

Retirement Newsletter Number 7

November 13, 2002

To: Oklahoma State University Faculty and Staff

From: Lionel M. Raff,

Regents Professor

Plaintiff Class Action Lawsuit

**Member, Faculty Council Retirement and Fringe Benefits
Committee**

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, the second and third in July, the fourth in late August, the fifth September 18, and the sixth on October 16. In the interests of brevity, I will not summarize the contents of these six newsletters here. If you wish to receive a copy of any of them, send an email message to either Lionel Raff (lionelraff@hotmail.com) or Ed Lawry (elawry@okstate.edu), and we will transmit them to you via return email.

The sixth newsletter informed you of the fact that our legal counsel had filed a petition with the Court requesting certification of the class in our class action lawsuit. This newsletter also related the fact that the Attorney General's (AG) office had requested a continuance for an additional 30 days to provide them time to prepare a response to our petition. The Plaintiffs, Professors Edgley, Rockley, and Raff, and our legal counsel, Mr. Larry Derryberry, agreed that this request was very reasonable, and we raised no objection. The AG's office has now filed a brief with the Court opposing class certification. Their brief is supported by affidavits submitted by Tommy Beavers, Director of OTRS, and by the OSU Administration through the OSU Benefits Office under the direction of Assistant Vice-President Anne Matoy. Our legal counsel, Mr. Larry Derryberry and Mr. Douglas Rice, have filed a response to this brief. In this newsletter, I will summarize the contents of these documents along with my views of them.

The OSU Administration and the AG's office are well aware that if they can prevent certification of the class, they will have escaped the Court's judgment of their acts. The Administration will no longer have to answer for breaching the contract of faculty and staff by unilaterally eliminating the TIAA-CREF retirement program without provision for grandfathering vested employees. The State will no longer have to face the Court for breaching the OTRS contract by changing the OTRS retirement rules without provision for grandfathering vested faculty and staff. Both the State and the OSU Administration will no longer have to face the Court and answer for the bogus formula devised and circulated by OTRS and circulated by the OSU Benefits Office. If they can defeat our petition for class certification, each employee will have to bring suit individually. The

damages suffered by each member of the proposed class vary, but almost all fall within the range of \$10,000 to \$25,000. This amount, although large for the individual, is insufficient to justify the expense of hiring legal representation to bring suit and insufficient to make it feasible for a legal firm to accept an individual's case on a contingency basis. This is precisely the reason why class action lawsuits were devised. Without them, victims of corporate fraud, victims of administrative and/or bureaucratic deception are denied the protection of the Court because their individual damages are too small to merit the expense of a lawsuit.

To merit certification of the class, four criteria must be met. These are (1) the class must be so numerous that bringing suit by individual cases is impractical, (2) there must be questions of law common to the class, (3) the claims of the members of the class must be typical, and (4) the representative parties will fairly and adequately protect the interests of the class. The brief filed by the Attorney General's office argues that OSU faculty and staff do not meet any of these criteria.

Point One:

The class must be so numerous that bringing suit by individual cases is impractical.

The AG's brief asserts that "A number of factors are relevant in determining whether joinder is impracticable, including class size, the geographic diversity of class members, the relative ease or difficulty in identifying members of the class for joinder, the financial resources of class members, and the ability of class members to institute individual lawsuits." The brief from the AG also states that "The size of the proposed class is not determinative of the Numerosity question; instead, "the real inquiry under Rule 23(a)(1) is whether joinder would be impractical" (Kohn vs. American Housing Foundation, Inc.) The AG's brief contends that most, if not all, of the proposed members of the class reside in Oklahoma. Therefore, they argue that individual lawsuits are not impractical.

In response, our legal counsel note to the Court that "Under Oklahoma law, the numerosity test is satisfied by numbers alone when the size of the class is in the hundreds. (Black Hawk Oil Co. vs. Exxon Corp., 1998)." Our counsel has also noted that the Defendants do not provide any authority that states that the numerosity requirement cannot be satisfied when the potential class members reside in the same State. In addition, many former OSU employees who have retired since 1993 now reside in different states.

