

Retirement Newsletter Number 2

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To: Oklahoma State University Faculty and Staff

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Plaintiff Class Action Lawsuit

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The purpose of this and other newsletters to follow is to keep all of you informed about current developments in our class action lawsuit aimed at recovering our retirement benefits confiscated by the Campbell administration and retained by the Halligan administration. The first newsletter was mailed in late June. If you wish to receive a copy, send an email message to either Lionel Raff (lionelraff@hotmail.com) or Ed Lawry (elawry@okstate.edu), and we will transmit one to you via return email.

As you were informed in Newsletter Number 1, the Administration and OTRS (Oklahoma Teachers Retirement System) acting through their attorneys filed a motion in district court requesting that our lawsuit be summarily dismissed. Our legal counsel, Ms. Gladys Cherry and Mr. Larry Derryberry, prepared a response asking the Court to deny the motion for summary judgment filed by the Defendants. The Court held oral arguments on the case June 28th. The Court delayed making a decision on both motions to give the parties the opportunity to try to settle the case. We are to report back to the Court after the July 22nd meeting with the administration.

Initially, the Court was inclined to require us to exhaust administrative remedies. However, when the Attorney General's office confirmed that OSU is not subject to the Administrative Procedures Act, she delayed making a decision on the motion. Our legal counsel has reported that Tommy Beavers and the attorney for the defendants were at the hearing and that it was clear that they were disappointed that they did not get a favorable ruling.

At this point, the outcome of the case is in the hands of the Court and our legal counsel. There is very little the faculty and staff can do to affect the eventual decision. Nevertheless, I believe that it is important for all faculty and staff to know the nature of the arguments presented by the administration and OTRS to support their request for summary judgment. In my opinion, the arguments they have presented to the Court clearly show the vast difference between the public pronouncements made by members of the Halligan administration and their real objectives. In this Newsletter, I shall summarize their arguments and our rebuttals. The actual briefs are voluminous and replete with legal citations. If you wish to examine them, please contact me or Professor Lawry.

The Defendants have presented the Court with a listing of what they characterize as a "Statement of Uncontroverted Material Facts". We take significant exception to these so-called "facts". We believe them to be a collection of half-truths and distortions. Five examples are given below:

1. The Defendants state to the Court that on May 24, 1991, the OSU Task Force on Compensation submitted its final report to President Campbell. Assistant Vice President Anne Matoy has provided a sworn affidavit confirming this fact.

In our rebuttal submission to the Court, we note that the Defendants' brief completely omits any mention of the fact that the initial report of the Task Force was rejected by the Campbell administration. This omitted report from the Task Force clearly and unequivocally recommended that all present faculty and staff be given the option of being grandfathered in the system in existence prior to 1993. Ms. Matoy was deeply involved with this program and certainly knew of the existence of this initial recommendation. Yet, her affidavit does not mention it.

2. The Defendants' have claimed in their brief to the Court and again in Ms. Matoy's affidavit that the 7-11 changes were implemented with approval of the OSU Faculty Council subject to two modifications one of which was the elimination of mandatory participation by OSU employees in OTRS.

Our rebuttal submission notes that this condition for approval was never met by the OSU administration. Therefore, it is incorrect to state that the recommendations of the Task Force were implemented with the approval of the Faculty Council. There was, in effect, no approval by the OSU Faculty Council. The fact that the OSU administration never met the condition for approval is not mentioned by the Defendants' brief nor Ms. Matoy in her sworn affidavit. They were very selective in the information they placed before the Court.

3. In an effort to persuade the Court that every effort was made to fully inform faculty and staff of the nature of the changes in their retirement program, the Defendants' brief and Ms. Matoy's affidavit cites four informational sessions held for employees, a 1993 issue of OSU People that describes the changes to the retirement plan, and eight informational informational sessions held between April 23rd and 28th, 1993. The Defendants' brief also cites the OTRS newsletter TRENDS and states that all "OSU employees were notified of these and other changes along with all other members by the OTRS newsletter TRENDS".

