that will allow it to place any value on the plan whatsoever.

Dated: March 27, 2018.

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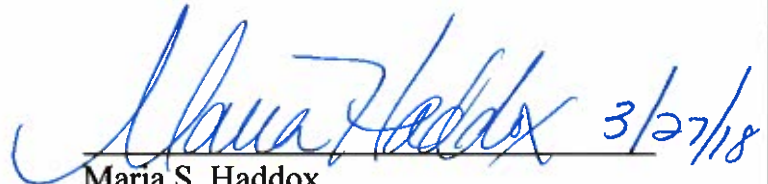
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CERTIFICATE OF SERVICE

I certify that true and correct copies of the **Defendant's Trial Brief** and this

Certificate of Service were served via U.S. Mail on the following:

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