The AG's brief asserts that "the potential size of the class is not so numerous as to render joinder impractical." They further state that our estimate of approximately 2050 class members is doubtful." The OSU Administration and Benefits Office know that this assertion by the AG's office is patently incorrect. In 1992, Oklahoma State University retained the services of Foster Higgins to

examine the retirement and health programs at the University and formulate recommendations as to how the University might save money on these programs. Foster Higgins submitted its report and recommendations to the University on February 7, 1992. On page 5 of this report, which is available from the OSU Benefits Office, there is a table containing a numerical tabulation of "OSU EMPLOYEES' KEY STATISTICS". This table shows the total number of OSU A/P staff and faculty present at the time to be 2,787. So the statement made in the AG's brief that our estimate of 2050 potential class members is in error is correct. But the error is that it is probably an underestimate of the actual number, not an overestimate. The fact that OSU Benefits Office knows this and yet supports a brief to the Court that misrepresents the situation tells you something very important about the sincerity of the Administration.

Point Two: There must be questions of law common to the class,

The brief filed by the AG's office contends that because the various members of the proposed class joined OSU under different retirement programs and, therefore, have suffered different alleged damages, class certification is not appropriate. Their brief even contends that "...those individuals who joined OTRS prior to 7-1-92 have retirement benefits calculated on the high three years of contributory salaries. Those who joined OTRS 7-1-92 or thereafter have retirement benefits calculated on a high five years of contributory salaries."

Consider the AG's statement to the Court. Everyone now knows that the retirement benefits formula that states retirement benefits are computed using the average of the highest three years of salary for employees who joined OTRS prior to 7-1-92 is totally bogus. But here is the office of the AG asserting to the Court that this bogus formula is the actual method of computation used by OTRS when in fact, they compute benefits on a year-by-year basis. The average of the highest three years never enters the calculations at any point. If you repeat a lie often enough, some will believe you.

In response, our legal counsel point out to the Court that differences in date of hire, classification of employees, length of employment, etc. may be factually correct, but they have no bearing on the issue of commonality. "The primary issues in this case are whether OSU breached its agreement with the professors and staff to pay a certain amount into their TIAA-CREF accounts and whether OSU and OTRS misrepresented the formula for computing their retirement benefits, thereby causing the professors and staff to suffer economic damages." Derryberry and Rice note that "each proposed class member was subject to exactly the same contractual provisions relating to the payment of retirement funds into his or her TIAA-CREF account. Further, each proposed class member received the same misrepresentations from OSU and OTRS relating to the formula used to compute his or her retirement benefits from the OTRS. Thus, a decision as to OSU's obligations to the proposed class representatives and the misrepresentations made by OSU and OTRS is dispositive as to all of the class

members." Finally, our legal counsel note to the Court that "The Defendants arguments concerning the differences in the terms of each individuals retirement only pertains to the issue of damages. However, as set forth in Perry vs. Meek, Okla. 1980, the fact that the amount of an individual damages suffered by each class member may differ will not defeat class certification."

Point Three: There must be questions of law common to the class,

Here, the brief submitted by the AG's office contends that since the Plaintiff's representatives (Mark G. Rockley, Charles Edgley, and Lionel Raff) are tenured professors, their claims are not typical of the all members of the proposed class since some members are A/P and classified staff.

This is a clever strategy on the part of the AG, OTRS, and the OSU Administration. The only individuals who can afford to bring a lawsuit against the University, OTRS, and the State are those individuals whose employment is protected by tenure. If staff who are not so protected have to "take the point" in bringing such a suit, the Defendants know they are safe.