In our rebuttal brief to the Court, we have pointed out that although the Defendants conducted the "informational sessions" and issued a special issue of OSU People in February 1993, nothing in the publication or the "informational sessions" informed the Plaintiffs of the effect of the changes on the calculation of their retirement benefits. In support of this position, we have provided the Court with copies of the issue of OSU People and TRENDS in question and also a videotape one of the "informational sessions" that was made by the OSU Benefits Office. These "informational sessions" and publications never stated the actual method by which faculty/staff benefits were to be computed. Instead there was a presentation made of a totally bogus retirement benefits formula that misled every staff and faculty member in attendance. Thus, these "informational" sessions were, in reality, misinformational sessions. We have also noted to the Court that the annual statements mailed by OTRS do not contain information concerning the method to be used in computing retirement benefits. They list only contributions made to OTRS.

4. The Defendants' brief to the Court presents the argument that OSU faculty and staff suffered no financial damage because a compensatory raise was given that fully compensated for any loss of benefits because of implementation of the 7-11 plan.

In our response to the Court, we point out that the OSU administration completely eliminated the normal yearly raises given to faculty and staff in 1993. We have provided evidence to the Court that since 1995, the annual raise has averaged 3.94%. In place of the 1993 raise, the Administration put in place a compensation program amounting to an average of less than 1% and called it a "salary/benefits adjustment", as noted in the Defendant's brief. Thus, there was, in reality, no adjustment at all for lost retirement benefits. Faculty and staff not only lost approximately \$1.7 million annually from their OSU retirement benefits, they also lost about 75% of their normal annual raise. None of these facts are contained in the Defendants' brief or in affidavits filed by Mr. Tommy Beavers (Director, OTRS) or Ms. Matoy. They misrepresented the situation in 1993 and the misrepresentation continues.

5. The Defendants have asserted to the Court that "The 1995 change to extend the cap on contributions was enacted at the request of OSU, the University of Oklahoma, and their employees."

Our Responses refutes this assertion in toto. The OSU Faculty Council was not asked to, nor did they, make such a recommendation. Further, none of the Plaintiffs made such a request.

The Defendants base their request for summary judgment on four points. These are as follows:

Point #1

OSU administrators and OTRS claim that the Plaintiffs have no right to claim breach of contract because their retirement program is not vested. It only vests at the time of actual retirement.

In rebuttal, our legal counsel point out that the Defendants' brief ignores the common law rule that a right vests by contract or statute. In this case, Plaintiff's rights to payment into TIAA-CREF vested immediately by contract. Additionally, since Plaintiffs are eligible to receive retirement benefits under the OTRS, they have a vested contractual right. In fact, publications circulated by OTRS state that the program vests after 10 years. We also note that the Defendants statement of material facts contain absolutely no evidence that Plaintiffs did not have a contract with them and that the contracts were not breached.

Point #2

OSU administrators and OTRS claim that the Plaintiff's have no cause of action for the alleged misrepresentations made by the Defendants. In support of this position, they cite the case of Garst vs. the University of Oklahoma in which an employee sued because university employees had erroneously informed her that if she accepted any benefits from OTRS, her

disability payments would be reduced by an equal amount. The Court rejected her claim ruling that employees are not entitled to error-free assistance.

In rebuttal, our legal counsel point out that the present case is very different from that in *Garst vs. University of Oklahoma*. In *Garst*, the misrepresentation was made by an employee of the University, which could not bind the University. The misrepresentation was not made by officials of the disability program. In contrast, in the present case, Plaintiff's relied on publications circulated by OTRS itself, which had been reviewed and approved by both the Governor and the Legislature. Unlike *Garst*, the misrepresentation was made by the entity charged with administering the OTRS. *Garst* does not mean that a rule, once properly adopted, does not have to be "error-free". There is a presumption that a rule circulated by the administering entity is valid. Moreover, an administrative agency cannot change that rule without complying with the Administrative Procedures Act, Article 1. Defendants have changed a rule without going through the proper rulemaking procedures. Since OTRS is the agency charged with interpreting the Teacher Retirement System Act, and since its representations in *TRENDS* is the same as that in the rule, it can only be presumed that OTRS intentionally misrepresented how the retirement benefits will be computed to lull class members into complacency unless each member individually requested his or her benefits be computed by OTRS.

