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**9th Circ. Partially Revives Orange County Retiree Benefits Suit**

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Law360 (September 5, 2018, 10:03 PM EDT) -- The Ninth Circuit on Wednesday revived a class of Orange County retirees’ claims that the municipality wrongly reduced a health care benefit that had been promised to them for life, but it affirmed the dismissal of the retirees’ Fair Employment and Housing Act discrimination claims regarding a separate benefit.

The three-judge panel said in its published opinion that the retirees adequately claimed that they had an implied contract with the county that provided them the right to a monthly grant for health care costs during their lifetime. However, the panel rejected their claims that the county’s system for charging active employees and retirees different premiums for their health care flouted the FEHA, in what the panel said was a first of its kind ruling.

The panel referred to the two benefits in question as the grant benefit and the retiree premium subsidy. The grant benefit was established in 1993 through negotiations between the county and its union-represented employees, and it provided through 2007 a monthly grant to retirees to help with premiums, according to the opinion.

The retiree premium subsidy referred to the county’s decision in 1985 to combine active and retired employees into a single pool, which lowered the premiums for  retired employees and raised the premiums for active employees, the opinion said.

But in 2004, the county began negotiating with the unions representing its employees to restructure the benefits, and in 2006, they agreed to split the active and retired employees into two separate pools and reduce the grant benefit, according to the opinion. Gaylan Harris, on behalf of thousands of Orange County retirees, sued the county in January 2009, alleging that the benefit reductions were a contractual breach and that the elimination of the retiree premium subsidy violated FEHA, the opinion said.

In 2011, the county was granted judgment on the pleadings on the class’ grant benefit claims after the lower court ruled that no “explicit legislative or statutory authority” was identified that required the county to vest the benefit for life, according to the opinion. But the Ninth Circuit revived the claim, finding that the retirees should have been given a chance to amend their pleadings in light of the [California Supreme Court](https://www.law360.com/agencies/california-supreme-court)’s response to a question that was certified in a separate suit over the same benefit reductions, the opinion said. In its answer, the high court held that an implied contract could confer on retirees health care benefits that were vested for life, according to the opinion.

The retirees amended their claims twice, but the district court tossed them both times, and once a final judgment was entered in favor of Orange County, the retirees appealed, according to the opinion. On Wednesday, the Ninth Circuit panel agreed with the retirees that the district court had been wrong to nix the claims over the grant benefit.

The panel said that the retirees’ allegations regarding the monthly grant were sufficient based on the framework created in the Ninth Circuit’s 2013 ruling in[Sonoma County Association of Retired Employees v. Sonoma County](https://advance.lexis.com/api/search?q=2013%20U.S.%20App.%20LEXIS%203856&qlang=bool&origination=law360&internalOrigination=article_id%3D1080042%3Bcitation%3D2013%20U.S.%20App.%20LEXIS%203856&originationDetail=headline%3D9th%20Circ.%20Partially%20Revives%20Orange%20County%20Retiree%20Benefits%20Suit&). The decision clarified that once a plaintiff established that there was an express contract that covered the substance of a benefit, the plaintiff could use extrinsic evidence to show there was an implied contract that required the benefit be continued into perpetuity, the panel said.

The retirees did just that in their revised pleadings, the panel found, noting that they pointed to the establishment of a long-term funding mechanism for the monthly grant benefit and the requirement that active employees contribute 1% of their wages towards the benefit. The pleadings for their grant benefit claims were enough to survive at the motion to dismiss stage, the panel said.

However, the panel agreed with the lower court that the retirees’ FEHA claims had to be tossed. The panel ruled that though the Age Discrimination in Employment Act covered retirees — an issue the circuit had yet to weigh in on — and that FEHA, consequently, covered changes in their benefits, the county had the right to consider the retirees as a group separate from the active employees and to make cost determinations based on the age demographics of that group.

The county didn’t discriminate based on age within the group of active employees or within the group of retirees, the panel noted. The panel also found that the retirees had no contractual right to continue receiving the retiree premium subsidy.

Art Hartinger of the Renne Public Law Group, lead counsel for Orange County, told Law360 in a statement Wednesday that the county was pleased that the court affirmed the dismissal of some of the claims.

“This case was submitted at the Ninth Circuit after oral argument over 4½ years ago, and the county is anxious to have the uncertainty looming over its retiree medical program resolved,” he said. “This decision is an important step in that direction.”

Hartinger also expressed confidence in succeeding on the surviving claim.

“The Ninth Circuit declined to dismiss one claim based solely on the pleadings, but we are confident the evidence will show that that the county acted lawfully and appropriately to strengthen its retiree medical program, and that the county will ultimately prevail,” he said.

Michael P. Brown of [Gordon Tilden Thomas & Cordell LLP](https://www.law360.com/firms/gordon-tilden), counsel for the retirees, told Law360 in a statement Wednesday that they were also happy with part of the decision.

“We are very pleased that the court ruled in our favor on one of our two claims and that we will be permitted to proceed with our case in the trial court, to seek reinstatement of a critically important retirement health benefit that was unlawfully terminated in 2007,” he said. “We are disappointed with the court’s ruling on our age discrimination claim and are evaluating our options with respect to that aspect of the decision.”

Circuit Judges Marsha S. Berzon and Johnnie B. Rawlinson and 10th Circuit Judge Michael R. Murphy sat on the panel for the Ninth Circuit.

The retirees are represented by Michael P. Brown of Gordon Tilden Thomas & Cordell LLP.

The county is represented by Art Hartinger and Jennifer L. Nock of the Renne Public Law Group LLP.

The case is Harris v. County of Orange, case number [13-56061](https://www.law360.com/cases/5221c94c8d2d0964e400a751), in the U.S. Court of Appeals for the Ninth Circuit.