

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

GREGORY R. SULLIGER,

Plaintiff,

v.

LANE COUNTY, political subdivision of the
State of Oregon,

Defendant.

Case No. 16-00-08839

OPINION AND ORDER RE:
UNJUST ENRICHMENT

THIS MATTER came before the Court on October 4, 2005. David Force appeared on behalf of the plaintiff. David Williams appeared on behalf of the defendant. The Court, having heard evidence and having considered the parties' subsequent written submissions and being fully advised, now rules as follows.

FACTUAL BACKGROUND

Plaintiff is a former employee of defendant. This case arises out of plaintiff's employment with Lane County Mental Health Division (LCMH). From September 3, 1974 to February 3, 1999, plaintiff was employed by defendant as a mental health specialist and commitment investigator. Throughout his employment, plaintiff was covered by the Public Employee Retirement System (PERS).

From about 1979 to 1989, plaintiff, in addition to his paid employment with LCMH, was a volunteer reserve deputy sheriff with Lane County Sheriff's Office. In early 1989, plaintiff made a request to be appointed as a special deputy sheriff instead of a reserve deputy sheriff since the reserve officer program was ending. In February 1989, Sheriff Dave Burks appointed plaintiff to special deputy sheriff status as long as he (1) met all reserve deputy training requirements, including monthly training meetings, firearm qualifications, etc., and (2) complied with any future requirement of the Sheriff Department. Plaintiff's Exhibits 2 and 3. Lane County Mental Health Department Director approved plaintiff to exercise peace officer powers as authorized by

the Lane County Sheriff while performing duties as a commitment investigator for LCMH. Plaintiff's Exhibit 4.

After resigning in February 1999 at age 50, plaintiff sought to retire in April 1999. Plaintiff believed his special deputy status entitled him to retire under PERS as a police officer at age 50. In September of the same year, defendant notified plaintiff that it did not consider him a police officer for purposes of PERS, and refused to process plaintiff's retirement request. In October 1999 and March 2000, PERS, upon plaintiff's request, paid plaintiff the balance of his account as nonretirement distributions.

PROCEDURAL HISTORY

This case involves a claim of unjust enrichment stemming from plaintiff's employment with Lane County's Mental Health Division. Plaintiff contends that defendant was unjustly enriched by receiving plaintiff's services as a special deputy sheriff from March 10, 1989, until his resignation on February 3, 1999, and failing to match plaintiff's accrued pension amount when he retired at age 50.

Plaintiff filed his original complaint in May 2000, alleging that defendant had been unjustly enriched in an amount equal to what he should have received from PERS as Lane County's "retirement match," plus interest, had his retirement been processed as that of a police officer.

In November 2000, this Court abated the proceedings and required plaintiff to apply to PERS to exhaust any available administrative remedy before his legal action proceeded. Plaintiff did, and PERS responded that because plaintiff had withdrawn his account balance, he had lost all of his membership rights in PERS and therefore no administrative remedy was available unless he first reestablished his membership. Plaintiff then filed his amended complaint and defendant moved to dismiss under ORCP 21A(1) and (8). This Court granted the motion to dismiss in an order dated September 7, 2001.

On September 26, 2001, plaintiff sought leave to file a second amended complaint, alleging that in addition to unjust enrichment, he had been wrongfully terminated from his part-time employment with the County for filing a lawsuit. The Court denied plaintiff's motion and issued a judgment of dismissal in this matter on October 12, 2001.

Plaintiff appealed the judgment of dismissal, and on November 5, 2003, the Oregon Court of Appeals issued its opinion, reversing and remanding the case to this Court. On appeal, the Court of Appeals held that plaintiff's amended complaint stated a cause of action because it was "reasonable to infer from [plaintiff's] allegations of fact . . . that he was an employee of the sheriff, that the sheriff classified his duties, and that they were the regular duties of a police officer as contemplated by ORS 238.005(16)(d)." *Sulliger v. Lane County*, 190 Or App 359, 366-67 (2003). Upon remand, plaintiff successfully moved to amend his amended complaint to add a wrongful termination claim to his existing unjust enrichment claim. It is this complaint, the second amended complaint, that is pending before the Court.

