Daniel R. Murphy
Presiding Judge

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CIRCUIT COURT OF THE STATE OF OREGON
TWENTY THIRD JUDICIAL DISTRICT
LINN COUNTY

December 8, 2016

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SENT BY EMAIL ONLY

Name of Case:	Linn County, Douglas County, Jefferson County, Malheur County, Morrow County, Polk County, Sherman County, Yamhill County vs. Kate Brown as Governor, Brad Avakian as Commissioner of Oregon Bureau of Labor and Industries
Case Number(s):	16CV17209
Attorney for Plaintiffs:	Nathan R. Rietmann – Nathan@rietmannlaw.com
Attorney for Defendants:	
For Brad Avakian	Sarah Weston – Weston@doj.state.or.us
For Kate Brown	Carla Scott – Carla.a.scott@doj.state.or.us
Filed Date:	05.27.16
Case Management Deadline:	06.27.17
Discovery Deadline (120 days)	09.27.16 – extended to 12.26.16 (on 09.01.16)
Pre trial resolution (90 days)	12.27.16 / extended to 04.27.17
Trial stage (180 days)	06.27.17 / extended to 10.27.17

Dear Counsel:

This matter came before the court for arguments on motions for summary judgment on November 23, 2016. After argument the court took the matter under advisement.

Background

Plaintiffs, all counties in Oregon, filed a complaint on 05.27.16 seeking declaratory relief pursuant to ORS 28.010 et seq. to determine whether or not plaintiffs must comply with Oregon's paid sick leave law (Oregon Laws 2015, Chapter 537) in light of the provision in the Oregon Constitution (Article XI §15) prohibiting the state from imposing a fiscal program obligation on counties without funding it. Defendants (Governor Brown and Commissioner of the Oregon Bureau of Labor and Industries, Brad Avakian) filed an Answer and Affirmative Defense on 06.27.16.

A motion for summary judgment is to be granted where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ORCP 47C. The moving party has the burden to showing this. *Seeborg v. General Motors Corp*., 284 Or 695, 699 (1978). As a result of the 1995 amendments to ORCP 47C and the decision in *Jones v. General Motors Corp*., 325 Or 404 (1997) the court must find that no objectively reasonable juror could return a verdict for the adverse party before a summary judgment is granted.

On 08.22.16 Defendants Filed Motion for Summary Judgment

Defendants argue that the paid sick leave provided by employers in exchange for services provided by employees does not constitute an unfunded program under Article XI, Section 15 of the Oregon Constitution.

In 2015 the Oregon Legislature adopted SB 454 (Oregon Laws 2015, Ch 537) called the Paid Sick Leave Law. It requires certain employers to provide up to 40 hours of paid sick leave per year. The law went into effect on January 1, 2016 with a provision for civil penalties for non-compliance after January 1, 2017. The law applies to Oregon counties.

The complaint seeks declaratory relief exempting counties from this law because it violates Article XI, Section 15 of the Oregon Constitution, a provision prohibiting unfunded *programs*.

The state argues that the sick leave law does not constitute a "program" as that term is used in the constitutional provision. The constitutional provision was adopted by the voters through Ballot Measure 30 on referral from the Legislature.

The plaintiff cites an Attorney General Opinion which found that the benefits under PERS fell within the definition of Section 15.

On 09.14.16 Plaintiffs Filed Cross Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment

Plaintiffs seek a ruling from this court that Oregon's Mandatory Sick Leave Law is an unfunded mandate in violation of Article XI §15 of the Oregon Constitution and then to enjoin defendants from requiring plaintiffs to comply with it unless the Legislature funds it. Plaintiffs claim that the sick leave requirements impose significant administrative costs on them including a "new and separate layer of record keeping, separate annual data input, separate personnel rule changes and employee notification, and a higher volume of tracking employee's' sick leave time…". Dec. Tim Freeman ¶15. Plaintiffs also claim a significant cost to them for training related to the provision.

Plaintiffs note that the Legislature was well aware that this provision would bring additional administrative cost such that they appropriated "$1.4 million to the Oregon Health Authority, Department of Human Services, and the Bureau of Labor and Industries "which may be expended for carrying out the provisions of [the Mandatory Sick Leave Law]. SB 454 §§19-21", Plaintiff's Motion for Summary Judgment, page 10.

