

FILED: May 21, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOSEPH BOVA,
Plaintiff-Respondent,

v.

CITY OF MEDFORD, an incorporated Subdivision of the State of Oregon; and
MICHAEL DYAL, City Manager of the City of Medford,
as an Individual, and in his official capacity,
Defendants-Appellants.

Jackson County Circuit Court
081663E7

A150810

Timothy C. Gerking, Judge.

Argued and submitted on July 17, 2013.

Robert E. Franz, Jr., argued the cause and filed the briefs for appellants.

Stephen L. Brischetto argued the cause and filed the briefs for respondent.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Schuman, Senior Judge.

SCHUMAN, S. J.

Award of attorney fees and costs to plaintiff on plaintiff's claim for age discrimination reversed; otherwise affirmed.

1 SCHUMAN, S. J.

2 This case is the latest battle--but probably not the last--in an ongoing war
3 between the City of Medford and its retired employees, including plaintiff, a now-retired
4 former city employee.¹ The underlying dispute is over the city's refusal to make available
5 to retired employees the same health care insurance that was available to them before
6 retirement. The trial court ruled in favor of plaintiff on his claim that the city violated a
7 statute requiring local governments to provide the health care opportunities to retirees,
8 ORS 243.303(2); on his claim that the city violated ORS 659.030(1)(b) by discriminating
9 against him on the basis of his age; and on his claim that the city was in contempt of
10 court for failing to comply with the court's order to provide the requested health care
11 opportunities. In *Bova v. City of Medford*, 262 Or App 29, ___ P3d ___ (2014) (*Bova I*),
12 we affirmed the trial court's ruling holding the city in contempt, we reversed and
13 remanded the trial court's ruling on the claim under ORS 243.303(2), and we reversed the
14 trial court's judgment in favor of plaintiff on his claim under ORS 659A.030(1)(b). In
15 this appeal, filed as a separate matter, the city challenges the trial court's rulings that
16 awarded plaintiff costs and attorney fees with respect to the contempt and age
17 discrimination claims. We reverse the award of costs and attorney fees with respect to
18 the age discrimination claim and affirm the award with respect to the contempt matter.

19 As relevant to this appeal, plaintiff in *Bova I* alleged that (1) the city

¹ Plaintiff is a member of a class of current and former city employees in this class action suit. Although there are two defendants, the city and the city manager, we refer to them collectively as "the city."

1 violated ORS 243.303(2), which requires that a "local government that contracts for or
2 otherwise makes available health care insurance coverage for officers and employees of
3 the local government shall, insofar as and to the extent possible, make that coverage
4 available for any retired employee of the local government"; and (2) the city
5 discriminated against plaintiff on the basis of his age in violation of ORS

6 659A.030(1)(b).² The trial court

7 "concluded that, in failing to offer that coverage, the city violated ORS
8 243.303(2), * * * [and] ordered the city to provide plaintiff and the class
9 members with health insurance coverage that included the option to
10 purchase that same health insurance at the time they retired. The trial court
11 later awarded plaintiff attorney fees on that claim and found the city in
12 contempt of the court's orders to comply with ORS 243.303(2). Separately,
13 following a trial to the court, the court concluded that, by not making the
14 same health insurance coverage available to plaintiff upon his retirement,
15 the city had discriminated against him on the basis of age under ORS
16 659A.030(1)(b)."

17 *Bova I*, 262 Or App at 31 (footnote omitted). The court also awarded plaintiff
18 \$48,609.96 in costs and attorney fees for successfully litigating the contempt matter and
19 \$68,771.25 for costs and attorney fees on the age discrimination claim.

20 On appeal in *Bova I*, we

21 "conclude[d] that the trial court erred in granting summary judgment to
22 plaintiff on his claim for declaratory and injunctive relief under ORS
23 243.303(2), because the legal standard that the trial court applied conflicts
24 with the standard articulated by the Supreme Court in *Doyle v. City of*
25 *Medford*, 347 Or 564, 227 P3d 683 (2010), a decision that issued after the
26 trial court's summary judgment ruling. We reverse[d] and remand[ed] the

² ORS 659A.030(1)(b) provides that it is an unlawful employment practice "[f]or an employer, because of an individual's * * * age if the individual is 18 years of age or older * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment."

1 limited judgment on the ORS 243.303(2) claim for declaratory and
2 injunctive relief for further proceedings. As to plaintiff's age discrimination
3 claim under ORS 659A.030(1)(b), we conclude[d] that the trial court erred
4 in allowing plaintiff to try that claim, over the city's objection, on a theory
5 of disparate impact, because that theory had not been pleaded and depended
6 on proof different from the disparate treatment theory that plaintiff had
7 pleaded. We therefore reverse[d] the trial court's judgment in favor of
8 plaintiff on his age discrimination claim. Because the supplemental
9 judgment for attorney fees [for the ORS 243.303(2) claim] is not
10 appealable, we dismiss the city's appeal of that judgment."

11 *Id.* at 31-32. We affirmed without discussion the contempt judgment.

12 In the present appeal, the city assigns error to the trial court's award of costs
13 and attorney fees with respect to the contempt and age discrimination claims--that is, the
14 city argues that, if we reverse on those issues, we should also reverse the associated
15 awards of costs and attorney fees. Plaintiff, in two cross-assignments of error, concedes
16 that, if we reverse the trial court on all of its rulings in favor of plaintiff, then he is not
17 entitled to costs or fees, but that, if we reverse on some issues but affirm on others (as, in
18 fact, we subsequently did), then we should award fees based on the "substantial benefit
19 and common fund equitable doctrines" or based on ORS 20.105(1), which requires the
20 award of fees if the court finds that "there was no objectively reasonable basis for
21 asserting the claim, defense or ground for appeal."

22 Because we affirmed the trial court with respect to the contempt matter in
23 *Bova I*, we have no reason to reverse the associated award of costs and fees, nor does the
24 city so argue. We therefore affirm the trial court's award of fees on that matter.

25 Because we reversed the trial court with respect to the age discrimination
26 claim, we also reverse on the award of attorney fees and costs relative to that claim. In so

1 doing, we reject without extended discussion plaintiff's cross-assignments of error in
2 which he argues that he is entitled to attorney fees under the equitable doctrines of
3 "common fund" or "substantial benefit," or, alternatively, under ORS 20.105(1). The
4 "common fund" doctrine is inapplicable because plaintiff's success in the contempt
5 matter--the only one on which he prevailed--did not "create, discover, increase, or
6 preserve a fund of money to which others also have a claim[.]" *Strunk v. PERB*, 341 Or
7 175, 181, 139 P3d 956 (2006). The "substantial benefit" doctrine is inapplicable because
8 plaintiff did not vindicate an important *constitutional* right applying to all citizens
9 without any gain to himself. *Pendleton School Dist. v. State of Oregon*, 347 Or 28, 33-
10 34, 217 P3d 175, *adh'd to as modified on recons*, 347 Or 344, 220 P3d 744 (2009). And
11 ORS 20.105(1) does not apply because, in light of our decision in *Bova I*, we cannot say
12 that the city had "no objectively reasonable basis" for taking the position it took below or
13 on appeal.

14 Award of attorney fees and costs to plaintiff on plaintiff's claim for age
15 discrimination reversed; otherwise affirmed.