ANALYSIS

To succeed on his unjust enrichment claim, plaintiff must show that (1) he was a police officer for the purposes of PERS classifications, (2) by acting in his capacity as a police officer during his employment with Lane County, a benefit was conferred on defendant and defendant was aware of the benefit received, and (3) under the circumstances, it would be unjust to allow defendant to retain the benefit without paying for it. See *Summer Oak Ltd. Part. v. McGinley*, 183 Or App 645, 654 (2002) (citing *Edward D. Jones & Co. v. Mishler*, 161 Or App 544, 570 (1999); *Jaqua v. Nike, Inc.*, 125 Or App 294, 298 (1993)).

1. “Police Officer” for Purposes of PERS Classification

Under ORS 238.005(16)(d), “police officer” for the purposes of PERS classification is defined as “[s]heriffs and those deputy sheriffs or other employees of a sheriff whose duties, as classified by the sheriff, are the regular duties of police officers” Therefore, to qualify as a police officer, plaintiff must meet two requirements. First, he must fall within one of the enumerated categories of “sheriff and those deputy sheriffs or other employees of a sheriff.” Second, plaintiff’s duties must be “[those] classified by the sheriff, [and] the regular duties of police officers.”

Plaintiff clearly is not a “sheriff” within the meaning ORS 238.005(16)(d), however, the Court must determine whether as alleged, his “special deputy sheriff” status makes him a “deputy sheriff or other employee[s] of the sheriff” within the meaning of the statute. This question turns on the meaning of “deputy sheriff” and “other employees of the sheriff,” and whether the legislature intended for the purposes of ORS 238.005(16)(d) for police officers to be employees of the sheriff or whether deputy sheriffs could be commissioned by the sheriff but *employed* by another county division or department.

Statutory construction presents a question of law. *Wyatt v. Body Imaging, P.C.* 163 Or App 526, 530 (1999). In interpreting the statute, a court’s task is to discern the legislature’s intent by considering the text and context of the statute. *Deschutes County Sheriff’s Assoc. v Deschutes County*, 169 Or App 445, 453 (2000) (citing *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 317 Or 606, 610 (1993)). The text should be given its plain, natural and ordinary meaning whereas context may include other provisions of the same or related statutes as well as prior enactments and judicial interpretations of such statutes. *Id.* Legislative history is considered only if the legislature’s intent is not clearly expressed in the text and context of the statute. *Id.*

Plaintiff argues that his special deputy sheriff status makes him a “deputy sheriff” within the meaning of ORS 238.005(16)(d). He argues that the statutory requirement of employment by the sheriff applies only to “other employee,” meaning employees of the sheriff who are not deputies. Defendant argues that plaintiff’s reading of the statute would deprive the word “other” of any purpose or function, and such a reading leads to an unreasonable result.

When construing a statute, a court is “not to insert what has been omitted, or to omit what has

been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effective to all.” ORS 174.010. Accordingly, meaning must be given to the “and” and “or” of ORS 238.005(16)(d) to determine the consequence of “other employee of the sheriff.” “And” and “or” are conjunctions used as function words “to indicate that two words or expressions are to be taken together or individually.” *Webster’s Ninth New Collegiate Dictionary* (9th ed. 1991). “And” is a word to indicate “connection or addition especially of items within the same class or type; used to join sentence elements of the same grammatical rank or function” *Id.* “Or” is used as a “function word to indicate an alternative, the equivalent or substitute character of two words or phrases” *Id.*

After examining the plain meaning, this Court finds that the “and” joining “sheriff and those deputies” delineates two classes of police officers for the purposes of ORS 238.005(16)(d). The “or” further delineates the second class of police officers, indicating an alternative to being a deputy sheriff. To give meaning to all the words in the statute, the “other” refers to employees other than those who are employed by the sheriff as deputies. Thus, the two categories are (1) sheriffs, and (2) deputy sheriffs or other employees of the sheriff.