Plaintiffs also note that the Legislative Fiscal Office prepared a "fiscal impact statement" indicating that the provision may affect local governments' services levels or shared revenues and trigger Section 15, Article XI of the Oregon Constitution. Dec. Emily Rietmann, Ex 4, 74; Plaintiff's Motion for Summary Judgment, page 11.

Plaintiffs argue that Article XI §15 (hereinafter §15) provides as follows:

> "[W]hen the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity."

They further cite the provision under §15 that allows a local government not to comply with a requirement imposed in violation of the provision.

Because the fundamental issues are the same in both motions the court will address them by issue rather than by motion--

Textual Analysis of the Mandatory Sick Leave Law in light of §15

The plaintiff frames the inquiry here in two ways:

1. Whether Oregon's Mandatory Sick Leave Law is a *program* within the meaning of §15; and

2. Whether Oregon's Mandatory Sick Leave Law requires plaintiffs to spend more than one-hundredth of one-percent of their annual budget (a threshold requirement).

Plaintiffs argue that the court must examine the text, context and legislative history of both §15 and the Oregon Mandatory Sick Leave Law to determine whether the latter is a *program*. Plaintiff cites *State v. Reinke*, 354 Or 98, 106 (2013, *adh'd to as modified on reconsideration,* 354 Or. 570 (2013). *Reinke* was a criminal case where the issue was about sentencing enhancement. The Court said that they interpret a constitutional provision the same way they interpret a statute: "we look to the text, context, and legislative history of the amendment to determine the intent of the voters…". *Reinke* at 106.

Plaintiff also notes that in *State v. Sagdal*, 356 Or 639, 642 (2015) the "purpose of this analysis is not to freeze the meaning of the state constitution on the date when the relevant provision was adopted but, rather, to identify relevant underlying principles that may inform our application of the constitutional text to modern circumstances." Page 642. The plaintiff argues that this court must apply this level of analysis to both §15 and the Sick Leave law whereas they argue that defendants only seek its application to the Constitutional provision.

This court agrees that the full analysis should apply to both laws in order to fully understand to what extent each law affects the other or to what extent execution of one law is limited by the other.

The key question is whether or not the Oregon Sick Leave Law is a *program* as defined by §15. If it is a *program* than §15 applies. If it is not a *program* than it does not apply.

Program as Defined by §15, Article XI, Oregon Constitution

Section 15 defines program as follows: 2 (c) "Program" means a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally.

The court must disregard the use of the term program in defining program since it is of no help. The focus must be on the criteria provided in Section 15(2)(c): "which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally".

Section 15 also provides that the provision must either be enacted by the Legislature or promulgated by a state agency – there is no controversy on this issue here – the Oregon Sick Leave law was clearly a legislative enactment. (The court also agrees with plaintiff regarding the common definitions for "program" and "project" cited on page 15 of their motion).

It is also without doubt that the Oregon Sick Leave law creates a mandate on local governments by requiring them to adhere to the law.

Thus we must return to the definition of program. Plaintiff begins by citing *Merriam Webster Unabridged* for the definition of program. This court is not sure that we need to

even go there in that the criteria for program in §15 appears clear and unambiguous. However, should an appellate court find that resort to a dictionary definition is useful or even required in this analysis this court finds the *Merriam* definition instructive. The four definitions listed at page 17 of the motion all clearly apply to this law. It is done for the benefit of another (employees) at the command of another (the Legislature); it is an action that furthers an end or purpose (providing time off for employees for health related problems); it directs local governments (as employers) to administer its provisions; and it is an effort inspired by philanthropic motives or to improve human welfare.

Plaintiff further analyzes other terms in their motion including the word service, however this court does not see any need to discuss that further, both because if the term program is applicable, which it is, this court need not go further, and, the court finds the discussion on the other term to be correct in any event. The court finds plaintiff's arguments on the definition of service and how that affects program to be correct. Defendant relies on the definition of service in Article XI §15(2)(a) as part of an enterprise activity. Plaintiff argues that an enterprise activity is but one of a number of forms of services or programs to which the unfunded provisions of §15 apply. The court agrees. There is nothing in (2)(a) that suggests it fully limits the definition for all purposes.