In response, Derryberry and Rice point out to the Court that "...Defendants fail to recognize that the claims of the representative parties (Rockley, Edgley, Raff) are identical to the claims of the proposed class members (i.e. the Oklahoma State University has failed to pay the amount it promised to pay into TIAA-CREF retirement accounts of each member of the proposed class and that both OSU and OTRS misrepresented the formula used to compute proposed class members retirement benefits). Therefore, the typicality requirement has been satisfied." It is also noted that "..., their argument concerning typicality is really addressed to damages under the argument that in terms of cash, individual retirement may differ. However, as set forth above, the fact that the amount of individual damages suffered by each class member may differ does not defeat class certification. Perry vs. Meek, Okla. 1980."

Point Four: The representative parties will fairly and adequately protect the interests of the class

The brief filed by the AG opposing class certification cites that there are individuals in the class that would be financially harmed if the Plaintiffs are successful in this action. Examples include some proposed class members close to retirement, or retired, who benefitted because of the change to the 7-11 program and by the changes in the OTRS contributions and benefits rules. Therefore, they state that the representative parties may not adequately protect the interests of these individuals.

Our legal counsel point out to the Court that this element relates specifically to the legal position of the representative parties vis-a-vis the proposed class members and the capabilities and experience of Plaintiff's counsel. Derryberry and Rice state, "The sole argument raised by Defendants with regard to this element is their claim that the proposed class contains individuals that will be financially harmed if the Plaintiffs are successful in this action. Assuming, arguendo, that Defendants assertion is accurate, there is a mechanism under the class action procedure to deal with these class members. Namely, if these proposed class members were to be adversely affected by this action, they would be given the opportunity and could choose to opt out of the class and not pursue their claim. Thus, they would not be harmed by this class action."

"In this case, the representative parties and class members have identical claims against the identical defendants. The representative parties include members of the OSU Faculty Council. Thus, the representative parties will be able to adequately protect the interests of the class."

Finally, the Defendants have advanced a fifth proposition to the effect that class certification is not superior to other available methods. Once again, they suggest that OSU faculty and staff have not pursued their administrative remedies under the Administrative Procedures Act. They advance this point even though it has already been pointed out and they have admitted during the Court hearing on their request for summary judgment that OSU faculty and A/P staff are not covered by the Administrative Procedures Act.

At the present time, the Court has not scheduled a date for hearing arguments on our request for class certification. If any faculty or staff member would like to examine the AG's brief and the response prepared by our legal counsel, you may either contact Professor Ed Lawry, Professor Charles K. Edgley, Professor Carol Moder, Professor Mark Rockley, or me. All of us have copies of these documents and will share them with you if you wish.

I would like to take this opportunity to comment and venture my opinions about the events that have transpired. In a presentation to all OSU Faculty that was broadcast via TV to all OSU campuses about a year ago, President Halligan voiced his concern about the state of the OSU retirement program and said that something had to be done to fix the damages. We have his remarks on video tape. But we do not see any evidence of this concern. Instead, once again, we see the OSU Administration, OTRS, and the Attorney General's office attempting every available legal strategy to prevent this case from reaching a Court and jury where the defendants will have to answer the charges of the plaintiffs and the questions of our legal counsel. Mr. Tommy Beavers has filed an affidavit in support of the AG's brief requesting that class certification be denied. This is understandable. Mr. Beavers wants to see the unfunded liability of OTRS reduced and he has no problems using OSU faculty and staff as a "milk cow" to achieve this purpose.

However, the OSU Administration and Benefits Office are supposed to be looking after the benefits of OSU faculty and staff while we do the job of teaching the young men and women of Oklahoma knowledge that is already known and teaching them how to create new knowledge and beauty. They are supposed to be working for us. Unfortunately, this is clearly not the case. They are, instead, determined adversaries.

At the present time, there is no word from Judge Morris and Kristen Oliver as to when they will complete their report to the OSU Regents on damages suffered by faculty and staff.

I will continue to keep you informed of events as they transpire.