Point #3

OSU administrators and OTRS claim that the Plaintiffs claims are barred by the applicable statutes of limitation. They cite the fact that there is a three-year statute of limitations for the type of actions represented by our class action lawsuit. Consequently, they are protected from liability because we are too late. They have escaped.

Our rebuttal hinges on the following concept: A surgeon leaves a sponge inside the body of a surgical patient. The patient suffers no ill effects for four years. At that point, he/she begins to experience pain. Examination reveals the sponge and a tumor growing around it. The fact that four years have elapsed since the sponge was left inside the patient does not bar a lawsuit under the statute of limitations since there was no way for the patient to be aware of the damage. That is, the statute only begins to run from the point at which the patient knew of the injury.

Our rebuttal states, in part, "Here, since the Defendants are fiduciaries of the Plaintiffs, the statute of limitations did not begin to run until the Plaintiffs became aware of Defendants' breach and misrepresentations (Legal cases are cited here)." The Plaintiffs, relying on the published retirement benefits formula, believed that their retirement benefits would not be substantially affected by the reduction in payments by OSU into their TIAA-CREF accounts. The cause of action did not accrue until the Plaintiffs learned, after receiving individual retirement statements, that the compilation of their benefits was misrepresented by Defendants. This information was obtained in 2001. The action was filed in September, 2001, well within the three(3) year statute of limitations.

Further, even if this action was filed outside of the three(3) year period after the cause accrued, Defendants are estopped to plead statute of limitations as a defense because of their

false promises. Defendants' false publications and OTRS rule caused Plaintiffs to delay filing an action against Defendants. It is a general rule under Oklahoma law that a defendant is estopped to plead statute of limitations as a defense if defendant made unfulfilled promises to the plaintiff (legal cases are cited).

Point #4

OSU administrators and OTRS claim that the Plaintiffs have not exhausted their administrative remedies prior to bringing this action and therefore, the defendants are entitled to summary dismissal of the case. In support, the Defendants state that "In this case, the Plaintiffs had ample recourse provided by the Administrative Procedures Act. The Oklahoma Legislature intended to create and did in fact create a comprehensive procedural mechanism designed to provide for and protect the rights of state employees."

Initially, the Judge was going to grant the summary judgment sought by OSU administrators and OTRS on this point. However, our counsel (Mr. Larry Derryberry and Ms. Gladys Cherry) pointed out to the Court that OSU employees are not covered by the Administrative Procedures Act and therefore, the point made in the Defendants' brief is without merit. The Court asked the counsel for the Defendants for a response. The result was that the Attorney General's office had to confirm that OSU employees are not covered by the Administrative Procedures Act.

This completes the summary of events up to this point in time. I would suggest that each you think about the methods being used by the OSU administration and OTRS. Half-truths, outright lies and distortions, a fraudulent retirement benefits formula, claims that they can't be held responsible for misinformation because we aren't entitled to error-free information, a claim that your retirement program isn't vested, hiding behind the statute of limitations coupled with a claim that they have successfully escaped the judgment of the Court because we are too late, and finally, a completely bogus claim that we had ample remedies available under the Administrative Procedures Act when they knew very well that OSU employees are not covered by that act.

The Executive Committee of the Faculty Council, Professor Mark Rockley and I plan to have a meeting prior to our scheduled meeting on July 22nd to prepare our presentation. Our legal council will be present at the July 22nd meeting as will the counsel for the Defendants. I will keep you informed of events as they transpire.