Defendants argue that sick leave is not a program. They also make arguments based on the text, context and legislative history of §15. They focus as well on the language defining program in §15(2)(c). They argue that the ordinary definition of service does not include employee benefits. (In direct contradiction of 49 Or. Atty. Gen. Opinion 152 finding that PERS, an employee benefit, would fall within §15.)

Defendants further rely on an argument that the ordinary understanding of what government provides is services and for those services the government pays employees compensation and benefits. They cite Webster's Third New International Dictionary which defines services as duties, work, or business performed by a government official. Defendant's argue that this somehow implies that services cannot mean the compensation provided to employees in consideration for their work (services).

Defendants cite the statutory analysis principle that in the absence of evidence to the contrary we may assume that the legislature intends words to be used consistently. *Tharp v. Psychiatric Sec. Review Board*, 338 Or 413 (2005). They cite that Section 15(2)(a) refers to "enterprise activity" as a "program under which local government sells products or services". Defendants' Motion, page 7. They reference other language as well supporting the concept that products and services provided by local government must have a market value; they must be sellable. Sick leave cannot be sold (although it can sometimes be assigned as when healthy employees donate or assign their sick leave to an ill employee and sick leave can be, under certain circumstances, converted to vacation time or compensation, especially when an employee retires.) This court

agrees with defendants however that under the ordinary definition of "sell" paid sick leave cannot be sold.

The defendants also make various arguments about the law in Michigan and California law however this court does not find those argument persuasive in that those are other states and there is no evidence that the legislature or the voters were relying on foreign state rules or laws to understand the Oregon provision. Unless we cannot clearly understand and define the Oregon law without reference to other states we need not do so.

Contextual Analysis of the Mandatory Sick Leave Law in light of §15

Both parties agree that the contextual evidence for the Sick Leave law is thin.

Plaintiff notes the following contextual references:

1. 49 Or. Op. Atty. Gen. 152 (1999) provides that nothing in the definition of program expressly limits program to services or other activities performed in a governmental capacity.

2. The same AG opinion found that PERS would fall under §15 as a program.

3. §15 was enacted contemporaneously with the federal Unfunded Mandate Reform Act, 2 USC §1501. Minimum wage and other personnel matters are included in the federal act. As plaintiff notes the press compared the federal act with §15 and there is good reason to think that voters considered them similar.

4. The Oregon Attorney General issued an opinion finding that the bill (§15) was intended to apply to state-imposed personnel requirements citing the many instances of local government testimony before the legislature on the subject. 49 Or. Op. Atty. Gen. 152 (1999). It was found to apply to personnel mandates, shifts, fringe benefits, compulsory binding arbitration of labor-management impasses and retirement benefits. Plaintiffs' Motion, page 25.

5. The 1995 Fiscal Analysis prepared by the Legislative Fiscal Office includes the League of Oregon Cities' analysis that §15 would affect local government employee and family benefits and collective bargaining.

Defendants argue that the court ought not to consider legislative history in determining the intent or meaning of legislation. While this court could decide this without considering such evidence the court is persuaded by plaintiff's arguments that the court can and should consider such history. *State v. Lane*, 357 Or 619 (2015). Without quoting the various sources cited by plaintiff it is clear that those in support of §15 and those arguing in opposition clearly believed that employee benefits *could or would* fall within it and that there was nothing said or done to indicate that employee benefits were excluded.

Defendants argue that the AG opinion depended too much on what local governments were arguing about §15 at the time it was adopted. *See again Sagdal*, 356 Or at 642. But see *State v. Lane*, 357 Or 619 (2015) where the Court signaled that we should look more at legislative history.

Defendants make additional arguments about why the available "legislative history" may not be useful to inform us what the legislature or the voters intended the language of §15 to mean:

a. The legislative deliberations occurred 18 months before the measure was voted on by the people in Measure 30.

b. Although legislative deliberations are open to the public they are not readily available to the public who were not sitting at the Capitol to hear the testimony.

c. The legislative history is not particularly clear as to what was intended to be a program or a service.

d. The committee's counsel in the Legislature apparently advised them that unemployment insurance benefits to employees would not be included in the provision.

The defendant's strongest argument is a comparison between HJR 2 (which ultimately was referred to the voters and became Article XI §15 and the language in HJR 17 which was considered but not referred. The language in HJR 17 is much broader than the language in HJR 2. (See the table comparing language sent out with this letter; it was Exhibit D provided by the state.) The language differences set out in the Exh. D table clearly demonstrates that the limit set out in §15 did not apply to every action of state government that could increase local government costs. It offers less assistance to us to distinguish between what is and what is not a program or service.

