

Gallipo v. City of Rutland, No. 1-1-07 Rdcv (Teachout, J., Sept. 2, 2008)

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**STATE OF VERMONT
RUTLAND COUNTY**

RAYMOND GALLIPO)	Rutland Superior Court
)	Docket No. 1-1-07Rdcv
v.)	
)	
CITY OF RUTLAND)	
)	
v.)	
)	
VLCT PACIF)	

**DECISION
Plaintiff Raymond Gallipo’s Motion for Summary Judgment**

The Plaintiff Raymond Gallipo was employed by the City of Rutland as a firefighter. The present case is a declaratory judgment action concerning the calculation of his pension benefits. The City of Rutland has brought a third party action against its insurer VLCT PACIF in which it seeks, among other things, indemnification in the event Gallipo prevails on his claim against the City. The Plaintiff has filed for summary judgment in the main action. The material facts are undisputed.

In 1985, after many years of service, the Plaintiff was passed over for promotion to Lieutenant. He filed a lawsuit against the City and the Fire Chief, alleging that his non-promotion was due to discrimination based on his religious beliefs and practices and also based on his disability.

In that action, the Plaintiff claimed that, but for his employer’s discrimination, he would have been promoted, in the normal course, up through the ranks, with corresponding increases in pay. On December 20, 1995, the jury awarded him \$199,335.15 for religious and handicap discrimination, \$35,000 for emotional distress due to failure to promote, and \$105,000 on the claim of retaliatory conduct.

On September 13, 1996, an incident occurred at work which left the Plaintiff shaken and anxious. Thereafter, he was unable to return to work. The City continued to pay him. On March 20, 1998, the Plaintiff was laid off pursuant to the terms of Section 19.16 of the Rutland City Fire Department Union Contract which provides that the City may lay off an employee after 18 months of inability to work. In the letter notifying

Plaintiff of his lay-off, he was also advised of the additional provision of Section 19.16 of the Union Contract. That section states that if a laid-off employee, within six (6) months after the date of layoff, presents a doctor's certification saying he is able to return to duties at the same level as before the layoff, the employee shall be entitled to fill the next occurring vacancy. In Plaintiff's case, the six months passed without any certification being submitted.

After the lay-off notice, the Plaintiff continued on in "laid-off" status. Ultimately, he opted to seek to retire from his employment, and in January 2004, he met with the pension administrator concerning the date that pension payments would begin. Pension payments began in February 2004.

When the City calculated the Plaintiff's pension amount, it decided that no part of the jury's award should count as income. In the present action, the Plaintiff claims that the City's decision was incorrect and additionally, he claims that the City used the wrong formula in its calculation. The issues before the court have been narrowed to just two, and, there being no dispute as to material facts, both are appropriate for summary judgment. The issues are: (1) whether the jury's award should be considered in determining the "Final Earnings" figure in the pension benefit calculation, and (2) what 'multiplier' should be used in the Basic Formula that is used in that calculation. This second issue is wholly dependent on a determination of whether the Plaintiff's employment ended before or after January 1, 2000, the date on which the 'multiplier' changed from 1.75% to 2.0%

On the first issue, the Plaintiff argues that the \$199,335.15 portion of the jury award was an award to compensate him for the earnings he would have received if he had not been discriminated against. He argues that since the award represented lost income, it should be included in the calculation of his "Final Earnings" (which comprise a key element of the retirement income formula), with the result that he would receive more retirement income than he is currently receiving.

The City maintains that the Plaintiff is not entitled to have the jury award included in the "Final Earnings" calculation. It argues that because the money awarded by the jury was not for personal services actually rendered, the award does not fit within the definition of Compensation found in Section 2.3 of the City of Rutland Police and Fire Retirement Income Plan. That section defines compensation as follows:

Compensation - For purposes of determining the statutory maximum retirement income required by Code section 415 and set forth in Section 7.1 of this Plan, the term "Compensation" means wages, salaries, fees for professional services and other amounts received (whether or not in cash) for personal services actually rendered in the course of employment with the Employer to the extent that these amounts are includible in gross income.

