

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-416

MAR 5 2009

MARCH TERM, 2009

Raymond F. Gallipo

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APPEALED FROM:

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v.

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Rutland Superior Court

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City of Rutland and VLCT PACIF

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DOCKET NO. 1-1-07 Rdcv

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Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

The City of Rutland appeals from a summary judgment of the Rutland Superior Court in favor of plaintiff Raymond F. Gallipo. The City contends the court erred in ruling that a portion of an earlier damage award to plaintiff must be included as income in calculating his pension benefits. We affirm.

This is the latest in a series of appeals to this Court resulting from an employment dispute between the parties. Plaintiff's claim for employment discrimination ultimately resulted in a jury verdict in his favor, which included an award of \$199,335.15 for lost income.* Plaintiff subsequently returned to work, became involved in another employment dispute, and left work for good in 1996, although he remained on "laid-off" status for some period thereafter. Plaintiff decided to formally retire several years later, and pension payments began in February 2004. In calculating plaintiff's pension benefits, however, the City excluded the jury award for lost income. Plaintiff, in response, filed this lawsuit seeking a declaratory judgment that he was entitled to be credited for the damage award in his determining his pension benefit. The trial court agreed, and entered summary judgment in his favor. This appeal followed.

The City contends the court's ruling violates the terms of the City's retirement income plan. Under that plan, an employee's pension benefit is determined from the employee's average "rate of earning" over the last several years of employment, which is defined as "basic compensation . . . excluding overtime payments, commissions, bonuses, and any other additional compensation." The City argues that the jury award for lost wages falls in the excluded category of "additional compensation." In addition, the City notes that "compensation" is specifically defined in the plan as meaning "wages, salaries, fees for professional services and other amounts received (whether or not in cash) for personal services actually rendered in the course of

* The trial court here found that the award exactly matched the amount in lost wages that plaintiff claimed he would have been paid but for the City's illegal failure to promote him, and the City has not disputed this finding

employment.” The City asserts that the award for lost wages was not the result of “services actually rendered.”

The trial court was unpersuaded by the City’s argument, and we are similarly unmoved. Although the jury award for lost wages could be construed to fall within the literal scope of “additional compensation” or payment for services not “actually rendered,” there is no evidence that the drafters of the retirement plan ever actually considered the category of income derived from a jury award, an undeniably unusual circumstance, and it is well settled that “pension plans are construed liberally in favor of the employee.” Viles v. Vt. State Colleges, 168 Vt. 459, 462 n.1 (1998). Furthermore, as the trial court properly observed, a plaintiff who receives a jury award for lost income resulting from employment discrimination “is entitled to the full benefit of that income, including the fruits that the income would have borne in the normal course of employment,” including pension benefits. “To hold otherwise,” the court explained, “would be to allow the employer continued economic benefit from discriminatory action,” contrary to the purpose of the judgment in the discrimination action and the important public policies underlying the anti-discrimination laws. See Campbell v. City of Omaha Police & Fire Ret. Sys. Bd. of Trustees, 682 N.W.2d 259, 264 (Neb. 2004) (holding that former police officer’s disability pension must include payments from settlement agreement resolving complaint for discrimination and retaliatory action since it was “clear from the terms of the settlement agreement that its purpose was to put [the officer] in the position he would have been in had the city lawfully promoted him”). Accordingly, we discern no basis to disturb the court’s ruling.

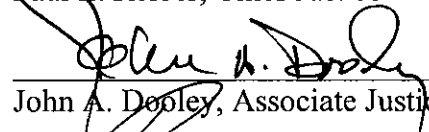
Assuming that the court correctly included the jury award within the pension calculation, the City further contends that only a portion of the award should have been included. The award was apparently broken down into “back pay” (\$73,169.74) and “future pay” (\$126,165.41) for the amount that plaintiff would have earned from the date of the verdict in December 1995 to plaintiff’s normal retirement date in early 2004. The City argues that the pension calculation should include only that portion of the future-pay award up to plaintiff’s termination from employment in September 1998. This specific argument was not raised below with sufficient clarity or specificity to allow the trial court to address it, and therefore was not preserved for review on appeal. In re Cent. Vt. Pub. Serv. Corp., 2006 VT 70, ¶ 12 (mem.).

Affirmed.

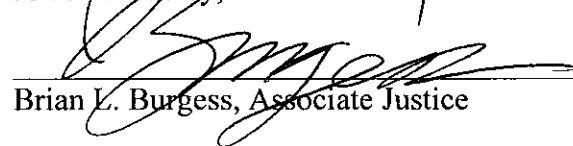
BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Brian L. Burgess, Associate Justice