Defendants argue that the two relevant Voter's Pamphlets do not mention "sick leave or employee pay or benefits at all". Defendant's Motion at page 16. This is not very persuasive. It may well be because at the time no one anticipated that employee compensation or benefits would be included. It could just as easily be because people assumed they were included or perhaps more likely they were not considered at all.

Defendants argue that newspaper articles during the period when the Constitutional provision was enacted do not mention paid sick leave or employee benefits. This again is of little help. The absence of discussion does not tell us what people are thinking.

Benefits, Compensation, Services and Programs

All four of these terms: benefits, compensation, services and programs have been discussed broadly by the parties in their arguments. None of these terms has a legal definition that is clear enough to resolve this question. Even dictionary definitions differ and lack the specificity that would resolve this question.

There is one distinction that may be persuasive and that no one has argued. Salary or wages are a form of compensation, that is, they are compensation (consideration) rendered to an employee for value given (work). In most cases this is a voluntary relationship or employment at will. The employer says he is willing to pay this amount of compensation in consideration for work performed and the employee says he is willing to perform certain work for that amount of compensation. Non-cash compensation may be included such as vacation time, sick leave, etc., by agreement between the parties.

The Oregon Mandatory Sick Leave law mandates that an employer increase the level of compensation in consideration for nothing more. It in effect raises the price of labor by adding mandatory sick leave. In this regard it provides a service or program that chiefly benefits employess, not employers[1]. Even considering some arguments that employers benefit to some extent from sick leave the provision is aimed primarily at benefitting employees. In the Article XI §15 definition of Program this is clearly an enactment by the Legislature that requires a local government to provide administrative, financial, social, health, or other specified services to persons, government agencies or to the public in general. In this instance the "persons" benefitted are the employees.

Does the Mandatory Sick Leave law meet the 0.0001 Threshold?

Plaintiffs offer the Declaration of Dave Alderman, who works in the accounting department for Linn County, who testified that it has so far cost Linn County $41,067 in administrative expenses related to executing the sick leave law and that this is well above the one-hundreth of one percent of the county's annual budget. Decl. of Dave Alderman, page 4. Similar declarations were submitted from the other plaintiff counties setting out the current cost to the county of this provision.

In defending a motion for summary judgment the nonmoving party has the burden of offering admissible evidence that would create a genuine issue of fact. In this instance defendants discuss the potential for such evidence but cannot offer any. *See O'Dee v. Tri-Met*, 212 Or App 456 (2007) and ORCP 47C. There must be a genuine issue of fact.

Defendants argue that they do not know if they dispute the amount claimed by plaintiffs. Asserting that one does not know if there is a dispute does not constitute a dispute and does not put that factual determination at issue. At present there is no actual dispute as to the facts.

Therefore this court finds that there is no genuine issue of fact and that the plaintiff's motion for summary judgment is well taken under the law and defendants' motion is not. The court has considered all the arguments and weighed them. This is not a case where the answer is crystal clear. However the court is persuaded that the law defines the Sick Leave law as a program and by Section 15 of Article XI the program may not increase costs to the counties. Based on those legal conclusions the court orders that

[1] Advocates of these benefits argue that they benefit employers by creating healthier work forces and therefore higher productivity. The court need not evaluate these claims here.

Defendants' motion for summary judgment is denied. Plaintiff's motion for summary judgment is allowed.

Plaintiff may submit judgments in accordance with this as well as a judgment enjoining the state from enforcing the Sick Leave Law against the plaintiffs. These judgments should be submitted no later than January 8, 2017. Failure to submit by that date could result in dismissal of the action.

Sincerely yours,

/s/ Daniel R. Murphy

Daniel R. Murphy
Circuit Judge

Oregon Constitution, Article XI, Section 15

Section 15. Funding of programs imposed upon local governments; exceptions. (1) Except as provided in subsection (7) of this section, when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity.

(2) As used in this section:

(a) "Enterprise activity" means a program under which a local government sells products or services in competition with a nongovernment entity.

(b) "Local government" means a city, county, municipal corporation or municipal utility operated by a board or commission.

(c) "Program" means a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally.