Under the Plan, the amount of an employee's "Final Earnings" depends on the employee's highest average "Rate of Earnings."¹ The City maintains that the jury award does not meet the definition of "Rate of Earnings" found in Section 2.19 of the Plan, and for this reason, too, the award cannot be included in the calculation of the Plaintiff's "Final Earnings." Section 2.19 defines "Rate of Earnings" as follows:

Section 2.19 - Rate of Earnings - the rate of annual basic compensation received from the Employer on the January 1 specified, excluding overtime payments, commissions, bonuses, and any other additional compensation.

The City maintains that the jury award is not "basic compensation received from the employer" and also that the "additional compensation" exclusion prevents the award from being considered.

The City's argument does not sufficiently take into account the facts underlying the verdict of the jury. In the discrimination case, the Plaintiff detailed, in his Exhibit 36, the amounts that he claimed he would have been paid, but for the City's illegal failure to promote him. The jury's award on the discrimination claim matches, exactly, the amount that the Plaintiff claimed, a fact that is undisputed by the City. Under these circumstances, the jury's award of discrimination damages was clearly intended to put the Plaintiff in the position he would have been in if he had not been discriminated against, and this includes, of course, compensating him for lost income.²

The portion of the jury award representing lost income should be counted as income in calculating the Plaintiff's "Rate of Earnings."³ When a party prevails on a claim of employment discrimination and is awarded lost income, he is entitled to the full benefit of that income, including the fruits that the income would have borne in the normal course of employment. To hold otherwise would be to allow the employer continued economic benefit from discriminatory action, contrary to the terms of the judgment in the discrimination suit. The language of the Retirement Income Plan cannot be allowed to dictate a result that conflicts with the result required by the important

¹ Section 2.13 of the Plan defines "Final Earnings" as "the highest average Rate of Earnings on any five consecutive January 1's during the last ten years before Retirement Date, or the date Service ceases, if earlier."

² The City filed an appeal in the earlier case. On page 2 of its unpublished entry order, the Supreme Court characterized the jury award for discrimination as "damages for loss of income and emotional distress for failure to promote." Because the jury clearly designated a separate \$35,000 award as emotional distress damages, the "loss of income" damages referenced by the Supreme Court can only have been the award of \$199,335.15.

³ Exhibit 36 shows that the jury award had several different components. The City initially argued that if the court were to decide that the award must be considered in making the pension calculation, certain components of the award should nevertheless be excluded. Because the parties are now agreed on how the Plaintiff's retirement income will be affected if he prevails in this action, the court deems that argument by the City to have been abandoned.

public policy that underlies the anti-discrimination laws and is a direct and logical consequence of the jury verdict and judgment in the discrimination suit.

Turning now to the 'multiplier' issue, some additional facts are needed.

Section 4.1 of the City of Rutland Police and Fire Retirement Income Plan sets out the basic retirement income formula, as well as the provision that changed the multiplier on January 1, 2000.

Paraphrased for the sake of simplicity and clarity, section 4.1 says that the retirement income formula for a person retiring after January 1, 1995 but before January 1, 2000 is as follows: (1.75%) times (the employee's "Final Earnings") times (the number of years worked, including fractional years).

The same section provides that for people retiring after January 1, 2000, the formula, again paraphrased, is: (2%) times (the employee's "Final Earnings") times (the number of years worked, including fractional years).

The Plaintiff maintains that he retired after January 1, 2000 when the multiplier was 2%. He claims that his employment was never terminated and that he remained employed right up to January 2004, when he began the process of applying for retirement benefits. The City maintains that the Plaintiff's employment ceased when he was laid off in March 1998, when the "multiplier" was 1.75%

The court finds that the latest possible time of termination of Plaintiff's employment was in September 1998, six months after the March 20, 1998 date of lay-off, when Plaintiff was no longer able to come back into the Department at his former level. No formal act of termination was required. It is immaterial that the multiplier was 2% at the time the Plaintiff applied for retirement benefits. An employee is not entitled to increases in pension benefits that become effective after he is no longer employed.

Accordingly, the Plaintiff Raymond Gallipo's motion for summary judgment in the main case is *granted in part and denied in part*, and the court declares the following interests of the parties:

The portion of the jury award representing lost income should be counted as income when determining the Plaintiff's "Rate of Earnings," and the percentage multiplier that should be used, in the Section 4.1 Basic Formula, is 1.75%.

Dated at Rutland, Vermont this 29th day of August, 2008.

Mary Miles Teachout
Superior Court Judge