

No. S226779

SUPREME COURT
FILED

JUL -1 2015

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Frank A. McGuire Clerk

Deputy



FRANK FLETHEZ,
Plaintiff and Respondent,

v.

SAN BERNARDINO COUNTY EMPLOYEES
RETIREMENT ASSOCIATION,
Defendant and Appellant.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One
Case No. D066959

**REPLY IN SUPPORT OF PETITION FOR
REVIEW**

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SUPREME COURT OF THE STATE OF CALIFORNIA

FRANK FLETHEZ,)	No. S226779
)	
Plaintiff and Respondent,)	
)	
vs.)	
)	
SAN BERNARDINO COUNTY)	
EMPLOYEES RETIREMENT)	
ASSOCIATION,)	[San Bernardino Co.
)	Super. Ct No. CIVDS
Defendant and Appellant.)	1212542; 4th Civil No.
)	D066959]

A MUTATING QUESTION

The Question of Retroactive Benefits

This action originally asked a mundane question: when did Plaintiff Flethez' disability retirement become effective?¹ SBCERA answered the question by declaring that the effective date of the pension was the date of

¹ The short forms utilized in the Petition for Review other than initial case citations are also used herein.

Plaintiff Flethez' initial application therefor, 12 June 2008. (See Slip Op. at 3.) Unwilling to accept that answer, Plaintiff Flethez demanded and was afforded a formal administrative hearing in which he challenged it without success. (See id.) Plaintiff Flethez then took his challenge to the Superior Court, which found that the "deemer" clause of section 31724 of the Government Code² was applicable and that therefore the commencement of benefits should be retroactive to the date after the last day that he received regular compensation, 15 July 2000. (See id. at 3-4.)

The Question of Interest: Vesting

The question then became whether the award of retroactive - retirement benefits carries with it prejudgment interest on all retroactive payments pursuant to section 3287(a) of the Civil Code. The Superior Court answered this question affirmatively, but the Court of Appeal answered it negatively.

According to the Court of Appeal, a retiring county employee is

² That clause, contained in the last sentence of the statute, provides that if the board of retirement finds that a retiring employee's application "was delayed by administrative oversight or by inability to ascertain the permanency of [his or her] incapacity until after the date following the day for which the [employee] last received regular compensation, such date will be deemed the date the application was filed".

entitled to recover interest on a court award of retirement benefits from the day that his or her right to those benefits vests. (See Slip Op. at 13-14.)

The Court of Appeal further asserts that vesting occurs, not on the retroactive date when benefits commence, but instead on the much later date when the employee establishes his or her entitlement to such retroactive benefits. (See id. at 14.) Under this theory, until such time as a retiring [employee] has filed an application for disability retirement benefits and has proven his or her entitlement thereto, the right to receive such benefits has not vested, and therefore no prejudgment interest should accrue on any retroactive benefits attributable to the time period before that application and proof were presented. (See id. at 15.)

But this contention grossly misstates the law. Section 3287(a) requires vesting ““only in order to fix with sufficient certainty the time the obligation accrues so that interest should not be awarded before it is due””. Austin v. Bd. of Ret., 209 Cal. App. 3d 1528, 1533, 209 Cal. Rptr. 3d 106, 109 (1989) (quoting Mass v. Bd. of Educ., 61 Cal. 2d 612, 626, 394 P.2d 579, 588, 39 Cal. Rptr. 739, 748 (1964)).

“Each salary payment in [Mass] accrued on a date certain. Unless the suspension itself [could] be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If [the] plaintiff had not been wrongfully suspended, he would have obtained the benefits of the moneys paid as of those dates; he

has thus lost the natural growth and productivity of the withheld salary in the form of interest.”

Id. (quoting Mass, 61 Cal. 2d at 1533-34, 394 P.2d at 588, 39 Cal. Rptr. at 748).

Thus, the question posed by this action becomes: what is the meaning of vesting. Plaintiff Flethez and the Court of Appeal have irreconcilably contradictory views as to the correct answer to that question. Along with the inherent importance of the issue, this conflict demands resolution by this Court.