(d) "Usual and reasonable costs" means those costs incurred by the affected local governments for a specific program using generally accepted methods of service delivery and administrative practice.

(3) A local government is not required to comply with any state law or administrative rule or order enacted or adopted after January 1, 1997, that requires the expenditure of money by the local government for a new program or increased level of service for an existing program until the state appropriates and allocates to the local government reimbursement for any costs incurred to carry out the law, rule or order and unless the Legislative Assembly provides, by appropriation, reimbursement in each succeeding year for such costs. However, a local government may refuse to comply with a state law or administrative rule or order under this subsection only if the amount appropriated and allocated to the local government by the Legislative Assembly for a program in a fiscal year:

(a) Is less than 95 percent of the usual and reasonable costs incurred by the local government in conducting the program at the same level of service in the preceding fiscal year; or

(b) Requires the local government to spend for the program, in addition to the amount appropriated and allocated by the Legislative Assembly, an amount that exceeds one-hundredth of one percent of the annual budget adopted by the governing body of the local government for that fiscal year.

(4) When a local government determines that a program is a program for which moneys are required to be appropriated and allocated under subsection (1) of this section, if the local government expended moneys to conduct the program and was not reimbursed under this section for the usual and reasonable costs of the program, the local government may submit the issue of reimbursement to nonbinding arbitration by a panel of three arbitrators. The panel shall consist of one representative from the Oregon Department of Administrative Services, the League of Oregon Cities and the Association of Oregon Counties. The panel shall determine whether the costs incurred by the local government are required to be reimbursed under this section and the amount of reimbursement. The decision of the arbitration panel is not binding upon the parties and may not be enforced by any court in this state.

(5) In any legal proceeding or arbitration proceeding under this section, the local government shall bear the burden of proving by a preponderance of the evidence that moneys appropriated by the Legislative Assembly are not sufficient to reimburse the local government for the usual and reasonable costs of a program.

(6) Except upon approval by three-fifths of the membership of each house of the Legislative Assembly, the Legislative Assembly shall not enact, amend or repeal any law if the anticipated effect of the action is to reduce the amount of state revenues derived from a specific state tax and distributed to local governments as an aggregate during the distribution period for such revenues immediately preceding January 1, 1997.

(7) This section shall not apply to:

(a) Any law that is approved by three-fifths of the membership of each house of the Legislative Assembly.

(b) Any costs resulting from a law creating or changing the definition of a crime or a law establishing sentences for conviction of a crime.

(c) An existing program as enacted by legislation prior to January 1, 1997, except for legislation withdrawing state funds for programs required prior to January 1, 1997, unless the program is made optional.

(d) A new program or an increased level of program services established pursuant to action of the Federal Government so long as the program or increased level of program services imposes costs on local governments that are no greater than the usual and reasonable costs to local governments resulting from compliance with the minimum program standards required under federal law or regulations.

(e) Any requirement imposed by the judicial branch of government.

(f) Legislation enacted or approved by electors in this state under the initiative and referendum powers reserved to the people under section 1, Article IV of this Constitution.

(g) Programs that are intended to inform citizens about the activities of local governments.

(8) When a local government is not required under subsection (3) of this section to comply with a state law or administrative rule or order relating to an enterprise activity, if a nongovernment entity competes with the local government by selling products or services that are similar to the products and services sold under the enterprise activity, the nongovernment

entity is not required to comply with the state law or administrative rule or order relating to that enterprise activity.

(9) Nothing in this section shall give rise to a claim by a private person against the State of Oregon based on the establishment of a new program or an increased level of service for an existing program without sufficient appropriation and allocation of funds to pay the ongoing, usual and reasonable costs of performing the mandated service or activity.

(10) Subsection (4) of this section does not apply to a local government when the local government is voluntarily providing a program four years after the effective date of the enactment, rule or order that imposed the program.

(11) In lieu of appropriating and allocating funds under this section, the Legislative Assembly may identify and direct the imposition of a fee or charge to be used by a local government to recover the actual cost of the program. [Created through H.J.R. 2, 1995, and adopted by the people Nov. 5, 1996]

Section 15a. Subsequent vote for reaffirmation of section 15. [Created through H.J.R. 2, 1995, and adopted by the people Nov. 5, 1996; Repeal proposed by S.J.R. 39, 1999, and adopted by the people Nov. 7, 2000]