Therefore, in order to qualify as a police officer under ORS 238.005(16)(d) for PERS retirement, plaintiff must be an employee of the sheriff. Here, plaintiff was a commissioned special deputy of Lane County Sheriff’s Office and carried a badge representing such. Plaintiff’s Exhibit 5. Furthermore, defendant recognized plaintiff’s special deputy status in plaintiff’s 1990 performance evaluation:

[h]e continues as a Special Deputy with the Sheriff’s Department, which enables him to assume peace officer powers when the situation calls for it. This has been very beneficial to Emergency Services in a number of instances, and certainly affords us additional credibility with police agencies.

Plaintiff’s Exhibit 6. In his duties as a mental health investigator and commitment investigator, plaintiff performed peace officer functions such as arresting and confining person on both criminal charges and director’s holds of dangerous mentally ill persons pursuant to ORS Chapter 426. In such capacity, plaintiff carried a badge, handcuffs, mace, and a handgun, all issued by Lane County Sheriff’s Office. Plaintiff’s Exhibit 5. In addition, Lane County Sheriff’s Office gave plaintiff access to the AIRS and LEDS computer systems at the Lane County Mental Health offices, which were for his exclusive use since no other mental health investigators or commitment investigators were special deputy sheriffs.

Although plaintiff performed some duties of a police offer, this does not mean that he was an employee of the sheriff. In general, an “employee” is “one employed by another usually for wages or salary and in a position below the executive level.” *Webster’s Ninth New Collegiate Dictionary* (9th ed. 1991). Lane County classified plaintiff as a mental health specialist and paid plaintiff at that classification. There is no evidence that plaintiff was paid a salary out of the Sheriff’s Office budget or that Sheriff’s Office supervised plaintiff’s work. Just because plaintiff was a county employee does not mean that he also was an employee of the sheriff.

Plaintiff was an employee of Lane County's Health and Human Services Department and not an employee of the Sheriff's Office. Therefore, since the Court determines that to be a police officer for purposes of PERS under ORS 238.005(16)(d) an individual must be an employee of the Sheriff's Office, and because plaintiff was not an employee of the sheriff, plaintiff was not a police officer for the purposes of PERS classification at the time of his retirement request.

Consequently, he does not satisfy the first requirement for ORS 238.005(16)(d) PERS police officer classification. It is unnecessary then for the Court to reach the issue of whether plaintiff could meet ORS 238.005(16)(d)'s second requirement that his duties were those "classified by the sheriff, [and] the regular duties of police officers," although it is apparent on the record that the plaintiff would not meet the second requirement either.

2. Conferred Benefit and Awareness of Benefit Received

Plaintiff alleges that defendant significantly benefitted from plaintiff's service as a special deputy sheriff performing police duties while also acting as a mental health specialist and commitment investigator. Plaintiff seeks \$240,093.82 in restitution. This amount is based on defendant's PERS contribution, and plaintiff seeks this amount in damages apparently on the theory that if plaintiff had been allowed to retire as a police officer for purposes of ORS 238.005(16)(d), defendant would have been required to match this amount.

The Court, however, does not need to determine the form of the benefit and whether it was conferred because plaintiff fails the "employee of the sheriff" requirement and would fail the "duties" requirement as discussed above. Even if plaintiff had met the employment requirement, he failed to produce evidence demonstrating the actual value of the benefit allegedly conferred on defendant. Without such evidence, calculating restitution is impossible. The evidence was speculative at best to show that the benefit conferred on defendant was an amount equal to plaintiff's employee contribution.

3. Unjust Retention of Benefit

Like conferred benefit, the Court does not need to determine whether defendant retained a benefit and whether such retention was unjust because plaintiff was not a police officer for purposes of ORS 238.005(16)(d).

CONCLUSION

Plaintiff is not a police officer within the meaning of ORS 238.005(16)(d) thus his unjust enrichment claim fails.

IT IS HEREBY ORDERED that plaintiff's claim for unjust enrichment is dismissed with prejudice and with costs to the prevailing party, Lane County.

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IT IS FURTHER ORDERED that Mr. Williams shall prepare the judgment incorporating this opinion and order by reference.

DATED this _____ day of December, 2005.

Karsten H. Rasmussen
Circuit Court Judge

Prepared by EAlbrich