The Question of Interest: Wrongful Withholding

While nodding to the Court of Appeal, (see Answer to Pet. for Review at 5 [hereinafter Answer]), SBCERA redirects the question from vesting to wrongful withholding. According to SBCERA, the failure of the board of retirement to award disability retirement benefits “will not give rise to an award of prejudgment interest unless and until the [board] has rendered an erroneous decision denying the benefit, after the applicant has established a right to receive the benefits sought”. (Id. at 1.) In the view of SBCERA, section 3287(a) ““is designed to compensate for the lengthy delay resulting from the mandamus action made necessary to indicate the claimant’s rights following the Board’s wrongful denial of benefits””, and

only that delay. (Answer at 1-2 (quoting Weber v. Bd. of Ret., 62 Cal. App. 4th 1440, 1449-50, 73 Cal. Rptr. 769, 775 (1998) (all emphasis omitted).)

But SBCERA's theory fails to recognize the central role of retroactivity in the operation of section 31724 that renders the lump sum retroactive payment received by a successful claimant subject to interest pursuant to section 3287(a). If an employee proves that he is permanently incapacitated physically or mentally for the performance of his or her duties, the board of retirement is commanded to retire him or her "effective as of the date [his or her] application for disability retirement is filed with the board". § 31724. Moreover, if an employee can prove that his or her "application was delayed . . . by inability to ascertain the permanency of [his or her] incapacity until after the date following the day for which [he or she] last received regular compensation", that date is deemed to be the date the application was filed. Id. (final sentence); see Piscioneri v. City of Ontario, 95 Cal. App. 4th 1039, 1044, 116 Cal. Rptr. 2d 38, 43 (2002) ("[D]isability is often of uncertain duration. If the employee is able to prove that he or she has been continually disabled from the date of discontinuance of . . . service to the time of the application for disability retirement, his [or her] application is timely . . .").

In either case, if the employee prevails, the effective date of his or her retirement benefits (pension) is earlier than the date that the board ruled in his or her favor. Consequently, after so ruling, the [b]oard “must then make a lump-sum payment to bring payments current”. Weber, 62 Cal. App. 4th at 1450, 73 Cal. Rptr. 2d at 775. The employee “is retired[,] and his or her right to the benefits vests as of the date [or the deemed date] of application for those benefits”. Id. The statutory scheme thus “provides that once the eligibility determination is made, the right to benefits vests immediately, **effective retroactively**”. Id. at 1451, 73 Cal. Rptr. 2d at 776 (emphasis added). To repeat, “the right to [the pension] benefit vests automatically; **retroactive** to the date the [employee] applied for benefits”. Id. (emphasis added)

But “[t]hat the payment is retroactive does not mean that the [b]oard wrongfully denied benefits for that period”. Id. at 1450, 73 Cal. Rptr. 2d at 775. Until the board finally rules against the applicant and forces him or her to resort to the Superior Court, the board is simply doing its job. See AFL-CIO v. Unempl. Ins. Appeals Bd., 23 Cal. 4th 1017, 1037, 920 P.2d 1314, 1326, 56 Cal. Rptr. 2d 109, 121 (1996) (stating that until the agency erroneously determines that an applicant is ineligible for benefits, thus requiring him or her to seek review by way of administrative mandamus in

the Superior Court, “no wrongful withholding of benefits attributable to the administrative process occurs”); see also id. at 1034, 920 P.2d at 1324, 56 Cal. Rptr. 2d at 119 (stating that interest may not be awarded “merely because at some point in the administrative process someone made an error that the administrative agency . . . itself corrected”). “Where the [b]oard or administrative law judge rules in favor of the [employee], there is no *withholding* of benefits such as would justify judicial action giving rise to ‘damages.’” Weber, 62 Cal. App. 4th at 1451, 73 Cal. Rptr. 2d at 776 (emphasis in the original).

However, when the employee prevails in a mandamus action and the board is reversed, the right to prejudgment interest comes to the fore. “[S]ection 3287(a) allows trial courts, as opposed to administrative law judges, to award prejudgment interest following a successful administrative mandamus action to recover wrongfully withheld benefits.” Weber, 62 Cal. App. 4th at 1446, 73 Cal. Rptr. 2d at 772. Thus, that the trial court may award prejudgment interest on the retirement benefits wrongfully denied by the board “is settled law”. Id. at 1445, 73 Cal. Rptr. 2d at 772.

The prejudgment interest award extends not just to the benefits that accrue after the board’s final ruling and while the mandamus action is in progress, as SBCERA asserts, but instead from the date that section 31724

declares the pension to be effective, either the actual date of the application for disability retirement or the deemed date. “Interest is recoverable on each . . . pension payment from the date it fell due.” Austin, 209 Cal. App. 3d at 1532, 258 Cal. Rptr. at 107 (quoting Olson v. Cory, 35 Cal. 3d 390, 402, 673 P.2d 720, 728, 197 Cal. Rptr. 843, 851 (1983)). “[N]othing in the statutory scheme governing disability pension benefit[s] suggest[s] a legislative intent to preclude recovery of interest on damages awarded as prejudgment interest from the date such benefits become due.”³ Weber, 62 Cal. App. 4th at 1449 n.4, 73 Cal. Rptr. 2d at 775 n.4.

That arrangement is entirely as it should be. “The requirement that the right to a [pension] benefit allowance commences retroactively to the date of application assures that the [employee] receives the full amount of his or her benefit coverage.” Id. at 1448, 73 Cal. Rptr. 2d at 774. “The same public policy that favors the award of retroactive benefits would appear to favor the award of prejudgment interest on such benefits.” Tripp v. Swoap, 17 Cal. 3d 671, 683, 552 P.2d 749, 758, 131 Cal. Rptr. 789, 798 (1970). The hooves go with the hide.

³ SBCERA’s theory was rejected out of hand in Mass, see 61 Cal. 2d at 625, 394 P.2d at 587-88, 39 Cal. Rptr. at 747-48 and then again in Austin, see 209 Cal. App. 3d at 1533-34, 258 Cal. Rptr. at 109, but yet it has returned to bedevil the law once more. Plaintiff Flethez respectfully requests that this Court drive a stake through the heart of this heresy.

Thus, the question posed by this action now becomes: what is the meaning of wrongful withholding when the award of benefits is by statutory fiat effective immediately and retroactively. Plaintiff Flethez and SBCERA have sharply conflicting views on the correct answer to this question. That conflict coupled with the importance of the answer demand that it be resolved by this Court.

The Upshot

As the end of the day, the principles and precedents enunciated by this Court mandate that the interest award granted by the Superior Court pursuant to section 3287(a) of the Civil Code on all retroactive pension payments be affirmed. For the reasons adumbrated herein, the disability retirement benefits owed to Plaintiff Flethez had vested and were wrongfully withheld, and the award of prejudgment interest on each benefit payment as it accrued was proper.

But beyond the merits, the competing arguments of the parties and of the Court of Appeal speak volumes concerning the need for review. Each argument poses a different question. Plaintiff Flethez asks whether the retroactive effective date of a disability retirement entitles the employee to retroactive prejudgment interest as the payments accrue and answers in the

affirmative. The Court of Appeal asks whether the right to the retroactive payments has vested and answers in the negative. SBCERA asks whether the retroactive payments have been wrongfully withheld and also answers in the negative.

These disparate views of the interaction of section 3287(a) of the Civil Code and section 31724 of the Government Code reveal a conceptual uncertainty that has generated an undeniable conflict in the caselaw. (See Pet. for Review at 2-6.) Consequently, this Court should grant the petition and resolve the significant questions presented by the operation of these two statutes with regard to the award of prejudgment interest on retroactive disability retirement awards.

Dated: 29 June 2015

Respectfully submitted,

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By: 
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CERTIFICATE OF COMPLIANCE

WITH APPELLATE RULES 8.204(b)(2)(3)(4)

Plaintiff-Respondent Frank Flethez certifies that his brief is in a proportionately spaced type face (Times New Roman) of 13 point, that it is double spaced, and that it contains 2,094 words.

Dated: 29 June 2015

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 404 Enclave Circle #208, Costa Mesa, CA 92626

That on June 29, 2015, I served the foregoing document described as: **REPLY IN SUPPORT OF PETITION FOR REVIEW** on all interested parties as follows:

(X) by placing () the original (X) a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE

(X) **(BY MAIL)** I deposited such envelope(s) in the mail at 3101 W. Sunflower Ave., Santa Ana, CA 92799.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. The envelope was mailed with postage thereon fully prepaid. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing as stated in the Declaration.

Executed on June 29, 2015 at Costa Mesa, California.

I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.


Diane Castillo

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